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THE GENERAL STATUTES OF NORTH CAROLINA

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CONTAINING GENERAL LAWS OF NORTH CAROLINA ENACTED THROUGH JULY 10, 1981

Prepared under the Supervision of the Department of Justice of the State of North Carolina

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Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF
D. P. HARRIMAN, S. C. WILLARD, SYLVIA FAULKNER
AND D. E. SELBY, JR.

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Volume 1B

1981 Replacement Volume

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Scope of Volume

Statutes:

Full text of Chapters 2 through 14 of the General Statutes of North Carolina, including all enactments through the Session Laws of 1979, First and Second Sessions, heretofore contained in 1969 Replacement Volume 1B of the General Statutes and the 1979 Cumulative Supplement and 1980 Interim Supplement thereto, and all enactments passed at the 1981 Session of the General Assembly through July 10, 1981.

Annotations:

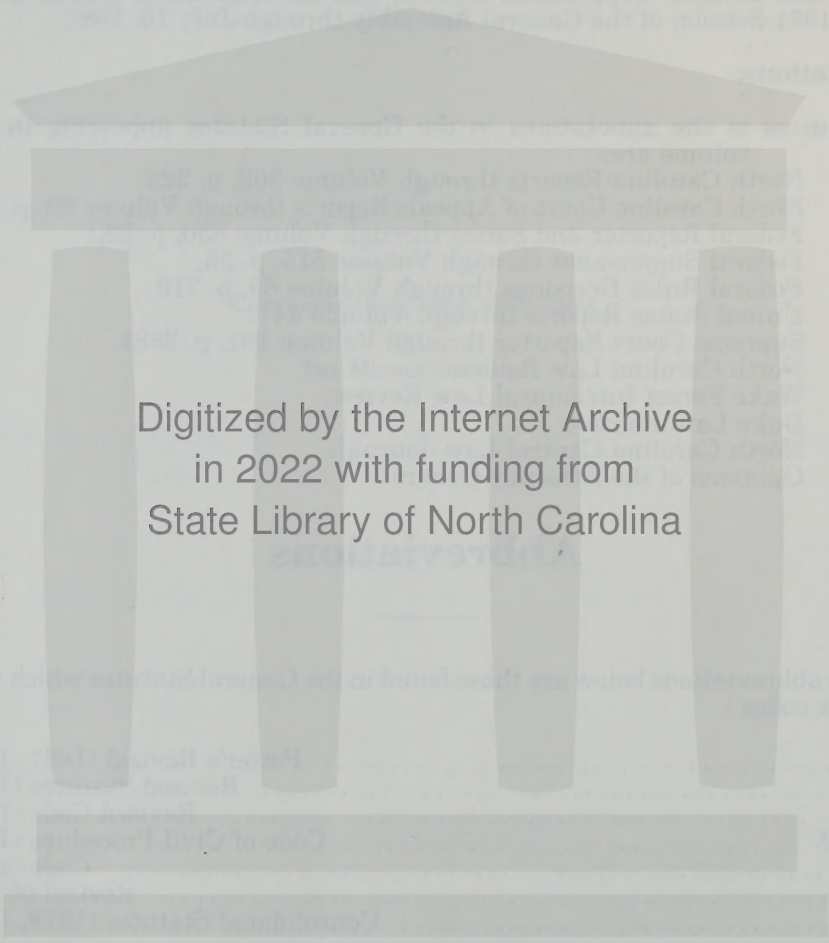
Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 302, p. 222.
North Carolina Court of Appeals Reports through Volume 50, p. 567.
Federal Reporter 2nd Series through Volume 650, p. 292.
Federal Supplement through Volume 515, p. 55.
Federal Rules Decisions through Volume 89, p. 719.
United States Reports through Volume 447.
Supreme Court Reporter through Volume 101, p. 2881.
North Carolina Law Review.
Wake Forest Intramural Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P. R.	Potter's Revisal (1821, 1827)
R. S.	Revised Statutes (1837)
R. C.	Revised Code (1854)
C. C. P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C. S.	Consolidated Statutes (1919, 1924)



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Preface

Replacement Volume 1B, published in 1969, accumulated a supplement equalling the bound volume in size. This 1981 replacement volume is issued to incorporate the new material, including statutes passed at the 1981 Session of the General Assembly through July 10, 1981, in the bound volume and to eliminate what is obsolete.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, such opinions which construe a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department.

RUFUS L. EDMISTEN
Attorney General

September 15, 1981

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§§ 2-16.1, 2-16.2: Repealed by Session Laws 1971, c. 363, s. 11.

Editor's Note. — Session Laws 1971, c. 363, s. 11, as amended by Session Laws 1971, c. 518, s. 1, provides: "Repeal of any curative or validating laws by this section shall not be construed to invalidate any acts validated by the curative or validating laws."

§ 2-17: Transferred to § 7A-104 by Session Laws 1971, c. 363, s. 4.

§ 2-18: Repealed by Session Laws 1971, c. 363, s. 11.

Editor's Note. — Session Laws 1971, c. 363, s. 11, as amended by Session Laws 1971, c. 518, s. 1, provides: "Repeal of any curative or validating laws by this section shall not be construed to invalidate any acts validated by the curative or validating laws."

§§ 2-19 to 2-21: Transferred to § 7A-104 by Session Laws 1971, c. 363, s. 4.

§ 2-22: Transferred to § 7A-106 by Session Laws 1971, c. 363, s. 5.

§ 2-23: Repealed by Session Laws 1971, c. 363, s. 11.

§§ 2-24, 2-25: Transferred to § 7A-100 by Session Laws 1971, c. 363, s. 1.

§§ 2-26, 2-27: Repealed by Session Laws 1971, c. 363, s. 11.

§ 2-28: Repealed by Session Laws 1969, c. 80, s. 6.

§§ 2-29 to 2-41: Repealed by Session Laws 1971, c. 363, s. 11.

§ 2-42: Transferred to § 7A-109 by Session Laws 1971, c. 363, s. 6.

Editor's Note. — Section 2-42, subdivision (35), which was repealed by Session Laws 1959, c. 1073, s. 3, but which remains in effect in certain counties, is set out in the note under § 7A-109.

§ 2-43: Repealed by Session Laws 1971, c. 363, s. 11.

Article 5.

Reports.

§ 2-44: Repealed by Session Laws 1971, c. 363, s. 11.

§ 2-45: Transferred to § 7A-110 by Session Laws 1971, c. 363, s. 7.

Article 6.

Money in Hand; Investments.

§§ 2-46 to 2-51: Repealed by Session Laws 1971, c. 363, s. 11.

§§ 2-52, 2-53: Transferred to § 7A-111 by Session Laws 1971, c. 363, s. 8.

§§ 2-54 to 2-56: Transferred to § 7A-112 by Session Laws 1971, c. 363, s. 9.

§§ 2-57 to 2-59: Repealed by Session Laws 1971, c. 363, s. 11.

§ 2-60: Transferred to § 7A-112 by Session Laws 1971, c. 363, s. 9.

Chapter 3.

Commissioners of Affidavits and Deeds.

Sec.

3-1 to 3-8. [Repealed.]

§§ 3-1 to 3-8: Repealed by Session Laws 1971, c. 202.

Chapter 4.

Common Law.

Sec.

4-1. Common law declared to be in force.

§ 4-1. Common law declared to be in force.

All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State. (1715, c. 5, ss. 2, 3, P. R.; 1778, c. 133, P. R.; R. C., c. 22; Code, s. 641; Rev., s. 932; C. S., s. 970.)

Legal Periodicals. — For note on the role of the judiciary in the abrogation of the municipal tort immunity rule, see 5 Wake Forest Intra. L. Rev. 383 (1969).

For article, "The Rule in Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For an article entitled, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

CASE NOTES

I. General Consideration.
II. Illustrative Cases.
A. Civil.
B. Criminal.

I. GENERAL CONSIDERATION.

Historical Background. — See Resort Dev. Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952).

The term "common law" refers to the common law of England. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961); State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967); State ex. rel. Bruton v. Flying "W" Enterprises, Inc., 273 N.C. 399, 160 S.E.2d 482 (1968).

Common Law Adopted as of Date of Signing of Declaration of Independence. — This section adopted the common law of England as of the date of the signing of the Declaration of Independence. Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971).

Extent of Common Law in Force and Effect. — So much of the common law as is not destructive of, repugnant to, or inconsistent with our form of government, and which has not been repealed or abrogated by statute or become obsolete, is in full force and effect in this jurisdiction. State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936).

So much of the common law as has not been abrogated or repealed by statute is in full force and effect in this State. Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946); Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949), overruled on other grounds, Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432, 12 A.L.R.2d 1171 (1949); Friendly Fin. Corp. v. Quinn, 232 N.C. 407, 61 S.E.2d 192 (1950); Ionic Lodge No. 72 F.A. & A.M. v. Ionic Lodge F.A. & A.M. No. 72 Co., 232 N.C. 648, 62 S.E.2d 73 (1950); Cooperative Whse., Inc. v. Lumberton Tobacco Bd. of Trade, Inc., 242 N.C. 123, 87 S.E.2d 25 (1955).

A common-law rule which has not been abrogated or repealed by statute in North Carolina, is still in effect under the terms of this section. Elliott v. Elliott, 235 N.C. 153, 69 S.E.2d 224 (1952); Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952); McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956); Mullen v. Sawyer, 8 N.C. App. 458, 174 S.E.2d 646 (1970), rev'd on other grounds, 277 N.C. 623, 178 S.E.2d 425 (1971). See note in 30 N.C.L. Rev. 417 (1952).

Extent to Which Common Law May Be Modified. — So much of the common law as is in force by virtue of this section may be modified or repealed, but those parts of the common law which are imbedded in the Constitution are not subject to control. State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932).

Effect of Legislation with Respect to Subject Matter of Common-Law Rule. — Where the North Carolina General Assembly has legislated with respect to the subject matter of a common-law rule, the statute supplants the common law with respect to the particular rule, but so much of the common law as has not been abrogated or repealed by statute is in full force and effect. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963).

Statutes Construed According to Common-Law Definition. — When a statute punishes an act, giving it a name known to the common law without otherwise defining it, the statute is construed according to the common-law definition. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

Presumption as to Common Law in Sister States. — Where there is no evidence to the contrary, the presumption is that the common law is in force in a sister state. Hipps v. Southern Ry., 177 N.C. 472, 99 S.E. 335 (1919).

Applied in Wells v. Guardian Life Ins. Co., 213 N.C. 178, 195 S.E. 394, 116 A.L.R. 130 (1938); State v. Sullivan, 229 N.C. 251, 49 S.E.2d 458 (1948).

Quoted in Lutz Indus., Inc. v. Dixie Home Stores, 242 N.C. 332, 88 S.E.2d 333 (1955); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

Stated in In re Johnston, 16 N.C. App. 38, 190 S.E.2d 879 (1972); State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977).

Cited in Hinton v. Hinton, 196 N.C. 341, 145 S.E. 615 (1928); Rhodes v. Collins, 198 N.C. 23, 150 S.E. 492 (1929); Grantham v. Grantham, 205 N.C. 363, 171 S.E. 331 (1933); State v. Emery, 224 N.C. 581, 31 S.E.2d 858 (1944); State v. Sneed, 38 N.C. App. 230, 247 S.E.2d 658 (1978); Nash County Bd. of Educ. v. Biltmore County, 464 F. Supp. 1027 (E.D.N.C. 1978).

II. ILLUSTRATIVE CASES.

A. Civil.

The common-law rights and disabilities of husband and wife are in force in this State except insofar as they have been abrogated or repealed by statute. Scholtens v. Scholtens, 230 N.C. 149, 52 S.E.2d 350 (1949), overruled on other grounds, Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965).

The common-law doctrine of survivorship between husband and wife as tenants by entireties has not been changed by statute and is in force in this State. Dorsey v. Kirkland, 177 N.C. 520, 99 S.E. 407 (1919).

Presumption of Death. — The doctrine of the common law as to presumptive death is not repealed or affected by statute, and obtains in our courts. Steele v. Metropolitan Life Ins. Co., 196 N.C. 408, 145 S.E. 787 (1928).

Obligation of Father to Support Child. — At common law it is the duty of a father to support his minor children. The common-law obligation of a father to support his child is not a debt in the legal sense, but an obligation imposed by law. It is not a property right of the child but is a personal duty of the father which is terminated by his death. These common-law principles have not been abrogated or modified by statute and are in full force and effect in this jurisdiction. Mullen v. Sawyer, 277 N.C. 623, 178 S.E.2d 425 (1971).

Tort Action by Child against Parent. — The common-law rule that an unemancipated, minor child, living in the household of its parents, cannot maintain an action in tort against its parents or either of them, still prevails in North Carolina. Redding v. Redding, 235 N.C. 638, 70 S.E.2d 676 (1952).

Exemption of Nonresidents from Civil Process. — The common-law privilege of the exemption of nonresidents from service of civil process while attending upon litigation in the courts of this State, as suitors or witnesses, was not repealed by implication by §§ 8-64, 9-18. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

Limitation Over in Personal Property. — The common-law rule that there can be no limitation over in personal property after reservation of a life estate therein is in force in this State, under this section, and has been recognized by judicial decision and by statutory implication. Speight v. Speight, 208 N.C. 132, 179 S.E. 461 (1935).

The common-law rule that future interests in personal property may be created by will but not by deed prevails in this State, since it has not been abrogated or repealed by statute or become obsolete, and is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State. Woodard v. Clark, 236 N.C. 190, 72 S.E.2d 433 (1952).

Trademarks. — State statutes providing for registration of trademarks are in affirmance of the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963).

The remedies given by statutes providing for registration of trademarks are either declaratory or are cumulative and additional to those recognized by the common law. Allen v. Standard Crankshaft & Hydraulic Co., 210 F. Supp. 844 (W.D.N.C. 1962), aff'd, 323 F.2d 29 (4th Cir. 1963).

Implied Warranty in Sale of Food. — The common-law rule of implied warranty in the sale of food by a retailer to a consumer, even though the food may be sold in a sealed container, has not been rendered obsolete by the

changes in the manner and method of the manufacture, preparation and distribution of food. Rabb v. Covington, 215 N.C. 572, 2 S.E.2d 705 (1939).

Survival of Actions. — Since at common law, causes of action for wrongful injury, whether resulting in death or not, did not survive the injured party, the survival of such actions is solely by virtue of statute. Hoke v. Atlantic Greyhound Corp., 226 N.C. 332, 38 S.E.2d 105 (1946).

Tortious Killing. — The common law, adopted as the law of North Carolina in this section, gave no right of action for the tortious killing of a human being. Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

Right of Father of Illegitimate Child to Visitation Privileges. — The common law principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother has been abrogated by statutes as well as case law. Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974).

Preference to Debts Due to State Abrogated. — The English common law which gave a debt due to the sovereign a preference over the debts due to others is not in force as applied to a debt due to this State, since the rule as it existed at common law is antagonistic to the spirit of our governmental institutions. North Carolina Corp. Comm'n v. Citizens Bank & Trust Co., 193 N.C. 513, 137 S.E. 587 (1927).

Exemption of Attorneys from Arrest. — The common law exemption of an attorney from arrest in a civil action, should, under our institutions and because of obsoleteness by nonusage, not prevail, except where the attorneys are actually in attendance upon court in the due course of their employment as attorneys. Greenleaf v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).

B. Criminal.

Punishment When No Penalty Expressly Provided. — The common-law rule obtains in this State that where a statute enacted in the public interest commands an act to be done or proscribes the commission of an act, and no penalty is expressly provided for its breach, its violation may be punished as for a misdemeanor. State v. Bishop, 228 N.C. 371, 45 S.E.2d 858 (1947).

The solicitation of another to commit a felony is a crime, although the solicitation is of no effect, and the crime is not committed, the common-law rule being in effect and controlling. State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936); State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977); State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980).

The offense of solicitation of another to commit a felony has been cognizable at common law at least since Rex v. Higgins, 2 East 5, 102 Eng. Rep. 269 (1801) and is still an indictable offense under the common law in this State. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

False Imprisonment. — North Carolina does not have a criminal statute making false imprisonment a crime and, therefore, the common law with respect to false imprisonment is the law of this State. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Kidnapping. — Since this section adopted the common law as the law of this State, the common law with respect to kidnapping and false imprisonment was the law of this State. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

The failure of § 14-39, prior to its 1975 amendment, to define kidnapping did not render the statute vague or uncertain, and the common-law definition of the offense was incorporated into the statute by construction. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Since § 14-39, prior to its 1975 amendment, did not define kidnapping, the common-law definition of that crime was the law of this State. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L.Ed.2d 112 (1974).

Rape. — By this section the common-law death penalty for rape was adopted in North Carolina. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Burglary. — Since 1889, burglary has been divided into two degrees by § 14-51. If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. To constitute burglary in either degree, however, the common law required the felonious breaking and entering to occur in the nighttime, and this common law requirement is still the law in North Carolina. State v. Jones, 294 N.C. 642, 243 S.E.2d 118 (1978).

The common-law definition of arson is still in force in this State. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956); State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Attempt to Commit Arson. — The common-law rule that an attempt to commit arson is a misdemeanor was changed by § 14-67, which made an attempt to commit arson a felony. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Champerty is an offense at common law, and prevails in this State, being retained under this section. Merrell v. Stuart, 220 N.C. 326, 17 S.E.2d 458 (1941).

Barratry. — The common-law offense of barratry obtains in this State, since it has never been the subject of legislation in North

Carolina and is not repugnant nor inconsistent with our form of government. State v. Batson, 220 N.C. 411, 17 S.E.2d 511, 139 A.L.R. 614 (1941).

Stop and Frisk. — The absence of a stop and frisk statute is not fatal to the authority of law-enforcement officers in North Carolina to stop suspicious persons for questioning and to search those persons for dangerous weapons, since those practices are valid under the common law. State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Right of Bail in Capital Cases. — At common law bail might be granted in capital cases only by a high judicial officer upon thorough scrutiny of the facts and great caution. This right, though once modified by former statutes against its existence in capital offenses where the proof was evident and the presumption was great, now prevails in this State as it existed at common law. State v. Herndon, 107 N.C. 934, 12 S.E. 268 (1890). See § 15A-533.

Habeas Corpus. — It is an admitted principle of common law that every court of record of superior jurisdiction has the power to issue the writ of habeas corpus. This power is preserved in this State and can be exercised by all courts of record of superior jurisdiction. In re Bryan, 60 N.C. 1 (1863).

The common-law writ of error coram nobis to challenge the validity of petitioner's conviction for matters extraneous the record, is available under our procedure. In re Taylor, 230 N.C. 566, 53 S.E.2d 857 (1949), overruled on other grounds, Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563 (1971); State v. Daniels, 231 N.C. 17, 56 S.E.2d 2 (1949), cert. denied, 339 U.S. 954, 70 S. Ct. 837, 94 L. Ed. 2d 1366 (1950), overruled on other grounds, Dantzic v. State, 279 N.C. 619, 184 S.E.2d 113 (1971).

The availability of a writ of error coram nobis in this State stems from this section which adopts the common law as the law of this State, and authority for the writ stems from N.C. Const., Art. IV, § 12, which gives the Supreme Court authority to exercise supervision over the inferior courts of the State. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970).

There is no requirement that, in every instance, the approval of the Supreme Court must first be obtained before application can be made to the trial court for issuance of a writ of error coram nobis. Prior to In re Taylor, 229 N.C. 297, 49 S.E.2d 749 (1948), it does not appear that authority for the issuance of the writ, long recognized as an available common-law writ, was derived from the supervisory powers granted in the Constitution but rather from this section which, with certain exceptions, adopted the common law as the law of this State. Dantzic v. State, 279 N.C. 212, 182 S.E.2d 563, cert. denied, 279 N.C. 619, 184 S.E.2d 113 (1971).

Forfeiture for felony, which was the established rule at common law, has had no force in this State since 1778. White v. Fort, 10 N.C. 251 (1824).

OPINIONS OF ATTORNEY GENERAL

Venue at Common Law for Offense of Purchasing Pistol Without a Permit. — See opinion of Attorney General to Mr. J.B. Roberts, Sheriff of Cabarrus County, 40 N.C.A.G. 195 (1969).

Chapter 5.
Contempt.

Sec.

5-1 to 5-9. [Repealed.]

§§ 5-1 to 5-9: Repealed by Session Laws 1977, c. 711, s. 33.

Cross References. — For present statute relating to contempt, see Chapter 5A.

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

Sec.

5A-1 to 5A-10. [Reserved.]
5A-11. Criminal contempt.
5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.
5A-13. Direct and indirect criminal contempt; proceedings required.
5A-14. Summary proceedings for contempt.
5A-15. Plenary proceedings for contempt.
5A-16. Custody of person charged with criminal contempt.
5A-17. Appeals.
5A-18 to 5A-20. [Reserved.]

Article 2.

Civil Contempt.

5A-21. Civil contempt; imprisonment to compel compliance.
5A-22. Release when civil contempt no longer continues.
5A-23. Proceedings for civil contempt.
5A-24. Appeals.
5A-25. Proceedings as for contempt and civil contempt.

OFFICIAL COMMENTARY

This Chapter replaces Chapter 5 of the North Carolina General Statutes. The Commission deals with the full range of contempt, both criminal and civil, for two reasons. First, criminal contempt is clearly within the subject matter which the Commission was charged to study, and many aspects of civil contempt are necessary to the enforcement of orders in criminal cases. Second, once the Commission began to deal with criminal contempt, it became necessary also to deal with civil contempt since the two are inextricably bound together in Chapter 5. The provisions in Chapter 5A are not directly drawn from any other statute, but they are drafted in light of Chapter 5 and of the American Bar Association's standards on the function of the trial judge. This Chapter does not carry forward the provisions of Chapter 5 which grant contempt powers to boards of county commissioners and the Utilities and Industrial Commissions. The application of those powers was sufficiently unclear under Chapter 5 that the Commission thought it best that those bodies either initiate statutes specifically dealing with that authority or that those bodies rely on court orders or criminal statutes dealing with the disruption of meetings.

Editor's Note. — Session Laws 1977, c. 711, s. 36, contains a severability clause.

The "Official Comments" under this Chapter are reprinted from the Legislative Program and Report of the Criminal Code Commission to the 1977 General Assembly.

Article 1.

Criminal Contempt.

OFFICIAL COMMENTARY

The establishment of this Article represents one of the basic purposes of the Commission in drafting the Chapter on contempt — to draw a sharp distinction between proceedings for criminal contempt and the proceedings for civil contempt (or "as for contempt"). This Article deals with those matters for which a sanction is imposed purely as punishment. The sanction occurs without regard to what the contemnor will do after imposition of the sanction.

§§ 5A-1 to 5A-10: Reserved for future codification purposes.

§ 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.

(9) Willful communication with a juror in an improper attempt to influence his deliberations.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

The grounds for criminal contempt specified here are exclusive, regardless of any other grounds for criminal contempt which existed at common law.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section is based on Section 5-1. Generally this section merely compresses the existing statement of grounds for criminal contempt, including the consolidation of previously separate grounds. Under subdivision (4), refusal to answer a question when that answer is privileged would not be contempt since the refusal would be "legally justified." Subdivision (5) adds the clause "made with knowledge that it was false. . ." thus engrafting the standard of New York Times v. Sullivan, 376 U.S. 254 (1964), onto cases of alleged contempt in publishing reports of proceedings. Subdivision (7) does not have a counterpart in Chapter 5; it was added to make clear, for example, that the failure to appear in court at the proper time by

one, including counsel, whose nonappearance would interfere with the court's schedule, could be subject to criminal contempt. Subdivision (9) is new and gives the court authority to step in immediately in cases of improper communication with jury. It is intended to complement the provision of a new G.S. 14-225.1, enlarging the Chapter 14 provisions dealing with jury tampering. The provisions of G.S. 5A-12(e) dictate the relationship between the two sanctions for jury tampering. Subdivision (10) is also new and is intended to insure that this Chapter does not reject attempts elsewhere in the General Statutes to make certain acts criminal contempt. The final sentences of this section are intended to effect the same purpose as the final two sentences of G.S. 5-1. Subsection (b) supplements or clarifies G.S. 5A-11(a)(4) by prohibiting as punishment as contempt for a communication which does not pose a "clear and present danger" to justice. Subsection (c) operates as a reminder of the existence of another new provision, G.S. 7A-276.1, which prohibits "gag orders" of reports of open-court proceedings or of records required to be open to public inspection. Especially important is the final sentence of the section making such an order void, thus overcoming the usual rule that a person subject to an order must comply with that order, even though it may be illegal, until a higher court declares its illegality.

Cross References. — As to failure to obey judgment, see § 1-302. As to failure to obey a court order in supplementary proceedings, see § 1-368.

Legal Periodicals. — For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

For comment on dealing with unruly persons in the courtroom, see 48 N.C.L. Rev. 878 (1970).

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

For note on the right of an individual to freedom of speech, and the right of the State to carry out normal functions of the judiciary, a balancing of interests, see 6 Wake Forest Intra. L. Rev. 491 (1970).

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For article entitled, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

For survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

CASE NOTES

I. General Consideration.
II. Nature and Purpose of Proceedings.
III. Rights of Accused.
IV. Acts Constituting Contempt.
A. In General.
B. Disruptive Conduct.
C. Disobedience of Orders.
D. Recalcitrant Witnesses.
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G. Failure to Comply with Schedules.
V. Practice and Procedure.

I. GENERAL CONSIDERATION.

Editor's Note. — Many of the annotations under this section are from cases decided under former § 5-1.

This section should be strictly construed as a criminal statute. West v. West, 199 N.C. 12, 153 S.E. 600 (1930). See In re Hege, 205 N.C. 625, 172 S.E. 345 (1934); North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C.), appeal dismissed, 386 F.2d 129 (4th Cir. 1967).

The power to punish for contempt is inherent in all courts. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888).

Statutory provisions regulating proceedings for contempt confer on the courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

For discussions of the history, nature, and extent of the power of courts to punish for contempt, see Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905); In re Brown, 168 N.C. 417, 84 S.E. 690 (1915). See also 12 N.C.L. Rev. 260.

And Courts Cannot Be Deprived of Power. — It is essential for an effective administration of justice in an orderly and efficient way that the court possess certain powers to enforce its mandate. A legislative interference to the extent of depriving the courts of these powers is tantamount to depriving the judicial department of the means of self-preservation and cannot be constitutionally justified. See Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905); Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621 (1922).

The power to punish for a contempt committed in the presence of the court, or near enough to impede its business, is essential to the existence of every court. In re Hennis, 6 N.C. App. 683, 171 S.E.2d 211 (1969), rev'd on other grounds, 276 N.C. 571, 173 S.E.2d 785 (1970).

But Legislature May Regulate. — These powers, however, as they existed at common law, while they may not be abrogated, may be reasonably regulated by legislation. Thus, statutes such as those in former Chapter 5 were regulatory legislation upon the subject, and being in accord with modern doctrine, could not be assailed on the grounds of unconstitutionality. See In re Oldham, 89 N.C. 23 (1883); In re Robinson, 117 N.C. 533, 23 S.E. 453 (1895); In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

Limit of District Court's Authority. — A judge of the district court has no authority, except in his own district, to punish for contempt. In re Rhodes, 65 N.C. 518 (1871); Morris v. Whitehead, 65 N.C. 637 (1871).

Acts constituting contempt committed before a referee in supplementary proceedings are to be punished by the court making the reference. LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

Authority of Commissioner Not Exclusive. — The power of a commissioner, appointed by the court, to commit for refusal to testify is not given exclusively, if at all; but he may invoke the power of the judge, even though he may be given concurrent authority, under statute. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

Authority of Nisi Prius Judge. — The right of a nisi prius judge to order a witness or anyone else into immediate custody for a contempt committed in the presence of the court in session is unquestioned. State v. Dick, 60 N.C. 440 (1864); State v. Ownby, 146 N.C. 677, 61 S.E. 630 (1908); State v. Swink, 151 N.C. 726, 66 S.E. 448 (1909).

Contempt of Subordinate Officer Regarded as Contempt of Appointing Court. — A contempt against a subordinate officer appointed by a court, such as a commissioner, ordinarily is regarded as contempt of the authority of the appointing court, and the appointing court has power to punish such contempt. This is true even where such subordinate officer is vested with the power to punish. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Applied in Osmar v. Crosland-Osmar, Inc., 43 N.C. App. 721, 259 S.E.2d 771 (1979).

II. NATURE AND PURPOSE OF PROCEEDINGS.

Nature of Proceedings. — The fact that contemptuous conduct arises in a civil action does not alter the fact that contempt proceedings are criminal in nature. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Although contempt of court, in its essential character, is divided into various kinds, such as direct or constructive, and civil or criminal, nevertheless in every species of contempt there is said to be necessarily inherent an element of offense against the majesty of the law savoring more or less of criminality. Therefore it is said that the process by which the party charged is reached and tried is essentially criminal or quasi-criminal. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

A contempt proceeding is sui generis. It is criminal in its nature in that the party is charged with doing something forbidden, and if found guilty, is punished. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

A contempt proceeding under this section is sui generis, criminal in its nature, which may be resorted to in civil or criminal actions. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

Although labeled "civil" contempt, the proceeding formerly designated "as for contempt" was by no means a civil action or proceeding to which § 6-18 (when costs shall be allowed to plaintiff as a matter of course), or § 6-20 (allowance of costs in discretion of court) would apply. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973).

Contempt proceedings may be resorted to in civil or criminal actions. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Purpose. — Punishments for contempt of court have two aspects, namely: 1. To vindicate the dignity of the court from disrespect shown to it or its orders. 2. To compel the performance of some order or decree of the court which it is

in the power of the party to perform and which he refuses to obey. See In re Chiles, 89 U.S. (22 Wall.) 157, 22 L. Ed. 819 (1874); Bessette v. W.B. Conkey Co., 194 U.S. 324, 24 S. Ct. 665, 48 L. Ed. 997 (1904).

Contempt Proceeding as Part of Original Injunction Suit. — While some jurisdictions hold that a criminal contempt proceeding is independent and not a part of the case out of which the alleged contempt arose, there is authority that a contempt proceeding based on the violation of an injunction, regardless of whether the proceeding is civil or criminal in nature, is a part of the original injunction suit and properly triable as such. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Criminal and Civil Contempt Distinguished. — Proceedings for contempt are of two classes, criminal and civil. Criminal proceedings are those brought to preserve the power and to vindicate the dignity of the court and to punish for disobedience of its processes or orders. Civil proceedings are those instituted to preserve and enforce the rights of the parties to actions and to compel obedience to orders and decrees made for the benefit of the suitors. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966); Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

Contempt proceedings are of two classes: those brought to vindicate the dignity and authority of the court; and those brought to enforce the rights of private parties. The former are as a rule held criminal in their nature and are generally governed by the rules applicable to criminal cases. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C.), appeal dismissed, 386 F.2d 129 (4th Cir. 1967).

Criminal proceedings, involving as they do offenses against the courts and organized society, are punitive in their nature, and the government, the courts, and the people are interested in their prosecution. Whereas civil proceedings, having as their underlying purpose the preservation of private rights, are primarily remedial and coercive in their nature, and are usually prosecuted at the instance of an aggrieved suitor. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Criminal contempt is the commission of an act tending to interfere with the administration of justice, while civil contempt is the remedy for the enforcement of orders in the equity jurisdiction of the court, and the willful refusal to pay alimony as ordered by the court is civil contempt. Dyer v. Dyer, 213 N.C. 634, 197 S.E. 157 (1938).

Punishment for Both Criminal and Civil Contempt. — There are certain instances where contemnors may be punished for both criminal contempt and for civil contempt. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698 (1969).

When Criminal Contempt Sanctions Applied. — Criminal contempt or punishment for contempt is applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967); Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

III. RIGHTS OF ACCUSED.

Criminal contempts are crimes. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C.), appeal dismissed, 386 F.2d 129 (4th Cir. 1967).

Accordingly, accused is entitled to benefits of all constitutional safeguards. North Carolina v. Carr, 264 F. Supp. 75 (W.D.N.C.), appeal dismissed, 386 F.2d 129 (4th Cir. 1967).

Summary Proceedings Not Repugnant to Principle of Due Process. — Summary proceedings for contempt, are not within the constitutional prohibition contained in the due process clause. The power to punish summarily for contempt has existed at common law "as far as the annals of the law extend." State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

But Safeguards Required Where Adjudication and Sentencing Delayed. — Due process safeguards must be extended to persons cited for direct contempt of court in cases where final adjudication and sentencing for the contemptuous conduct is delayed until after trial. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

Notice and Hearing but Not Trial Required. — Before an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full scale trial is appropriate. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

The United States Supreme Court has held that serious contempts are so merely like other

serious crimes that they are subject to the jury trial provisions of U.S. Const., Art. 3, § 2 and of the Sixth Amendment thereto, which is binding upon the states by virtue of the due process clause of the Fourteenth Amendment. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

The maximum punishment authorized for criminal contempt under former §§ 5-1 and 5-4 was a fine of $250 or imprisonment for 30 days, or both. This made it a petty offense with no constitutional right to a jury trial. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

The possibilities that striking workers adjudged guilty of criminal contempt under former § 5-1 might be denied the right to return to work or might be disqualified from drawing unemployment benefits for as long as 12 weeks were held irrelevant on the issue of whether the strikers were entitled to trial by jury in the contempt proceedings, since the possibilities were no part of the punishment which the court could impose for criminal contempt. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Contempt proceedings may be resorted to in civil or criminal actions, and though contempt is criminal in its nature, respondents therein are not entitled to trial by jury. Safie Mfg. Co. v. Arnold, 228 N.C. 375, 45 S.E.2d 577 (1947).

In a North Carolina contempt proceeding, the contemnor is not entitled to a jury trial. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

Due Process Requirements Met. — Due process requirements of notice and opportunity to be heard on a contempt charge were adequately met where petitioner received actual notice, including the time and place, that he would be cited for contempt, and a written transcript provided formal notice of the specific actions for which petitioner was being cited. In re Paul, 28 N.C. App. 610, 222 S.E.2d 479, appeal dismissed, 289 N.C. 614, 223 S.E.2d 767 (1976).

Right to Confront Witnesses. — A person denying his asserted violation of a restraining order in contempt proceedings has the right under the provisions of N.C. Const., Art. I, § 19, synonymous with due process of law under the United States Constitution, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

The North Carolina Constitution preserves the right of confrontation of the witnesses against an accused and this right is applicable to contempt proceedings so that an adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

But Such Right Is Waivable. — See Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

Self-Incrimination. — Where defendant was accused of mismanaging, diverting, converting and wasting corporate with the trial court's order to produce tax returns was not protected by the Fifth Amendment proscription against compulsory self-incrimination and, thus, he could be found in contempt since there was no evidence tending to show defendant was under any physical or mental coercion at the time he prepared his tax returns, and he therefore could not rely upon the contents of the tax returns to support his claim of Fifth Amendment protection. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets and he was ordered by the trial court to produce his tax returns, the production of the returns did not amount to such authentication as to be compelled testimonial self-incrimination which would support a claim of Fifth Amendment privilege, thus, defendant could be found in contempt. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

IV. ACTS CONSTITUTING CONTEMPT.

A. In General.

Grounds Exhaustive. — The enumeration of the acts punishable for contempt is exhaustive; hence no other act than those specifically designated may be the subject matter of contempt proceedings. See In re Odum, 133 N.C. 250, 45 S.E. 569 (1903).

A person guilty of any of the acts or omissions enumerated in this section may be punished for contempt because such acts or omissions have a direct tendency to interrupt the proceedings of the court or to impair the respect due to its authority. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967).

The acts and omissions enumerated in this section correspond to criminal contempt and involve offenses against the court and organized society, punishable for contempt for the purpose of preserving the power and vindicating the dignity of the court. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

"Willful" and "Unlawful" Distinguished. — The word willful, when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law. The term "unlawfully" implies that an act is

done, or not done as the law allows, or requires; while the term "willfully" implies that the act is done knowingly and of stubborn purpose. In re Hege, 205 N.C. 625, 172 S.E. 345 (1934).

As to direct and indirect contempt, see § 5A-13 and the notes thereto.

Trial courts must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

Accused Conducting His Own Defense. — Where the accused defended himself at his criminal trial when his motion for continuance, by reason of another trial engagement of his retained counsel, was denied, and he was adjudged in contempt for stating in summation after the close of evidence that the court was biased and had prejudged his case, and that he was a political prisoner, the court held that he was entitled to as much latitude in conducting his defense as is enjoyed by counsel vigorously espousing a client's cause, and that his statements did not constitute criminal contempt, as they were not uttered in a boisterous tone, did not actually disrupt the court proceeding, or constitute an imminent threat to the administration of justice. In re Little, 404 U.S. 553, 92 S. Ct. 659, 30 L. Ed. 2d 708 (1972).

A contempt citation delivered to a drunk who had been put into a holding cell at the far end of the room from the booking area, and who was behaving in a boisterous, rude, profane and obscene manner, by a magistrate who never engaged in any work on the drunk's warrant, was an unconstitutional act fundamentally unfair which violated due process of law. Thompson v. Stahl, 346 F. Supp. 401 (W.D.N.C. 1972).

B. Disruptive Conduct.

Disturbances Calculated to Interrupt Proceedings. — Acts which are punishable under this section include all cases of disorderly conduct, breaches of the peace, noise and other disturbance near enough, designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of justice and the dispatch of the business presently before it. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917).

Assaulting Judge during Recess of Court. — Where the respondent visited the judge at his boardinghouse during a recess of the court, before the adjournment of the term and assaulted the judge, it was held that this conduct was a direct contempt of the court as much as if the assault had been committed in the court during trial. Ex parte McCown, 139 N.C. 95, 51 S.E. 957 (1905).

Protection Extended to Officers of Court, Witnesses, etc. — It is an act of contempt to interfere with the functioning of the business not only of the judge but also of all the officers of the court, and persons such as attorneys, jurors and witnesses, who in the line of their duty are assisting the court in the dispatch of its business. State v. Little, 175 N.C. 743, 94 S.E. 680 (1917); Snow v. Hawkes, 183 N.C. 365, 111 S.E. 621 (1922).

Fighting in Courthouse Yard. — In State v. Woodfin, 27 N.C. 199 (1844), fighting in the yard of the courthouse, before the courthouse door, constituted the basis of the offense of contempt.

C. Disobedience of Orders.

Willful disobedience of an order lawfully issued by the court is contemptuous conduct. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Failure to obey a court order cannot be punished for contempt unless the disobedience is willful, which imports knowledge and a stubborn purpose. Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948); Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Impossibility to Comply with the Order of Process. — Where the disobedience to the process or order is due to circumstances which make it impossible for the contemnor to obey such order or process, he may not be punished for contempt. Thus where the clerk issued a notice to the respondent to produce a certain will which was in the custody of some other clerk, it was held that the order to adjudge the respondent guilty of contempt was reversible on appeal. In re Scarborough's Will, 139 N.C. 423, 51 S.E. 931 (1905).

The defendant must have been able to obey the order, and in spite of his ability must have disobeyed it. Inability to obey is a good excuse — for example, payment of money. Kane v. Haywood, 66 N.C. 1 (1872); Boyett v. Vaughan, 89 N.C. 27 (1883); Smith v. Smith, 92 N.C. 304 (1885).

One does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

The excuse is sufficient where the defendant has been unable to pay money according to an order. Kane v. Haywood, 66 N.C. 1 (1872); Boyett v. Vaughan, 89 N.C. 27 (1883); Smith v. Smith, 92 N.C. 304 (1885).

Where defendant testifies that his failure after knowledge to obey a court order for the payment of alimony pendente lite was due to his lack of financial means, and no evidence is presented at the hearing tending to negative the truth of defendant's explanation or to establish as an affirmative fact that he possessed the means wherewith to comply with the order, the court's finding that defendant willfully disobeyed the order is not supported by the record, and judgment committing him to imprisonment for contempt must be set aside. Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948).

Where the husband, in proceedings against him for contempt for disobeying an order to pay moneys for the support of his child, shows by the uncontradicted testimony of himself and a witness that he had no property nor income except what he could earn, and that he had been unable to obtain employment and was therefore unable to comply with the terms of the order, the evidence fails to show that the disobedience was willful, and he may not be adjudged in contempt of court and a sentence imposed upon him. West v. West, 199 N.C. 12, 153 S.E. 600 (1930).

But where the impossible circumstances are removed prior to the arrest for contempt the defendant will not be excused. Thomasville Shooting Club v. Thomas, 120 N.C. 334, 26 S.E. 1007 (1897).

Disavowal of Disrespectful Intent. — The willful disobedience of a restraining order by the party on whom it had been served, and who was aware of its meaning and import, is in itself an act of contempt, from which he may not purge himself by disavowing a disrespectful intent. In re Parker, 177 N.C. 463, 99 S.E. 342 (1919).

Advice of Counsel No Excuse. — The failure to obey the order of the court placing property in possession of a receiver is contempt, even though the contemnor acted under an advice of counsel. Such advice is no protection to the intentional violation of the order. Delozier v. Bird, 123 N.C. 689, 31 S.E. 834 (1898).

In such a case the counsel himself may be subjected to contempt proceedings. This fact, however, will be considered by the judge in imposing the punishment. Weston v. John L. Roper Lumber Co., 158 N.C. 270, 73 S.E. 799 (1912). See Green v. Griffin, 95 N.C. 50 (1886).

An order of court not lawfully issued may not be the basis on which to found a proceeding for contempt. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949); State v. Black, 232 N.C. 154, 59 S.E.2d 621 (1950).

Where an order is void ab initio, one may not be held for contempt for disobeying such order, and the fact that he did not appeal from the granting of the order does not affect his liability, the order not being one lawfully issued. In re Longley, 205 N.C. 488, 171 S.E. 788 (1933).

Where a subpoena issued by a municipal-county court and running outside the county is a nullity because not attested by the seal of the court, neither service of the process nor voluntary appearance thereunder, can waive the defect or vitalize the process so as to make the willful disobedience of the subpoena a basis for contempt proceedings. State v. Black, 232 N.C. 154, 59 S.E.2d 621 (1950).

Thus, disobeying an order entered by a court without jurisdiction is not contempt. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

Upon application for custody of children after decree of divorce, the resident judge entered a temporary order awarding the custody to the father, and issued an order to defendant wife to appear outside the county and outside the district to show cause why the temporary order should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949).

Failure to Comply with Discovery Order Punishable for Both Civil and Criminal Contempt. — One act may be punishable both for civil contempt, and for criminal contempt. This kind of duality particularly inheres in a party litigant's willful failure to comply with a discovery order. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Where defendant was accused of mismanaging, diverting and wasting corporate assets and the trial court ordered him to cooperate with receivers of the corporation and to provide them and plantiffs with copies of his tax returns and a list of his assets, defendant's contempt, if any, in failing to provide the required materials could be criminal or civil, and contemnor waived procedural requirements when he came into court to answer charges of the trial court's show cause order. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Disobeying Order of Clerk. — Where, in supplementary proceedings, the defendant has willfully disobeyed an order of the clerk of the superior court having jurisdiction, in disposing of his property, he is guilty of contempt of court. Bank of Zebulon v. Chamblee, 188 N.C. 417, 124 S.E. 741 (1924).

Urging Witness to Disobey Subpoena. — Where there was evidence that defendant telephoned a witness in a civil action and tried to get her not to obey a subpoena to be issued by the court, defendant was held to be in indirect contempt of court in accordance with § 5A-13. State v. Wall, 49 N.C. App. 672, 272 S.E.2d 152 (1980).

Noncompliance with Order to Produce Records of Business. — Where, in response to

an order to produce records of his business for a designated period, defendant appears and testifies that the only business records kept by him were the cash register tapes, that these had been destroyed by rats, and therefore, he had no records or documents with which to comply with the order, and there is no evidence to the contrary, it is error for the court to find and conclude defendant was in contempt within the purview of this section for noncompliance with the order. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Injunctions. — Where courts of competent jurisdiction successively issued three injunctive orders for the purpose of protecting persons who desired to work, and who had a right to work, if they so desired, in plaintiff's plant, while the orders were by their terms temporary and effective only until final trial of the cause, they were lawful orders of a court of competent jurisdiction. Any person guilty of willful disobedience of such orders may be punished for contempt of court. Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

Willfully Preventing Receiver from Taking Possession. — A judgment debtor, fixed with knowledge as a party upon whom notice was served, is guilty of contempt of court in willfully preventing the receiver from taking possession of the property in conformity with a lawful order of the court, even though the order may be erroneous, if no appeal therefrom was perfected by him. Nobles v. Roberson, 212 N.C. 334, 193 S.E. 420 (1937).

Support Payments. — The mere fact that defendant, ordered to pay a certain sum monthly for the necessary subsistence of his wife and child, has a right to move at any time for modification of the order does not support the conclusion that defendant's failure to comply with the order is willful. Smithwick v. Smithwick, 218 N.C. 503, 11 S.E.2d 455 (1940).

Failure to Comply with Separation Agreement. — Husband could not be adjudged in contempt for failure to comply with separation agreement entered into prior to the institution of divorce action, judgment in which provided that it should not affect or invalidate the separation agreement. Brown v. Brown, 224 N.C. 556, 31 S.E.2d 529 (1944).

Cases Involving Violations of Order Restraining Strikers. — For a series of cases involving violations of a restraining order which sought to prohibit violence and mass picketing on the part of strikers, see Harriet Cotton Mills v. Local No. 578, Textile Workers Union, 251 N.C. 218, 111 S.E.2d 457 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960); Harriet Cotton Mills v. Local No. 578, Textile Workers Union, 251 N.C. 231, 111 S.E.2d 465 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960); Henderson Cotton Mills v. Local No. 584, Textile Workers Union, 251 N.C. 234, 111 S.E.2d 476 (1959); Henderson Cotton Mills v. Local No. 584, Textile Workers Union, 251 N.C. 240, 111 S.E.2d 471 (1959); Harriet Cotton Mills v. Local No. 578, Textile Workers Union, 251 N.C. 248, 111 S.E.2d 467 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960); Henderson Cotton Mills v. Local No. 584, Textile Workers Union, 251 N.C. 254, 111 S.E.2d 480 (1959), cert. denied, 362 U.S. 941, 80 S. Ct. 806, 4 L. Ed. 2d 770 (1960).

Other Actions Held to Constitute Contempt. — Disobeying an injunction or restraining order such as cutting timber after injunction against the same. Fleming v. Patterson, 99 N.C. 404, 6 S.E. 396 (1888); In re Carolina, C. & O. Ry., 151 N.C. 467, 66 S.E. 438 (1909); Weston v. John L. Roper Lumber Co., 158 N.C. 270, 73 S.E. 799 (1912). Failure to pay alimony, Zimmerman v. Zimmerman, 113 N.C. 432, 18 S.E. 334 (1893). Failure of clerk to make transcript of record, Worth v. Piedmont Bank, 121 N.C. 343, 28 S.E. 488 (1897). See also generally Murray v. Berry, 113 N.C. 46, 18 S.E. 78 (1893). Failure to deliver property, McLean v. Douglass, 28 N.C. 233 (1846). Failure to return process, Ex parte Summers, 27 N.C. 149 (1844). Failure to settle estates by public administrator, In re Brinson, 73 N.C. 278 (1875).

D. Recalcitrant Witnesses.

Refusal to Testify after Having Been Sworn. — It has been uniformly held by the Supreme Court and by courts of other jurisdictions that the power to punish for contempt committed in the presence of the court, is inherent in the court, and not dependent upon statutory authority. Without such power the court cannot perform its judicial function. This principle is especially applicable when the contempt consists in the refusal of the witness in attendance upon the court, after having been duly sworn, to answer a question propounded to him for the purpose of eliciting evidence material to the issue to be decided by the court. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

The giving of testimony which is obviously false or evasive can constitute contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Since the power of the court over a witness in requiring proper responses is inherent and necessary for the furtherance of justice, it must be conceded that testimony which is obviously false or evasive is equivalent to a refusal to testify. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

Obviously False or Evasive Testimony Is Equivalent to Refusal to Testify. — The power of the court to require a witness to give

proper responses is inherent and necessary for the furtherance of justice, and therefore, testimony which is obviously false or evasive is equivalent to a refusal to testify. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Although It Is Also a Crime. — Making a false statement under oath may constitute contempt, notwithstanding that the conduct may also be a crime, such as perjury or false swearing. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

And Can Be Punished Civilly or Criminally. — Giving "obviously false" testimony can be punishable by contempt civilly or criminally. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972).

False Testimony as Direct or Indirect Contempt. — See note to § 5A-13.

Commissioner May Ask Aid of Judge; Declaration of Power. — The commissioner before whom the witness had refused to answer, may invoke the aid of the judge to punish for contempt. But the judge has no right to delegate the judicial power to punish for contempt to an executive officer. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

No Distinction between Refusing to Be Sworn and Refusing to Answer. — This section makes no distinction between one who, in the presence of the court, pursuant to its lawful subpoena, refuses to be sworn as a witness and one who, having been sworn, refuses to answer a proper question. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Motive of Recalcitrant Witness Immaterial. — Whatever the motive of the recalcitrant witness or party may be, it does not determine whether he may lawfully be adjudged in contempt and punishment. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

The refusal of one subpoenaed as a witness to take the oath or to answer proper questions propounded to him, when done knowingly and intentionally, is willful even though such person believes it to be his moral duty to refuse to testify. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Decrease in Esteem No Justification for Refusing to Testify. — The fact that one called as a witness fears that his testimony may decrease the esteem in which he is held in the community, or may decrease his ability to render service therein, does not justify refusal by him to testify in response to questions otherwise proper. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Nor Religious Conscience. — The State has a compelling interest that a person called as a witness should be sworn and should testify in the administration of justice between the State and one charged with a serious offense; therefore a minister called as a witness in such prosecution may be held in contempt of court upon his refusal to be sworn as a witness, notwithstanding he asserts that his refusal is a matter of religious conscience. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Other Actions Held to Constitute Contempt. — Refusal to testify before a commissioner, Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893). Refusal to testify before a referee, LaFontaine v. Southern Underwriters Ass'n, 83 N.C. 132 (1880).

E. Inaccurate Publications.

Publication after Adjournment of Court. — For constructive contempt by publication of false matter relating to the conduct of the presiding judge, published after the adjournment of the court, the judge must seek redress by the ordinary method and bring his cause before an impartial tribunal. He may not proceed to determine the matter summarily without the intervention of a jury. In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

Publication of Past Matter. — There no longer exists the power to punish summarily for defamatory reports and publications about a matter which is past and ended. To justify contempt proceedings the publication must have been pendente lite. In re Brown, 168 N.C. 417, 84 S.E. 690 (1915).

Trial of Issue by the Court Instead of the Jury. —If on the face of the publication there is nothing to show that it was grossly incorrect or calculated to bring the court into contempt, the respondent is entitled to have the issue tried not by a jury but by a court. In re Robinson, 117 N.C. 533, 23 S.E. 453 (1895).

F. Failure of Officer to Perform Duties.

Gross negligence of attorneys is a sort of contempt, and courts may order them to pay the costs of cases in which they are guilty of such negligence. Ex parte Robins, 63 N.C. 310 (1869).

G. Failure to Comply with Schedules.

Willful Absence of Attorney from Trial. — Generally, the willful absence of an attorney from a scheduled trial constitutes contempt of court, although disputes arise over whether it is direct or indirect contempt. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980).

V. PRACTICE AND PROCEDURE.

The court must specify the particulars of the offense on the record by stating the words, acts or gestures amounting to direct contempt, and when the record contains only conclusions that contemnor was contemptuous, contemnor is entitled to his discharge. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967).

Facts Must Be Found and Filed. — In contempt proceedings the facts upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, and the judgment must be founded on those findings. In re Odum, 133 N.C. 250, 45 S.E. 569 (1903); Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

In contempt proceedings it is necessary for the court to find the facts supporting the judgment and especially the facts as to the purpose and object of the contemner, since nothing short of willful disobedience will justify punishment. Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957).

Conclusions of Law Not So Denominated. — Where the judgment in contempt fully states the facts found and the conclusions of law based thereon, adjudging defendants in contempt for a willful disobedience of an order lawfully issued by the superior court having jurisdiction, exception on the ground that the court did not specifically denominate his conclusions of law as such cannot be sustained. Glendale Mfg. Co. v. Bonano, 242 N.C. 587, 89 S.E.2d 116 (1955).

Review of Findings of Fact. — In proceedings for contempt the facts found by the trial judge are not reviewable by the appellate division except for the purpose of passing upon their sufficiency to warrant the judgment. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

§ 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

(a) A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three, except that a person who commits a contempt described in G.S. 5A-11(8) is subject to censure, imprisonment not to exceed six months, fine not to exceed five hundred dollars ($500.00), or any combination of the three and a person who has not been arrested who fails to comply with a nontestimonial identification order, issued pursuant to Article 14 of G.S. 15A is subject to censure, imprisonment not to exceed 90 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three.

(b) Except for contempt under G.S. 5A-11(5) or 5A-11(9), fine or imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless:

(1) The act or omission was willfully contemptuous; or

(2) The act or omission was preceded by a clear warning by the court that the conduct is improper.

(c) The judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice.

(d) A person held in criminal contempt under this Article may nevertheless, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt. If a person is found in both civil contempt and criminal contempt for the same conduct, the total period of imprisonment is limited as provided in G.S. 5A-21(c).

(e) A person held in criminal contempt under G.S. 5A-11(9) may nevertheless, for the same conduct, be found guilty of a violation of G.S. 14-225.1, but he must be given credit for any imprisonment resulting from the contempt. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

Subsection (b) is drawn from the recommendations of the American Bar Association. It intends to preclude fine or punishment in response to what is essentially innocent conduct although censure alone would still be possible. Subsection (c) makes clear that a judge may change his mind and reduce or remove any punishment he imposed in response to contempt. Subsection (d) makes clear that, although civil contempt and criminal contempt proceedings are distinct, each may be imposed for the same conduct.

Legal Periodicals. — For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

For article surveying recent decisions by the North Carolina Supreme Court in the area of criminal procedure, see 49 N.C.L. Rev. 262 (1971).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

CASE NOTES

Editor's Note. — Most of the annotations under this section are from cases decided under former § 5-4.

No Constitutional Right to Jury Trial. — In view of the punishment, contempt is a petty offense for which there is no constitutional right to a jury trial. Thompson v. Thompson, 25 N.C. App. 79, 212 S.E.2d 243, appeal dismissed, 288 N.C. 120, 215 S.E.2d 606 (1975).

Punishment Immediate. — The punishment in contempt cases, must be immediate, or it would be ineffectual, as it is designed to suppress an outrage, which impedes the business of the court. State v. Yancy, 4 N.C. 133 (1814). Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Punishment for Both Criminal and Civil Contempt. — As recognized in subsection (d) of this section and § 5A-21(c), a person may be found to be in both criminal and civil contempt, although only a single act was committed. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

One act may be punishable both as civil contempt, and as criminal contempt. This kind of duality particularly inheres in a party litigant's willful failure to comply with a discovery order. Punishment is not, therefore, limited to criminal sanctions. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

No Defense to Criminal Prosecution. — The fact that a person has been punished for contempt of court, is no defense to a criminal indictment for the act constituting the contempt. State v. Yancy, 4 N.C. 133 (1814); In re Griffin, 98 N.C. 225, 3 S.E. 515 (1887).

Power of Industrial Commission. — The Industrial Commission proceeding under the Worker's Compensation Act, being expressly given the authority to subpoena witnesses and have them give evidence at the hearing, acts in a judicial capacity in adjudging in contempt a witness who refuses to give material evidence, and has power to punish by a fine or imprisonment under the provisions of this section. In re Hayes, 200 N.C. 133, 156 S.E. 791 (1931).

A sentence of ten days in jail, imposed by the superior court for contempt by refusal to be sworn as a witness, was well within the statutory maximum. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Imprisonment for Indefinite Period Erroneous. — A judgment entered is erroneous in directing that the defendant be committed to jail for an indefinite period rather than for the statutory period. Basnight v. Basnight, 242 N.C. 645, 89 S.E.2d 259 (1955).

Effect of Abolishment of Imprisonment for Debt. — The abolishment of imprisonment for debt does not include commitment under attachments for failure to comply with an order of court. Wood v. Wood, 61 N.C. 538 (1868).

A fine for contempt goes to the State, being a punishment for a wrong to the State, and should not be directed to be paid to a party to the suit. In re Rhodes, 65 N.C. 518 (1871); Morris v. Whitehead, 65 N.C. 637 (1871).

§ 5A-13. Direct and indirect criminal contempt; proceedings required.

(a) Criminal contempt is direct criminal contempt when the act:

(1) Is committed within the sight or hearing of a presiding judicial official; and

(2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

(3) Is likely to interrupt or interfere with matters then before the court.

The presiding judicial official may punish summarily for direct criminal contempt according to the requirements of G.S. 5A-14 or may defer adjudication and sentencing as provided in G.S. 5A-15. If proceedings for direct criminal contempt are deferred, the judicial official must, immediately following the conduct, inform the person of his intention to institute contempt proceedings.

(b) Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section specifies that only direct criminal contempt may be the subject of summary proceedings and defines direct criminal contempt. The three factors listed in subsection (a)(1), (2) and (3) must all be present before an act can be direct contempt. Subsection (a) also permits the judge who is authorized to punish summarily to defer the proceedings if he choose. The last sentence of subsection (a) establishes the rule that a person be cited for contempt at the time the contempt occurs even if the proceedings are to be held later.

CASE NOTES

Editor's Note. — Some of the annotations under this section are from cases decided under provisions of former Chapter 5.

False Testimony as Direct or Indirect Contempt. — Where all the facts necessary to establish false testimony were not before the court, it was impossible to say that there were words spoken or acts committed in the actual presence of the court which would constitute direct contempt. In re Edison, 15 N.C. App. 354, 190 S.E.2d 235 (1972), decided under former § 5-5.

Failure to comply with a prior court order would amount to an act committed outside the presence of the court, at a distance from it, which tends to degrade the court or interrupts, prevents or impedes the administration of justice and would be classified an indirect contempt. Ingle v. Ingle, 18 N.C. App. 455, 197 S.E.2d 61 (1973), decided under former § 5-7; Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

Urging Witness to Disobey Subpoena as Indirect Contempt. — Where there was evidence that defendant telephoned a witness in a civil action and tried to get her not to obey a subpoena to be issued by the court, defendant was held to be in indirect contempt of court in accordance with this section. State v. Wall, 49 N.C. App. 672, 272 S.E.2d 152 (1980).

Cited in State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979); State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979).

§ 5A-14. Summary proceedings for contempt.

(a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.

(b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary

imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

If the contempt proceedings are to be summary, subsection (a) requires that they occur substantially at the same time as the contempt itself. Subsection (b) follows the American Bar Association recommendation that the person charged with contempt be given notice of what the contemptuous action was and an opportunity to respond. This was intended not to provide for a hearing, or anything approaching that, in summary contempt proceedings, but merely to assure that the alleged contemnor had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort.

Legal Periodicals. — For comment on In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967), see 45 N.C.L. Rev. 863, 884, 924 (1967).

CASE NOTES

Editor's Note. — Some of the annotations under this section are from cases decided under former § 5-5.

Constitutionality. — Summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt must be represented by counsel, and therefore sentence for contempt does not deprive the contemner of his liberty without due process of law. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967).

Jury Trial. — It is well settled that the defendant in contempt proceedings is not entitled to a jury trial upon the controverted facts. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

What Findings of Fact Must Include. — A requirement that the judicial official's findings should indicate that the standard of proof required by subsection (b) was applied to his findings of fact is implicit in this section. State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979).

It is implicit in this section that the judicial official's findings in a summary contempt proceeding should clearly reflect that the contemnor was given an opportunity to be heard, along with a summary of whatever response was made and the judicial official's finding that the excuse or explanation proffered was inadequate or disbelieved. State v. Verbal, 41 N.C. App. 306, 254 S.E.2d 794 (1979).

Cited in State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979).

§ 5A-15. Plenary proceedings for contempt.

(a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

(b) Proceedings under this section are before a district court judge unless a court superior to the district court issued the order, in which case the proceedings are before that court. Venue lies throughout the judicial district where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judge is the trier of facts at the show cause hearing.

(e) The person charged with contempt may not be compelled to be a witness against himself in the hearing.

(f) At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt.

(g) The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section provides for a show-cause hearing in instances in which the judge either chooses not to proceed by summary proceedings or may not so proceed because the contempt was not direct. Plenary proceedings may not be held by a magistrate or clerk; they must always be held before a judge. The final sentence of subsection (a) responds to the constitutional requirement of Bloom v. Illinois, 391 U.S. 194 (1968), that contempt proceedings be held before another judge when the one citing the contemnor was involved in the act in question. Subsection (f) permits the judge, in addition to using the prosecutor, who traditionally represents the court in contempt actions, to appoint another member of the Bar when there is a conflict of interest. The central example of this would be when the prosecutor himself or a law-enforcement officer with whom he worked closely was involved in the contempt.

CASE NOTES

Verification Not Prerequisite to Issuance of Show Cause Order. — The filing of a petition, an affidavit, or other proper verification is not required as a prerequisite to issuance of a show cause order under this section, although they may be a proper basis for issuance of the show cause order. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

Service under § 1A-1, Rule 4(j)(1)c Proper. — Where the court issued an order pursuant to § 1A-1 Rule 4(j)(1)c notifying a foreign attorney of the contempt charges and allowing him 60 days to respond to the charges, which order was mailed to the attorney at the address he gave the court in a motion to be admitted in a case pro hac vice, this method of service was proper to comply with the requirement of subsection (a) that "[a] copy of the order must be furnished to the person charged" where the court had personal jurisdiction as provided in § 1-75.4. In re Smith, 45 N.C. App. 123, 263 S.E.2d 23 (1980).

Contempt Following Chapter 19 Injunction. — The plenary proceedings provided for in this section apply to contempt actions following a Chapter 19 injunction. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979), vacated, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980).

§ 5A-16. Custody of person charged with criminal contempt.

(a) A judicial official may orally order that a person he is charging with direct criminal contempt be taken into custody and restrained to the extent necessary to assure his presence for summary proceedings or notice of plenary proceedings.

(b) If a judicial official who initiates plenary proceedings for contempt under G.S. 5A-15 finds, based on sworn statement or affidavit, probable cause to believe the person ordered to appear will not appear in response to the order, he may issue an order for arrest of the person, pursuant to G.S. 15A-305. A person arrested under this subsection is entitled to release under the provisions of Article 26, Bail, of Chapter 15A of the General Statutes. (1977, c. 711 s. 3.)

OFFICIAL COMMENTARY

The authority for taking custody of a person charged with contempt has been unclear. This section is aimed to fill that gap. Subsection (a) clarifies the legality of seizing a person charged with direct contempt and bringing him before the judge. Subsection (b) makes clear the propriety of issuing an order for arrest of a person when the proceedings are not to be summary. A concurrent change in G.S. 15A-305, providing for the order for arrest, makes clear that an order may be used for this purpose.

§ 5A-17. Appeals.

A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section rejects present law and permits appeal from all convictions for criminal contempt.

Cross References. — As to appeals in criminal actions before magistrates and district court judges, see § 15A-1431 et seq. As to appeals to the appellate division, see § 15A-1441 et seq.

CASE NOTES

Editor's Note. — The annotations under this section are from cases decided under former § 5-2.

Finding of Fact Not Disturbed. — Where the judge has found sufficient facts to attach the defendant for direct contempt of court, upon imposing punishment therefor, the finding will not be disturbed by appeal. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890); State v. Little, 175 N.C. 743, 94 S.E. 680 (1917). Nor will the finding of fact by the judge be disturbed upon an appeal on an indirect contempt. In re Parker, 177 N.C. 463, 99 S.E. 342 (1919).

It is otherwise however on appeals from a subordinate court to the superior court. In such a case the facts as well as the law will be reviewed, and even additional testimony may be heard. In re Deaton, 105 N.C. 59, 11 S.E. 244 (1890).

§§ 5A-18 to 5A-20: Reserved for future codification purposes.

Article 2.

Civil Contempt.

OFFICIAL COMMENTARY

The Commission felt that it was proper, once they had to deal with civil contempt in some respect as a consequence of severing it in Chapter 5 from the related criminal contempt provisions, to resolve some of the uncertainties that surround the present civil contempt procedures.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order.

(b) A person who is found in civil contempt may be imprisoned as long as his civil contempt continues, unless the contempt is failure by a person not arrested for the crime to comply with a nontestimonial identification order issued pursuant to Article 14, Nontestimonial Identification Order, of Chapter 15A of the General Statutes. In that case, he may not be imprisoned more than 90 days unless he is arrested on probable cause.

(c) A person who is found in civil contempt under this Article may, nevertheless, for the same conduct, be found in criminal contempt under Article 1 of this Chapter, but the total period of imprisonment arising from the conduct may not exceed the greater of:

(1) The period during which the contemnor may be imprisoned for civil contempt; or

(2) The period of imprisonment provided in G.S. 5A-12(a). (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, s. 1.)

OFFICIAL COMMENTARY

This section is based on the Commission's recognition that civil contempt should be solely a matter of forcing the contemnor to comply with a court order and, unlike criminal contempt, is not a form of punishment. Subsections (a) and (b) make clear that civil contempt is appropriate only so long as the court order is capable of being complied with. The section rejects the approach of the present Chapter 5 specifying particular grounds for civil contempt. Instead, the only issue in determining whether imprisonment for civil contempt is proper is whether or not there is a court order which may be complied with. Subdivision (3) of subsection (a), by specifying that the contempt continues while the person is "able to take reasonable measures that would enable him to comply," is intended to make clear, for example, that the person who does not have the money to make court-ordered payments but who could take a job which would enable him to make those payments, remains in contempt by not taking such a job. In most cases, a person in civil contempt may be held for so long as his civil contempt continues; he holds the keys to his own jail by virtue of his ability to comply. The Commission felt, however, in the case of failure to comply with nontestimonial identification order by one who is only suspected of a crime, that this unlimited jailing would be improper. Therefore, unless probable cause for arrest arises, the person subject to a nontestimonial identification order who remains noncompliant must be released after 90 days. Concurrent amendments to G.S. 15A-279 (the section dealing with nontestimonial identification orders) point out that resisting compliance with a nontestimonial identification order may be used in determining whether there is probable cause that the person subject to the order committed the crime in question. This means that in many cases the person who resists the order for the full 90 day period will become subject to arrest on probable cause, at which time the 90 day limitation will no longer apply. Another concurrent amendment to G.S. 15A-279 provides, however, that a nontestimonial identification order may not be reissued unless there is newly available evidence to support it. In subsection (c), the Commission was seeking to insure that a person could not serve a longer period of imprisonment by being found in both civil and criminal contempt for the same conduct than he could if he had been found to be in only civil or criminal contempt. An earlier draft of this subsection had specified that a finding of civil or criminal contempt did not preclude disciplinary proceedings if the contemnor were a member of the Bar. The Commission approved

this policy but felt it more appropriate that it be mentioned in commentary rather than in the body of the section.

Cross References. — As to punishment for civil contempt of persons failing to report dispositions of criminal cases, see § 15A-1381.

Effect of Amendments. — The 1979, 2nd Sess., amendment substituted "a person who is found in civil contempt may be" for "A judge may order a civil contemnor" at the beginning of subsection (b).

Legal Periodicals. — For comment on this and other sections dealing with contempt, see 12 N.C.L. Rev. 260.

For note on criminal and civil contempt proceedings, see 34 N.C.L. Rev. 221 (1956).

For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

For an article entitled, "Trial Stage and Appellate Procedure Act: An Overview," see 14 Wake Forest L. Rev. 899 (1978).

For an article entitled, "Contempt, Order in the Courtroom, Mistrials," see 14 Wake Forest L. Rev. 909 (1978).

For note on specific performance of separation agreements, see 58 N.C.L. Rev. 867 (1980).

For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

CASE NOTES

Editor's Note. — Some of the annotations under this section are from cases decided under former § 5-8.

I. General Consideration.
II. Orders Enforceable as Civil Contempt.
III. Purging Contempt.
IV. Practice and Procedure.
V. Appeal and Error.

I. GENERAL CONSIDERATION.

Nature and Purpose of Proceeding. — Civil contempt is applied to a continuing act, and the proceeding is used to compel obedience to orders and decrees made for the benefit of private parties and to preserve and enforce private rights. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Civil contempt proceedings are without question civil in nature. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

This section makes clear that civil contempt is not a form of punishment; rather, it is a civil remedy to be utilized exclusively to enforce compliance with court orders. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

Acts and omissions constituting civil contempt involve matters tending to defeat, impair, impede, or prejudice the rights or remedies of a party to an action pending in court, and are punishable with the underlying purpose of preserving private rights by coercion. Galyon v. Stutts, 241 N.C. 120, 84 S.E.2d 822 (1954).

Criminal and Civil Contempt Distinguished. — The line of demarcation between civil and criminal contempts is hazy at best. A major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. Blue Jeans Corp. of America v. Amalgamated Clothing Workers, 275 N.C. 503, 169 S.E.2d 867 (1969).

Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such

parties. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

Civil contempt is applied to a continuing act, and the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 320 (1967); Blue Jeans Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

Disobedience Must Be Willful. — A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is willful, which imports knowledge and a stubborn resistance. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Thus, Defendant Must Possess Means to Comply. — To support a finding of willfulness in failing to comply with a support order, there must be evidence to establish as an affirmative fact that defendant possessed the means to comply with the order at some time after the entry of the order. Teachey v. Teachey, 46 N.C. App. 332, 264 S.E.2d 786 (1980).

For civil contempt to be applicable, the defendant must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order. Teachey v. Teachey, 46 N.C. App. 332, 264 S.E.2d 786 (1980).

In order to punish by contempt proceedings, the trial court must find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

For a defendant to be held in contempt for failure to comply with a court order, the trial judge must make particular findings that defendant possessed the means to comply with them. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Where the court enters judgment for civil contempt, the court must find not only failure to comply with the order but that the defendant presently possesses the means to comply. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Manifestly, one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

Even if he does not have the money to make court ordered payments, a person will be guilty of civil contempt if he could take a job which would enable him to make those payments. Frank v. Glanville, 45 N.C. App. 313, 262 S.E.2d 677 (1980).

Disobedience of an order made without, or in excess of, jurisdiction is not punishable as contempt. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

Confrontation of Witnesses. — The North Carolina Constitution preserves the right of confrontation of the witnesses against an accused and this right is applicable to contempt proceedings so that an adjudication of contempt against defendant based on the affidavit of the receiver of a corporation was invalid. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Applied in Monds v. Monds, 46 N.C. App. 301, 264 S.E.2d 750 (1980).

II. ORDERS ENFORCEABLE AS CIVIL CONTEMPT.

Child Support Orders. — Willful failure and refusal of a party to make payments for the support of his child in accordance with decree of court is civil contempt and the court may order him into custody until he shows compliance or is otherwise discharged according to law. Smith v. Smith, 248 N.C. 298, 103 S.E.2d 400 (1958).

Civil contempt proceedings to enforce orders for payment of support to children pursuant to consent judgment are authorized by this section. Smith v. Smith, 248 N.C. 298, 103 S.E.2d 400 (1958).

Alimony. — A judgment ordering the payment of alimony may be enforced by the contempt power. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Where the trial judge found that the party was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the whole amount. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

A breach of contract is not punishable as civil contempt. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951); In re Will of Smith, 249 N.C. 563, 107 S.E.2d 89 (1959).

Where the proceeding for civil contempt is set in motion to compel a person to substitute a binding agreement for an invalid one, an order penalizing the plaintiff runs counter to the sound rule that the court will not entertain contempt proceedings where the mover's purpose is to coerce his adversary into making a contract. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

Refusal to effectuate an agreement to sign a consent judgment may not be made the basis for contempt proceedings where it does not appear that the parties ever agreed to the exact terms of such judgment. State v. Clark, 207 N.C. 657, 178 S.E. 119 (1935).

Failure to Comply with Discovery Order Punishable as Both Civil and Criminal Contempt. — Where defendant was accused of mismanaging, diverting and wasting corporate assets and the trial court ordered him to cooperate with receivers of the corporation and to provide them and plaintiffs with copies of his tax

returns and a list of his assets, defendant's contempt, if any, in failing to provide the required materials could be criminal or civil, and contemnor waived procedural requirements when he came into court to answer charges of the trial court's show cause order. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Refusal of municipal officers to surrender their offices in accordance with the results of an election held pursuant to the provisions of a decree of court cannot be made the basis for contempt proceedings, since upon the hearing of the order to show cause the court must first adjudicate the rights of the parties to the offices and such adjudication can be made only in a direct proceeding for that purpose under article 41, chapter 1, of the General Statutes. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

Order to Produce Tax Returns. — Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets and he was ordered by the trial court to produce his tax returns, the production of the returns did not amount to such authentication as to be compelled testimonial self-incrimination which would support a claim of Fifth Amendment privilege, thus, defendant could be found in contempt. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Where defendant was accused of mismanaging, diverting, converting and wasting corporate assets, defendant's refusal to comply with the trial court's order to produce tax returns was not protected by the Fifth Amendment proscription against compulsory self-incrimination and, thus, he could be found in contempt since there was no evidence tending to show defendant was under any physical or mental coercion at the time he prepared his tax returns, and he therefore could not rely upon the contents of the tax returns to support his claim of Fifth Amendment protection. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

Order to Appear As Attorney. — An out-of-state attorney could not be held in and punished for willful contempt of court for failure to comply with an order of the trial court that he appear as an attorney in a criminal case where there had been no general appearance by local counsel as required by § 84-4.1 and the out-of-state attorney thus never acquired eligibility to appear in the case and was never an attorney in the case admitted to limited practice in North Carolina. In re Smith, 301 N.C. 621, 272 S.E.2d 834 (1981).

III. PURGING CONTEMPT.

Payment of Counsel Fees as Condition to Being Purged of Contempt. — The contempt power includes the authority for a district court judge to require one whom he has found in willful contempt of court for failure to comply with a child support order entered pursuant to § 50-13.1 et seq., to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt. Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

Effect of Payment of Fine. — A party to a proceeding as for contempt undoubtedly waives his right to have the judgment in the proceeding reviewed on appeal by voluntarily paying the fine imposed upon him by the judgment. But where the record reveals that the fine was paid under protest at the precise moment an appeal was noted from the order imposing it, and that the party took this course to avoid being committed to jail until the fine was paid, inasmuch as the payment was the product of coercion, the right of appeal was not waived by making it. Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951).

IV. PRACTICE AND PROCEDURE.

Jury Trial. — Respondents in proceedings for civil contempt are not entitled to a jury trial. In re Gorham, 129 N.C. 481, 40 S.E. 311 (1901).

Appointment of Counsel for Indigents. — Due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

Section 7A-451, concerning the scope of entitlement of indigent persons to representation, does not grant to indigent persons the right to be represented by appointed counsel in civil contempt proceedings. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

Right to Confront Witnesses. — A person denying his asserted violation of a restraining order in contempt proceedings has the right under the provisions of N.C. Const., Art. I, § 19, synonymous with due process of law under the United States Constitution, to confront and cross-examine witnesses by whose testimony the asserted violation is to be established. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

But This Right Is Waivable. — See Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

Punishment for Both Criminal and Civil Contempt. — As recognized in § 5A-12(d) and subsection (c) of this section, a person may be found to be in both criminal and civil contempt, although only a single act was committed. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

There are certain instances where contemnors may be punished for both criminal contempt and for civil contempt. Blue Jeans

Corp. v. Amalgamated Clothing Workers, 4 N.C. App. 245, 166 S.E.2d 698, aff'd, 275 N.C. 503, 169 S.E.2d 867 (1969).

One act may be punishable as both civil contempt and criminal contempt. This kind of duality particularly inheres in a party litigant's willful failure to comply with a discovery order. Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

District Court May Enforce Judgment Entered in Superior Court. — A district court judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Disobeying an order entered by a court without jurisdiction is not contempt. Harding v. Harding, 46 N.C. App. 62, 264 S.E.2d 131 (1980).

The violation of a provision of a judgment which is void cannot be made the basis for contempt. Corey v. Hardison, 236 N.C. 147, 72 S.E.2d 416 (1952).

V. APPEAL AND ERROR.

The findings of fact by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence, and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

In proceedings for contempt, the facts found by the judge are not reviewable except for the purpose of passing upon their sufficiency to warrant the judgment. Cox v. Cox, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

§ 5A-22. Release when civil contempt no longer continues.

(a) A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

(b) On motion of the contemnor, the court must determine if he is subject to release and, on an affirmative determination, order his release. The motion must be directed to the judge who found civil contempt unless he is not available. Then the motion must be made to a judge of the same division in the same judicial district. The contemnor may also seek his release under other procedures available under the law of this State. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

Subsection (a) permits the one who has custody of a jailed contemnor to release him without a court order or any formal proceedings, if the custodian finds that the contemnor has purged himself of the contempt by complying with the contempt order's specifications. This is intended to apply mainly to the situation in which compliance with the order calls for payment to the court. It was felt that this action was so clear that the custodian should be able to proceed on his own. The possibility that a person will be released when a release was not proper was outweighed by the importance of seeing to it that a person did not remain jailed longer than was necessary. Subsection (b) establishes the machinery for a civil contemnor to seek his own release if he has complied or if compliance is no longer possible, but he has still not been released.

§ 5A-23. Proceedings for civil contempt.

(a) Proceedings for civil contempt are either by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in

advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

(b) Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in the judicial district of the court which issued the order. Otherwise, venue is in the county where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judicial official is the trier of facts at the show cause hearing.

(e) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor. If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself of the contempt.

(f) A person with an interest in enforcing the order may present the case for a finding of civil contempt for failure to comply with an order.

(g) A judge conducting a hearing to determine if a person is in civil contempt may at that hearing, upon making the required findings, find the person in criminal contempt for the same conduct, regardless of whether imprisonment for civil contempt is proper in the case. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, ss. 2-4.)

OFFICIAL COMMENTARY

Subsection (a) draws a distinction between an order to appear for a show of cause hearing and a notice that the show-cause hearing will be held. The Commission wanted to make clear the propriety of a person's not appearing if he was notified of the show-cause hearing rather than ordered to appear at it. Since the Commission felt that there were some instances in which the court would want the contemnor present regardless of his wishes, the order was left as an option. Application of subsection (b) results in magistrates and clerks being unable to hold proceedings for civil contempt. The Commission particularly intended "a person with an interest" under subsection (f) to include the State, as represented by the district attorney, in a criminal case. Subsection (g) permits, in essence, consolidated hearings for civil and criminal contempt, thus permitting a judge who has begun a civil contempt hearing to continue and find the person in criminal contempt even though he is beyond the reach of civil contempt because of inability at that time to comply with the order.

Effect of Amendments. — The 1979, 2nd Sess., amendment added "Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court," at the beginning of subsection (b), and substituted "judicial official" for "judge" in subsection (d) and in two places of subsection (e).

Legal Periodicals. — For note on right to jury trial in criminal contempt proceedings, see 6 Wake Forest Intra. L. Rev. 356 (1970).

CASE NOTES

Editor's Note. — Some of the annotations under this section are from cases decided under former § 5-9.

Requirement for Proper Verification. — Although the language used in this section seems to be permissive in nature, prior case law under the antecedent statute established that, in cases of civil contempt, previously denominated as cases as for contempt, a petition, affidavit, or other proper verification charging a willful violation of an order of court was necessary in order for an order to show cause to issue. The legislature has not altered this requirement. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

An order issued on the basis of unsworn testimony given ex parte to the court could not lawfully have been one based on civil contempt. Lowder v. All Star Mills, Inc., 45 N.C. App. 348, 263 S.E.2d 624 (1980).

The procedure to punish for civil contempt is by order to show cause based upon a petition, affidavit, or other proper verification charging a willful violation of an order of court. Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 201, 154 S.E.2d 313 (1967).

Precedent decrees that a judge should recuse himself in contempt proceeding involving his personal feelings which do not make for an impartial and calm judicial consideration and conclusion in the matter. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951).

No judge should sit in his own case, or participate in a matter in which he has a personal interest, or has taken sides therein. Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 (1951).

Trial court did not have jurisdiction to conduct contempt proceedings while appeal was pending, because, under § 1-294, all proceedings below are stayed; therefore order finding defendant in contempt was void, at least until appeal was perfected. Collins v. Collins, 18 N.C. App. 45, 196 S.E.2d 282 (1973), decided under former § 5-9.

Waiver. — Where defendant was accused of mismanaging, diverting and wasting corporate assets and the trial court ordered him to cooperate with receivers of the corporation and to provide them and plaintiffs with copies of his tax returns and a list of his assets, defendant's contempt, if any, in failing to provide the required materials could be criminal or civil, and contemnor waived procedural requirements when he came into court to answer charges of the trial court's show cause order. Lowder v. All Star Mills, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981).

§ 5A-24. Appeals.

A person found in civil contempt may appeal in the manner provided for appeals in civil actions. (1977, c. 711, s. 3.)

§ 5A-25. Proceedings as for contempt and civil contempt.

Whenever the laws of North Carolina call for proceedings as for contempt, the proceedings are those for civil contempt set out in this Article. (1977, c. 711, s. 3.)

OFFICIAL COMMENTARY

This section makes clear that all of the existing references to "as for contempt" in the General Statutes should be interpreted to call for the procedures provided in this Article for civil contempt.

Legal Periodicals. — For note on enforcement of separation agreements by specific performance, see 16 Wake Forest L. Rev. 117 (1980).

Chapter 6.

Liability for Court Costs.

Article 1.

Generally.

Sec.
6-1. Items allowed as costs.
6-2. [Repealed.]
6-3. Sureties on prosecution bonds liable for costs.
6-4. Execution for unpaid costs; bill of costs to be attached.
6-5, 6-6. [Repealed.]
6-7. Clerk to enter costs in case file.
6-8 to 6-12. [Repealed.]

Article 2.

When State Liable for Costs.

6-13. Civil actions by the State; joinder of private party.
6-14. Civil action by and against State officers.
6-15. Actions by State for private persons, etc.
6-16. [Repealed.]
6-17. Costs of State on appeals to federal courts.
6-17.1. Costs and expenses of State in connection with federal litigation arising out of State cases.

Article 3.

Civil Actions and Proceedings.

6-18. When costs allowed as of course to plaintiff.
6-19. When costs allowed as of course to defendant.
6-20. Costs allowed or not, in discretion of court.
6-21. Costs allowed either party or apportioned in discretion of court.
6-21.1. Allowance of counsel fees as part of costs in certain cases.
6-21.2. Attorneys' fees in notes, etc., in addition to interest.
6-21.3. Remedies for returned check.
6-21.4. Allowance of counsel fees and costs in certain cases involving principals or teachers.
6-22. Petitioner to pay costs in certain cases.
6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.
6-24. Suits in forma pauperis; no costs unless recovery.
6-25. Party seeking recovery on usurious contracts; no costs.
6-26. Costs in special proceedings.
6-27. [Repealed.]
6-28. Costs of laying off homestead and exemption.
6-29. Costs of reassessment of homestead.
6-30. Costs against infant plaintiff; guardian responsible.
6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.
6-32. Costs against assignee after action brought.

Article 4.

Costs on Appeal.

6-33. Costs on appeal generally.
6-34, 6-35. [Repealed.]

Article 5.

Liability of Counties in Criminal Actions.

6-36 to 6-39. [Repealed.]
6-40. Liability of counties, where trial removed from one county to another.
6-41 to 6-44. [Repealed.]

Article 6.

Liability of Defendant in Criminal Actions.

6-45, 6-46. [Repealed.]
6-47. Judgment confessed; bond given to secure fine and costs.
6-48. Arrest for nonpayment of fine and costs.

Article 7.

Liability of Prosecuting Witness for Costs.

6-49. Prosecuting witness liable for costs in certain cases; court determines prosecuting witness.
6-50. Imprisonment of prosecuting witness for willful nonpayment of costs if prosecution frivolous.

Article 8.

Fees of Witnesses.

6-51. Not entitled to fees in advance.
6-52. [Repealed.]
6-53. Witness to prove attendance; action for fees.
6-54 to 6-59. [Repealed.]
6-60. No more than two witnesses may be subpoenaed to prove single material fact; liability for fees of such witnesses; one fee for day's attendance.
6-61. [Repealed.]
6-62. District attorney to announce discharge of State's witnesses.

Sec.
6-63. [Repealed.]

Article 9.

Criminal Costs before Justices, Mayors, County or Recorders' Courts.

6-64, 6-65. [Repealed.]

ARTICLE 1.

Generally.

§ 6-1. Items allowed as costs.

To the party for whom judgment is given, costs shall be allowed as provided in Chapter 7A and this Chapter. (Code, s. 528; Rev., s. 1249; C. S., s. 1225; 1955, c. 922; 1971, c. 269, s. 1.)

Cross References. — As to prosecution bonds for costs, see § 1-109 et seq. As to partial recovery, see § 6-18. As to fees of witnesses, see § 6-51 et seq.

CASE NOTES

I. General Consideration.
II. Particular Costs.
A. Attorneys' Fees.
B. Witness Fees.
C. Other Costs.

I. GENERAL CONSIDERATION.

For discussion of costs generally, see State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889).

Costs Follow the Judgment. — In general this section states the rule that costs follow the judgment, a rule which is founded on policy and natural justice, designed to prevent the unsuccessful litigant from escaping the consequence ensuing from the unfavorable termination of a suit, and which, to a great extent, acts as deterrent to the prosecution or appeal of promiscuous and frivolous litigation. Criminal actions and civil suits alike are controlled by the principle. In State v. Horne, 119 N.C. 853, 26 S.E. 36 (1896), it is said: "There is no exception in State cases to the rule prevailing in civil cases that the costs follow the result of the final judgment." The true and only test of liability for costs depends upon the nature of the final judgment, and the party cast in the suit is the one upon whom the costs must fall. Kincaid v. Graham, 92 N.C. 154 (1885); Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905); Smith v. Cashie & Cowan R.R. & Lumber Co., 148 N.C. 334, 62 S.E. 416 (1908); Kinston Cotton Mills v. Rocky Mount Hosiery Co., 154 N.C. 462, 70 S.E. 910 (1911); Ritchie v. Ritchie, 192 N.C. 538, 135 S.E. 458 (1926).

This basic rule of costs is underlying throughout and apparent from the other provisions of this chapter, and, as stated in Costin v. Baxter, 29 N.C. 111 (1846), "in no instance found in the books has the losing party recovered his costs or any part of them."

At common law neither party to a civil action could recover costs. Costin v. Baxter, 29 N.C. 111 (1846); State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889); Charwick v. Life Ins. Co., 158 N.C. 380, 74 S.E. 115 (1912); Waldo v. Wilson, 177 N.C. 461, 100 S.E. 182 (1919); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

And each party paid his own witnesses. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Costs are entirely creatures of legislation, without which they do not exist. Clerk's Office v. Commissioners of Carteret County, 121 N.C. 29, 27 S.E. 1003 (1897).

Today in this State, all costs are given in a court of law by virtue of some statute. Costs, in this State, are entirely creatures of legislation, and without this they do not exist. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

An award of costs is an exercise of statutory authority; if the statute is misinterpreted, the judgment is erroneous. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Statutes Strictly Construed. — Since the right to tax costs did not exist at common law and costs are considered penal in their nature, statutes relating to costs are strictly construed. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Costs May Not Be Adjudged on Mere Equitable or Moral Grounds. — Since costs may be taxed solely on the basis of statutory authority, it follows a fortiori that courts have

no power to adjudge costs against anyone on mere equitable or moral grounds. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Parties Entitled to Actual Costs Reasonably Incurred and Specifically Authorized. — Parties to whom judgment is given are entitled to recover their actual costs reasonably incurred and specifically authorized by statutes. Such reimbursement is the limit of their entitlement. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Costs and Expenses Unnecessarily Incurred. — Even when allowed by statute, costs and expenses unnecessarily incurred by the prevailing party will not be taxed against the unsuccessful party. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Applied in In re Cox, 17 N.C. App. 687, 195 S.E.2d 132 (1973); Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

Cited in Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966).

II. PARTICULAR COSTS.

A. Attorneys' Fees.

In the absence of express statutory authority, attorneys' fees are not allowable as part of the court costs in civil actions. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The power to make an allowance of counsel fees from a fund brought into court is susceptible of great abuse, and should be exercised with jealous caution. With the power of award being limited to items of reasonable attorney fees and expenses, so as to exclude compensation or allowance of any kind for the time and effort of the suing taxpayer, thus fixing it so the taxpayer may not capitalize on the suit, there is no real danger of abuse. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

B. Witness Fees.

In General. — The losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Witness Fees Not Allowed and Taxed for Party Testifying in His Own Case. — The general rule is that, unless authorized by express statute provision, witness fees cannot be allowed and taxed for a party to the action. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

In construing this section, it is not necessary to resort to rules of construction. Clearly, the legislature did not contemplate that a party would disburse or become liable to himself for a fee when he testified as a witness for himself in his own case. Neither did it contemplate that a party would pay an officer to subpoena himself as a witness. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

If a successful party is not entitled to have a witness fee for himself taxed against his losing adversary, he is not entitled to have taxed an expert witness fee for himself. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Expert witness fees can be taxed against an adverse party only when the testimony of the witness examined or tendered was or would have been material and competent. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The testimony of the expert civil engineer that his plan for widening the street was as good as city's, was totally irrelevant to the question of city's right to condemn the property in question. The record disclosed no facts which would justify taxing, as a part of the costs for which the city was liable, an expert witness fee. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Expense of Transporting Witnesses. — A provision in an order for removal that movant should pay "costs" of transporting the witnesses of the adverse party, held to mean "expense," since such "costs" are no part of the costs of the action. Nichols v. Goldston, 231 N.C. 581, 58 S.E.2d 348 (1950).

This section does not include expenses for returning defendant to this State from points without the State. State v. Patterson, 224 N.C. 471, 31 S.E.2d 380 (1944).

C. Other Costs.

Compensation for Time and Effort Devoted to Litigation. — Parties are not entitled to recover an hourly wage or per diem for the time they expended in attending hearings, or securing evidence or exhibits; a party is not entitled to compensation for the time and effort he devotes to the litigation. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Mileage, Meals and Hotel Bills. — No statute authorizes the inclusion of expenses of parties for mileage, meals and hotel bills expended in securing evidence and attending hearings, in court costs. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

The expense of procuring surveys, maps, plans, photographs and documents are not taxable as costs unless there is clear statutory authority therefor or they have been ordered by the court. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Nominal Damages Entitling Plaintiff to Costs Not Allowed in Action for Wrongful Death. — Where, in an action for wrongful death the sole issue is that of damages and

there is no pecuniary loss on which recovery could be based, nominal damages, which would entitle plaintiff to costs, would not be allowed. Armentrout v. Hughes, 247 N.C. 631, 101 S.E.2d 793 (1958).

Where the appellate court allows improvements claimed in partition proceedings, claimant is not to be taxed with the costs of trial in the superior court involving her claim. Jenkins v. Strickland, 214 N.C. 441, 199 S.E. 612 (1938).

An action upon a contract sounding in damages is one at law, and the costs are taxable under this section, and are not in the discretion of the court as an equity proceeding controlled by § 6-20. Highland Cotton Mills v. Ragan Knitting Co., 194 N.C. 80, 138 S.E. 428 (1927).

§ 6-2: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-3. Sureties on prosecution bonds liable for costs.

When an action is brought in any court in which security is given for the prosecution thereof, or when any case is brought up to a court by an appeal or otherwise, in which security for the prosecution of the suit has been given, and judgment is rendered against the plaintiff for the costs of the defendant, the appellate court shall also give judgment against the surety for said costs, and execution may issue jointly against the plaintiff and his surety. (1831, c. 46; R. S., c. 31, s. 133; R. C., c. 31, s. 126; Code, s. 543; Rev., s. 1251; 1913, c. 189, s. 1; C. S., s. 1227.)

Cross References. — As to use of mortgages in lieu of security for costs, etc., see § 109-25. As to appeal bonds, see § 1-297.

CASE NOTES

Section Applies in Supreme Court. — This section cannot be restricted in its application to appeals from the court of a justice of the peace, for the first sentence of the section would not apply to such a court, as no prosecution bond for costs is given there, but only in the superior court, or in the Supreme Court if an action is brought there against the State, or perhaps in some other cases not cognizable by a justice of the peace. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914); Grimes v. Andrews, 171 N.C. 367, 88 S.E. 513 (1916).

The words "appellate court," as used by the amendment of this section in 1913, in view of the context could mean only the Supreme Court. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

It Is Not Limited to Cases Where Plaintiff Appeals. — This section is so broadly worded as to apply to all cases where the costs are adjudged for the defendant against the plaintiff, and not simply to those where the plaintiff appeals. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

But it does not apply where the defendant does not gain an entire reversal in the appellate court; where a partial new trial only is awarded, the costs are in the discretion of the appellate court as provided in § 6-33. Rayburn v. Casualty Co., 142 N.C. 376, 55 S.E. 296 (1906).

Application Where Judgment is asked against sureties in Quo Warranto. — Where an action is brought to recover fees of an office, and in the same action judgment is asked against the sureties on a bond given in a quo warranto proceeding, the superior court has jurisdiction and judgment may be rendered against the sureties. McCall v. Zachary, 131 N.C. 466, 42 S.E. 903 (1902).

The words "security for the prosecution" mean the prosecution bond. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Increasing Penalty of Bond. — Where the defendant has been successful on his appeal to the appellate court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. Kenney v. Seaboard Air Line Ry., 166 N.C. 566, 82 S.E. 849 (1914).

Appeal by Surety. — Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. Smith v. Arthur, Coffin & Co., 116 N.C. 871, 21 S.E. 696 (1895).

§ 6-4. Execution for unpaid costs; bill of costs to be attached.

When costs are not paid by the party from whom they are due, the clerk of superior court shall issue an execution for the costs, and attach a bill of costs to each execution. The sheriff shall levy the execution as in other cases. (R. C., c. 102, s. 24; Code, s. 3762; Rev., s. 1252; C. S., s. 1228; 1969, c. 44, s. 17; 1971, c. 269, s. 2.)

CASE NOTES

Every execution presupposes a judgment of some sort, and the right given by this section to issue the one implies the existence of the other. Sheppard v. Bland, 87 N.C. 163 (1882).

§§ 6-5, 6-6: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-7. Clerk to enter costs in case file.

The clerk of superior court shall enter in the case file, after judgment, the costs allowed by law. (Code, s. 532; Rev., s. 1255; C. S., s. 1231; 1971, c. 269, s. 3.)

CASE NOTES

Authority of Assistant Clerk to Tax Cost of Deposition. — An assistant clerk of the superior court had the authority to tax the cost of a deposition against a plaintiff who took a voluntary dismissal of his case before it reached the trial calendar. Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Costs Properly Adjudged after Decision of Appellate Court. — After decision of the appellate court modifying and affirming a judgment of the superior court on appeal from the referee, allowances constituting items of costs may be adjudged as provided by this section. Clark v. Cagle, 226 N.C. 230, 37 S.E.2d 672 (1946).

Referee's Fee as Part of Costs. — In Young v. Connelly, 112 N.C. 646, 17 S.E. 424 (1893), the court cites this section to the following statement: "The referee's fee was a part of the costs. It was necessary for the clerk to tax the costs and insert the amount in the entry of judgment in addition to the sum adjudged by his honor."

Applied in Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67 (1978).

§§ 6-8 to 6-12: Repealed by Session Laws 1971, c. 269, s. 15.

ARTICLE 2.

When State Liable for Costs.

§ 6-13. Civil actions by the State; joinder of private party.

In all civil actions prosecuted in the name of the State, by an officer duly authorized for that purpose, the State shall be liable for costs in the same cases and to the same extent as private parties. If a private person be joined with the State as plaintiff, he shall be liable in the first instance for the defendant's costs, which shall not be recovered of the State till after execution is issued therefor against such private party and returned unsatisfied. (Code, s. 536; Rev., s. 1259; C. S., s. 1236.)

Legal Periodicals. — For an article, Jurisdiction of the North Carolina Supreme Court, see 5 N.C. L. Rev. 1.

CASE NOTES

Constitutionality. — In State ex rel. Blount v. Simmons, 119 N.C. 50, 25 S.E. 789 (1896), it was held that nothing in the Constitution deprived the legislature of power to enact this section.

Judgment May Be Rendered against State for Costs. — Upon the failure of the litigation, the State is, under this section, liable for the costs of an action authorized by act of the General Assembly and prosecuted in its name by the district attorney, and judgment may be rendered in such action against the State for such costs. State ex rel. Blount v. Simmons, 119 N.C. 50, 25 S.E. 789 (1896).

State's Liability Dependent upon Statute. — The general statutes giving costs do not include the sovereign, and the State is only liable for costs in the event of express statutory provisions. State ex rel. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

Disbarment Proceedings. — Where the proceedings for disbarment of an attorney have not been sustained, the costs are taxable against the State under the provisions of this section, and an order erroneously taxing them against the county in which the matter was tried will be vacated. State ex rel. Committee on Grievances v. Strickland, 201 N.C. 619, 161 S.E. 76 (1931).

Actions to Vacate Oyster-Bed Entry. — Where, in an action by the solicitor in the name of the State to vacate an oyster-bed entry, the plaintiff was nonsuited, it was error to tax the costs against the county, which was not a party to the action. State ex rel. Blount v. Simmons, 118 N.C. 9, 23 S.E. 923 (1896).

Under this section the State is liable for the costs of an action instituted by the State solicitor to vacate an oyster-bed entry. In such case, it seems that the persons making the required affidavit, alleging that the entry is a fraud upon the State, might be held liable as relators if it should appear that the action was for their benefit and at their instance. State ex rel. Blount v. Simmons, 120 N.C. 19, 26 S.E. 649 (1897).

§ 6-14. Civil action by and against State officers.

In all civil actions depending, or which may be instituted, by any of the officers of the State, or which have been or shall be instituted against them, when any such action is brought or defended pursuant to the advice of the Attorney General, and the same is decided against such officers, the cost thereof shall be paid by the State Treasurer upon properly drawn warrants. (1874-75, c. 154; Code, s. 3373; Rev., s. 1260; C. S., s. 1237; 1971, c. 269, s. 4.)

§ 6-15. Actions by State for private persons, etc.

In an action prosecuted in the name of the State for the recovery of money or property, or to establish a right or claim for the benefit of any county, city, town, village, corporation or person, costs awarded against the plaintiff shall be a charge against the party for whose benefit the action was prosecuted, and not against the State. (Code, s. 537; Rev., s. 1261; C. S., s. 1238.)

§ 6-16: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-17. Costs of State on appeals to federal courts.

In all cases, whether civil or criminal, to which the State of North Carolina is a party, and which are carried from the courts of this State, or from the district court of the United States, by appeal or writ of error, to the United States circuit court of appeals, or to the Supreme Court of the United States, and the State is adjudged to pay the costs, it is the duty of the Attorney General to certify the amount of such costs to the Treasurer, who shall pay them upon properly drawn warrants. (1871-2, c. 26; Code, s. 538; Rev., s. 1263; C. S., s. 1240; 1971, c. 269, s. 5.)

§ 6-17.1. Costs and expenses of State in connection with federal litigation arising out of State cases.

In all cases of litigation in any court of the United States arising out of or by reason of any cases pending or tried in any court of the State of North Carolina, or in any action originally instituted in any court of the United States, the expenses for State court costs, securing of court records and transcripts, and other necessary expenses in representing the State of North Carolina or any of its departments, officials or agencies shall be allocated from and paid out of the State Contingency and Emergency Fund. (1963, c. 844.)

ARTICLE 3.

Civil Actions and Proceedings.

§ 6-18. When costs allowed as of course to plaintiff.

Costs shall be allowed of course to the plaintiff, upon a recovery, in the following cases:

(1) In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.

(2) In an action to recover the possession of personal property.

(3) In an action for assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation or seduction, if the plaintiff recovers less than fifty dollars ($50.00) damages, he shall recover no more costs than damages.

(4) When several actions are brought on one bond, recognizance, promissory note, bill of exchange or instrument in writing, or in any other case, for the same cause of action against several parties who might have been joined as defendants in the same action, no costs other than disbursements shall be allowed to the plaintiff in more than one of such actions, which shall be at his election, provided the party or parties proceeded against in such other action or actions were within the State and not secreted at the commencement of the previous action or actions.

(5) In an action brought under Article 1 of Chapter 19A. (R. C., c. 31, s. 78; 1874-5, c. 119; Code, s. 525; Rev., s. 1264; C. S., s. 1241; 1971, c. 269, s. 6; 1979, c. 808, s. 5.)

CASE NOTES

I. General Consideration.
II. Actions for Recovery of Real Property, etc.
III. Recovery of Personalty.
IV. Costs When Damages Are Less than $50.00.

I. GENERAL CONSIDERATION.

Section 6-20 Governs Where This Section Inapplicable. — Where the action is not of such a nature that it falls within any of the subdivisions of this section or of the following section, it comes within the terms and is included by § 6-20. Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889); Yates v. Yates, 170 N.C. 533, 87 S.E. 317 (1915).

Section Inapplicable to Contempt Proceeding. — Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which this section or § 6-20, allowing costs in discretion of court, would apply. United Artists Records, Inc. v.

Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973).

Meaning of Recovery. — The recovery referred to in this section is a final determination upon the merits, and success in the appellate court is by no means equivalent to a recovery in the court below. Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905).

A recovery within the meaning of the section cannot be predicated upon anything coming to the plaintiff which was not in the contemplation of the plaintiff when he filed his complaint, and especially of a thing to which he virtually disclaimed any right or title. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

In order to determine who should pay the costs, the general result must be considered and inquiry made as to who has, in the view of the law, succeeded in the action. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

Partial Recovery. — There is no provision that limits the allowance of costs in favor of the plaintiff in case of only a partial recovery. The language of the statute as to them is comprehensive and without exceptive provision. In Wall v. Covington, 76 N.C. 150 (1877), it was held that no part of the costs in such actions can be taxed against the party recovering. And in Horton v. Horne, 99 N.C. 219, 5 S.E. 927 (1888), it was decided in an action to recover personal property, that if the plaintiff establishes his title to only a portion of the property delivered to him under claim and delivery proceedings, he will be entitled to costs. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892); Ferrabow v. Green, 110 N.C. 414, 14 S.E. 973 (1892); Kinston Cotton Mills v. Rocky Mount Hosiery Co., 154 N.C. 462, 70 S.E. 910 (1911).

Action by Executor. — Where the action involves the question as to the recovery of a portion of the estate of a deceased person, and judgment is rendered in favor of the executor, the plaintiff, he is entitled to a judgment for costs under this section. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

Applied, as to action of slander, in Wolfe v. Montgomery Ward & Co., 211 N.C. 295, 189 S.E. 772 (1937).

II. ACTIONS FOR RECOVERY OF REAL PROPERTY, ETC.

Section States Common-Law Rule. — Subdivision (1) of the section is in affirmance of the principle established before its enactment. Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895).

Construed with § 6-21. — This section, allowing plaintiffs' costs as of course, upon recovery, in an action involving title to real estate, and § 6-21, providing apportionment of costs in a special proceeding for the division or sale of realty or personalty are related sections, pertain to the same subject matter, and must be construed in pari materia. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1942).

Actions to Recover Both Realty and Personalty. — Under this section the plaintiff in an action to recover both real and personal property is entitled to recover costs, although he recovers the real property only. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892).

Partial Recovery. — Where the plaintiff is adjudged entitled to a part of the land sued for, whether such land is a portion of one tract or is one of several tracts for which the action is brought, then the plaintiff is exonerated as to costs and no part thereof should be found against him. Ferrabow v. Green, 110 N.C. 414, 14 S.E. 973 (1892); Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895); Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897); Vanderbilt v. Johnson, 141 N.C. 370, 54 S.E. 298 (1906). See Staley v. Staley, 174 N.C. 640, 94 S.E. 407 (1917).

Where the plaintiff has been required to introduce evidence of his title to the whole of the locus in quo, and then the defendant consents that the court charge the jury to find for the plaintiff if they believe the evidence as to a certain part, and the issue is found for the defendant as to the remaining land, the costs of the action are properly awarded against the defendant. Swain v. Clemmons, 175 N.C. 240, 95 S.E. 489 (1918).

When There Is More than One Issue. — In an action of trespass to real property, where the plaintiff's title and the fact of trespass are both put in issue by the defendant's answer, and the jury find the issue as to the title in favor of the plaintiff, and the issue as to the trespass in favor of the defendant, the defendant is entitled to judgment for costs. To entitle the plaintiff to recover costs, both issues must be found in his favor. Murray v. Spencer, 92 N.C. 264 (1885).

Boundary Dispute. — Where, in an action in ejectment and for damages for cutting of timber, defendant files answer defending plaintiffs' title to the land in dispute, and verdict is entered in favor of plaintiffs, plaintiffs, as a matter of law, are not liable for any of the costs notwithstanding that upon the trial each party admitted the title of the other within the boundaries of their respective grants and the only controversy was as to the location of the boundary between their respective grants. Cody v. England, 221 N.C. 40, 19 S.E.2d 10 (1942).

Necessity for Disclaimer In Order to Avoid Costs. — A defendant in an action concerning land should enter a disclaimer if he does not claim the land in controversy, or does not intend to litigate with the plaintiff, in order to escape the payment of costs. Swain v. Clemmons, 175 N.C. 240, 95 S.E. 489 (1918).

This rule is forcibly illustrated by the case of Moore v. Angel, 116 N.C. 843, 21 S.E. 699

(1895), where, in an action in trespass, the defendant failed to disclaim title to all the land declared for by plaintiff, but recovered according to the boundaries set up in his answer, with a greater amount for damages on his counterclaim than was allowed the plaintiff, and the plaintiff was nevertheless held entitled to costs.

But if the defendant disclaims title to all the land declared for, except that for which he proves his right, no issue as to the plaintiff's title will arise, and the findings that the defendant's title, disputed by the plaintiff, is good and that the defendant has sustained greater damages than his adversary, upon both necessarily, perhaps on either, will entitle the defendant to costs. Moore v. Angel, 116 N.C. 843, 21 S.E. 699 (1895).

So in ejectment, where the defendant denies the right to possession and denies that the plaintiff holds the title in trust for him, and judgment is rendered that the defendant is entitled to the land upon payment of an amount found due the plaintiff, no part of the cost is taxable against the defendant. Patterson v. Ramsey, 136 N.C. 561, 48 S.E. 811 (1904).

It would seem that in order to escape potential liability for costs the defendant must enter his disclaimer of all the lands declared for, and that a disclaimer of half the locus in quo will not suffice to enable him to escape upon the unfavorable adjudication of the other half. See In re Hurley, 185 N.C. 422, 117 S.E. 345 (1923).

One who successfully maintains an equitable defense against the recovery of land on the bare legal title is entitled to judgment for his costs. Vestal v. Sloan, 83 N.C. 555 (1880).

Liability of Intervener. — Where the defendant intervenes in an action to recover real property and files a joint answer with his codefendant, and makes a joint defense, the plaintiff is entitled to the costs under this subdivision of the section. Having joined in the controversy, and made common cause in the defense, interveners must abide the result. Spruill v. Arrington, 109 N.C. 192, 13 S.E. 779 (1891). See Willis v. Coleburn, 169 N.C. 670, 86 S.E. 596 (1915).

III. RECOVERY OF PERSONALTY.

Partial Recovery. — There is no exception to the partial recovery rule when the action is for the recovery of personalty, and when the plaintiff establishes title to any part of the property sued for, he is entitled to judgment for costs. Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892); Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897). This is not the case where some of the defendants recover judgment, in which case, of course, they recover costs. Phillips v. Little, 147 N.C. 282, 61 S.E. 49 (1908).

As an example of the application of this rule to claims for personal property it has been held that the plaintiff on being adjudged entitled to only a portion of a crop in a suit for claim and delivery was entitled to costs. Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897).

Claim and Delivery. — Judgment in an action of claim and delivery carries all costs under this section. Rawlings v. Neal, 126 N.C. 271, 35 S.E. 597 (1900).

Enforcement of Lien. — Where the controversy depended upon the right of the mechanic to repossess an automobile that he repaired, in order that he could enforce his lien thereon, and the jury found in the plaintiff's favor upon determinative issues, but in the defendant's favor upon an issue of fraud, the question of taxing the cost did not depend upon the finding of the jury upon the issue of the defendant's fraud, and the plaintiff, having established his right to the possession, was entitled to recover the costs, under this section. Maxton Auto Co. v. Rudd, 176 N.C. 497, 97 S.E. 477 (1918).

IV. COSTS WHEN DAMAGES ARE LESS THAN $50.00.

In General. — In a civil action, if the provocation is great, the jury will usually see fit to return nominal or small damages, and if the amount is less than fifty dollars the plaintiff, under this section, recovers no more costs than damages. Palmer v. Winston-Salem Ry. & Elec. Co., 131 N.C. 250, 42 S.E. 604 (1902). The subdivision was applied where the recovery for slander was less than fifty dollars in Smith v. Myers, 188 N.C. 551, 125 S.E. 178 (1924). And again when one dollar damages were sustained by the erection of a mill. See Bridgers v. Purcell, 23 N.C. 232 (1840). The former rule as to slander is stated in Coates v. Stephenson, 52 N.C. 124 (1859), where it was held that the costs of the plaintiff, under R.C., c. 31, § 78, could not be taxed against the defendant.

Where the plaintiff is entitled to nominal damages, such damages will carry with it the costs under this section. Wilson v. Forbes, 13 N.C. 30 (1828); Britton v. Ruffin, 123 N.C. 67, 21 S.E. 271 (1898).

Instructed Verdict for One Penny Damages and One Penny Costs. — For a case where an instructed verdict for one penny damages and one penny costs, under this section, was held erroneous because actual and not nominal damage was shown, see Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

§ 6-19. When costs allowed as of course to defendant.

Costs shall be allowed as of course to the defendant, in the actions mentioned in the preceding section [6-18] unless the plaintiff be entitled to costs therein. In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor or any of them. (C. C. P., s. 277; Code, ss. 526, 527; Rev., s. 1266; C. S., s. 1242.)

CASE NOTES

Where plaintiff fails to recover in an action involving title to real property in which a court survey is ordered, the clerk is without authority to tax the surveyor's fees in the bill of costs, but on appeal from the clerk's order, the superior court, while properly affirming the clerk's order, should pass upon the motion for taxing such fees as a part of the costs as a matter of right. Ipock v. Miller, 245 N.C. 585, 96 S.E.2d 729 (1957). See § 38-4 and note.

Where the plaintiff fails in an action upon a covenant, the defendant recovers costs under this section. Britton v. Ruffin, 123 N.C. 67, 31 S.E. 271 (1898).

Unsuccessful Action to Set Aside Deed. — Costs were properly awarded to the grantee in a deed in an unsuccessful action to set aside such deed. D. B. Brisco & Co. v. Norris, 112 N.C. 671, 16 S.E. 850 (1893).

Cited in Gold v. Kiker, 218 N.C. 204, 10 S.E.2d 650 (1940).

§ 6-20. Costs allowed or not, in discretion of court.

In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law. (Code, s. 527; Rev., s. 1267; C. S., s. 1243.)

Cross References. — As to costs where new trial is granted, see § 6-33 and the note thereto.

CASE NOTES

The purpose of this provision is to give the court authority to allow costs, as the justice of the case may require. Gulley v. Macy, 89 N.C. 343 (1883); Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889).

Section Inapplicable to Contempt Proceeding. — Although labeled "civil" contempt, a proceeding as for contempt is by no means a civil action or proceeding to which § 6-18, providing when costs shall be allowed to plaintiff as a matter of course, or this section would apply. United Artists Records, Inc. v. Eastern Tape Corp., 18 N.C. App. 183, 196 S.E.2d 598, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973).

Exercise of Discretion Presumed. — Nothing to the contrary appearing, it will be taken that the court gave judgment in the exercise of its discretion as provided in this section. Gulley v. Macy, 89 N.C. 343 (1883); Wooten v. Walters, 110 N.C. 251, 14 S.E. 734 (1892).

Discretion Not Reviewable. — By this section the taxing of the costs is placed in the discretion of the trial judge, which discretion is not reviewable. Kluttz v. Allison, 214 N.C. 379, 199 S.E. 395 (1938); Chriscoe v. Chriscoe, 268 N.C. 554, 151 S.E.2d 33 (1966).

The exercise of the court's discretionary authority is not reviewable. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Taxation of costs against the plaintiff is within the court's discretion and is not reviewable on appeal, the action being equitable in nature. Bumgarner & Bowman Bldrs. v. Hollar, 7 N.C. App. 14, 171 S.E.2d 60 (1969).

Costs Discretionary in Actions of an Equitable Nature. — In equity there was a broad discretion on the subject of costs, Little v. Lockman, 50 N.C. 433 (1858), and the allowance rested with the court. Worthy v. Brower, 93 N.C. 492 (1885); Hooper v. Davies, 166 N.C. 236, 81 S.E. 1063 (1914). Even since the abolition of the courts of equity in this State, it is held that where the case partakes of an equitable nature, the question of costs is in the court's discretion. Thus where the jury found that each party was entitled to an undivided half in land, and the appeal was from

taxing the defendant with costs, there being no element of an action in ejectment, neither party was permitted to recover costs from the other, especially as the question was of an equitable nature, and the taxing of costs was, under this section, in the sound discretion of the court. Hare v. Hare, 183 N.C. 419, 111 S.E. 620 (1922).

In actions of an equitable nature the costs are in the discretion of the court. Yates v. Yates, 170 N.C. 533, 87 S.E. 317 (1915).

If an action is equitable in nature the taxing of the costs is within the discretion of the court, and the court may allow costs in favor of one party or the other or require the parties to share the costs. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Apportionment of Costs. — Where a jury found that the allegations of the complaint with respect to the maintenance of the nuisance were true, the trial court, when it ordered the personal property sold, had discretionary power with respect to the apportionment of the costs. State ex rel. Morris v. Shinn, 262 N.C. 88, 136 S.E.2d 244 (1964).

A consolidated action, tried before the referee, in which judgments are rendered, is not an equitable proceeding, in which costs may be allowed or not, in the discretion of the court under this section. Highland Cotton Mills v. Ragan Knitting Co., 194 N.C. 80, 138 S.E. 428 (1927).

Creditor's Bill. — It is within the discretion of the trial court to tax the costs accruing upon either of the parties litigant, in an action in the nature of a creditor's bill, brought by materialmen, claiming under the statutory lien, the unpaid balance due by the owner of a dwelling, etc., to his contractor for its erection; and the action of the judge in taxing the trust funds in the owner's hands with the cost is commended in this suit. Bond v. Pickett Cotton Mills, Inc., 166 N.C. 20, 81 S.E. 936 (1914).

Specific Performance Generally. — Where the purpose of an action was simply to compel the specific performance of an executory contract, and to adjust certain rights involved in an account of moneys collected and certain indebtedness incident to that contract, it was clearly within this section. Parton v. Boyd, 104 N.C. 422, 10 S.E. 490 (1889).

Where one of defendants in injunction suit seeks affirmative relief by way of specific performance, the taxing of costs is in the discretion of the trial court since the controversy is of an equitable nature. Consequently the order of the court apportioning the costs will not ordinarily be disturbed on appeal upon affirmance of the judgment. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

Setting Aside Proceedings of Probate Court. — Where the action is to set aside certain proceedings in the probate court, the court is vested with discretion in the matter of allowing costs, under this section; each party is ordered to pay his own and each to pay one half of the allowance to the referee. Gulley v. Macy, 89 N.C. 343 (1883).

§ 6-21. Costs allowed either party or apportioned in discretion of court.

Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:

(1) Application for years' support, for surviving spouse or children.

(2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.

(3) Habeas corpus; and the court shall direct what officer shall tax the costs thereof.

(4) In actions for divorce or alimony; and the court may both before and after judgment make such order respecting the payment of such costs as may be incurred by either spouse from the sole and separate estate of either spouse, as may be just.

(5) Application for the establishment, alteration or discontinuance of a public road, cartway or ferry. The board of county commissioners may order the costs incurred before them paid in their discretion.

(6) The compensation of referees and commissioners to take depositions.

(7) All costs and expenses incurred in special proceedings for the division or sale of either real estate or personal property under the Chapter entitled Partition.

(8) In all proceedings under the Chapter entitled Drainage, except as therein otherwise provided.
(9) In proceedings for reallotment of homestead for increase in value, as provided in the Chapter, Civil Procedure.
(10) In proceedings regarding illegitimate children under Article 3, Chapter 49 of the General Statutes.
(11) In custody proceedings under Chapter 50A of the General Statutes.
(12) In actions brought for misappropriation of a trade secret under Article 22 of Chapter 66 of the General Statutes.

The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow: provided that attorneys' fees in actions for alimony shall not be included in the costs as provided herein, but shall be determined and provided for in accordance with G.S. 50-16.4. (Code, ss. 533, 1294, 1323, 1422, 1660, 2039, 2056, 2134, 2161; 1889, c. 37; 1893, c. 149, s. 6; Rev., s. 1268; C. S., s. 1244; 1937, c. 143; 1955, c. 1364; 1965, c. 633; 1967, c. 993, s. 2; c. 1152, s. 5; 1977, c. 576; 1979, c. 110, s. 3; 1981, c. 809, s. 1; c. 890, s. 2.)

Local Modification. — Edgecombe: 1953, c. 737; Johnston: 1967, c. 835; Nash: 1939, c. 46; 1941, c. 18; 1953, c. 737.

Editor's Note. — It appears that the purpose of the first 1981 amendment was to change the rule announced in In re Will of Ridge, 302 N.C. 375, 275 S.E.2d 424 (1981), that this section did not require a specific finding as to whether a caveat had substantial merit before attorney's fees could be awarded.

Effect of Amendments. — The first 1981 amendment substituted "provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit" for "provided, however, that in any caveat proceeding under this subdivision, if the court finds that the proceeding is without substantial merit, the court may disallow attorneys' fees for the attorneys for the caveators" at the end of subdivision (2). Session Laws 1981, c. 809, s. 2, provides: "This act is effective upon ratification and applies to all proceedings filed on and after that date." The act was ratified July 3, 1981.

The second 1981 amendment, effective Oct. 1, 1981, added subdivision (12). Session Laws 1981, c. 890, s. 3, makes the act applicable only to causes of action arising after Oct. 1, 1981.

Legal Periodicals. — For article discussing the effect of the 1937 amendment to this section and the history of attorneys' fees as costs in this State, see 15 N.C.L. Rev. 333.

For discussion as to attorneys' fees being awarded a successful litigant, see 38 N.C.L. Rev. 156 (1960).

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

For a survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

CASE NOTES

I. General Consideration.
II. Costs in Particular Actions.
A. Caveats to Wills.
B. Construction of Will or Trust.
C. Habeas Corpus.
D. Divorce or Alimony.
E. Compensation of Referees.
F. Partition or Sale of Property.
G. Actions Not Covered by This Section.

I. GENERAL CONSIDERATION.

Discretion Not Reviewable. — The exercise of the court's discretionary authority is not reviewable. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1962).

Attorneys' Fees Generally. — Ordinarily attorney fees are taxable as costs only when expressly authorized by statute. Horner v. Chamber of Commerce, 236 N.C. 96, 72 S.E.2d 21 (1952). For note commenting on case, see 31 N.C.L. Rev. 115 (1952).

Except as otherwise provided by this section, attorney fees are not now regarded as part of the court costs in North Carolina. Wachovia Bank & Trust Co. v. Schneider, 235 N.C. 446, 70 S.E.2d 578 (1952); Horner v. Chamber of Commerce, 236 N.C. 96, 72 S.E.2d 21 (1952); Rider v. Lenoir County, 238 N.C. 632, 78 S.E.2d 745 (1953); Hoskins v. Hoskins, 259 N.C. 704,

131 S.E.2d 326 (1963); Perkins v. American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

However, this section authorizes attorneys' fees in certain enumerated actions to be taxed as a part of the costs, to be paid out of the fund which is the subject matter of the action. Rider v. Lenoir County, 238 N.C. 632, 78 S.E.2d 745 (1953).

In the types of cases enumerated in this section, attorneys' fees may be included as a part of the costs in such amounts as the court in its discretion determines and allows. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

As to award of attorney's fees in particular actions, see annotations under analysis lines II (A)-(F).

Applied in Field v. Wheeler, 120 N.C. 264, 26 S.E. 812 (1897); Tyser v. Sears, 252 N.C. 65, 112 S.E.2d 750 (1960); Dillon v. North Carolina Nat'l Bank, 6 N.C. App. 584, 170 S.E.2d 571 (1969); Citizens Nat'l Bank v. Grandfather Home for Children, Inc., 280 N.C. 354, 185 S.E.2d 836 (1972); Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980).

Quoted in Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

Stated in Perry v. Pulley, 206 N.C. 701, 175 S.E. 89 (1934); In re King, 281 N.C. 533, 189 S.E.2d 158 (1972).

Cited in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Norman v. Royal Crown Bottling Co., 49 N.C. App. 656, 272 S.E.2d 355 (1980).

II. COSTS IN PARTICULAR ACTIONS

A. Caveats to Wills.

Discretion of Court. — It is within the discretionary power of a court, before which an issue of devisavit vel non is tried, to direct the payment of the costs out of the estate. Mayo v. Jones, 78 N.C. 406 (1878). See In re Will of Hargrove, 206 N.C. 307, 173 S.E. 577 (1934), for dicta on this point.

Subdivision (2) of this section leaves the taxing of court costs and the apportionment thereof to be made in the discretion of the court. Moreover, the fixing of reasonable attorney fees in applicable cases is likewise a matter within the sound discretion of the trial court. Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456 (1963).

Where appellant did not contend that the fees allowed counsel were unreasonable and nothing to the contrary appeared in the record, it was taken that the court taxed the costs and attorneys' fees in the exercise of its discretion and that there was no abuse of this discretion. Wachovia Bank & Trust Co. v. Dodson, 260 N.C. 22, 131 S.E.2d 875 (1963).

When an executor's right to qualify is contested and judicially denied, whether the court will exercise its discretion to award costs, including attorney's fees, incurred in his unsuccessful litigation, will depend in each case upon the grounds for the opposition and the reasonableness of his resistance to it, his good faith in pressing his appointment and whether his efforts were in the interest of the estate. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Albeit subdivision (2) authorizes the trial judge in his discretion to award costs, including attorneys' fees, in the instances specified therein, it is quite clear (1) that he should not award costs and attorneys' fees to an executor-designate whose claim for appointment is rejected unless the claim was reasonable, made in good faith and prima facie in the interest of the estate; and (2) that the judge has no discretion to tax costs against an estate when the nominated executor was disqualified to act as a matter of law. In re Estate of Moore, 292 N.C. 58, 231 S.E.2d 849 (1977).

Where a surviving spouse is forced to engage in litigation to determine whether a right of dissent from the will of the deceased spouse exists, the discretionary power given the trial judge under this section includes the power to award attorney's fees for the surviving spouse when, in the opinion of the trial court, the proceeding was one of substantial merit. In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981).

Caveat Unsuccessful. — Under this section, even though judgment is entered in favor of propounders, the trial court may tax the costs, including an allowance to counsel representing caveators, against the estate upon finding that the filing of the caveat was apt and proper and done in good faith. In re Will of Slade, 214 N.C. 361, 199 S.E. 290 (1938).

The allowance of attorney fees to counsel for the propounders is in the sound discretion of the trial court. In re Will of Coffield, 216 N.C. 285, 4 S.E.2d 870 (1939).

Same — Attorneys' Fees. — This statute authorizes the trial court in its discretion to allow attorneys' fees to counsel for unsuccessful caveators to a will. In re Will of Ridge, 47 N.C. App. 183, 266 S.E.2d 766 (1980).

It is a matter in the discretion of the court, both as to whether to allow attorneys' fees to counsel for unsuccessful caveators to a will and the amount of such fees. In re Will of Ridge, 47 N.C. App. 183, 266 S.E.2d 766 (1980).

Attorneys' Fees as Costs Paid by Executor. — The language of subdivision (2) of this section is sufficient to vest in the trial court the discretionary authority to tax reasonable attorneys' fees as a part of the costs to be paid by the executor. McWhirter v. Downs, 8 N.C. App. 50, 173 S.E.2d 587 (1970).

Attorneys' Fees Fixed By Mutual Agreement Not Taxable Costs. — Fees for services rendered by attorneys to the parties in a caveat to a will do not automatically become costs of the proceeding merely because they are incurred and paid. This section commits the allowance and apportionment of the fees and the determination of the amounts thereof to the discretion of the court. Where the court had made no determination of the matter, but the amounts were fixed by contingent agreement between attorneys and clients prior to suit and the allowance of the fees as part of the costs of the proceeding was intentionally excluded from the judgment of the court, the amounts paid to the attorneys did not and could not become part of the taxable costs of the suit under this section. Commercial Nat'l Bank v. United States, 196 F.2d 182 (4th Cir. 1952).

B. Construction of Will or Trust.

Sale of Trust Property. — The trial court had authority to tax a reasonable attorney's fee as part of the costs and to apportion it among the parties in an action for a declaratory judgment and for instructions to the trustees in connection with the sale of certain trust property. Tripp v. Tripp, 17 N.C. App. 64, 193 S.E.2d 366 (1972).

Testamentary Trusts. — In an action pursuant to the Uniform Declaratory Judgment Act for construction of certain trust provisions of a will, the taxing of costs, the inclusion therein of attorneys' fees, and the fixing of reasonable counsel fees, are matters within the sound discretion of the trial court. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

C. Habeas Corpus.

A reasonable allowance for attorney's fees may be made as a part of the costs in habeas corpus proceedings, but not until there is a proper hearing or an opportunity for defendant to be heard. Murphy v. Murphy, 261 N.C. 95, 134 S.E.2d 148 (1964).

D. Divorce or Alimony.

Husband Formerly Always Liable for His Own Costs. — Prior to the 1977 amendment to this section, in actions for divorce the husband, whether successful or unsuccessful, was liable for his own costs, and whether he should pay the wife's costs was in all cases in the discretion of the court. Broom v. Broom, 130 N.C. 562, 41 S.E. 673 (1902).

E. Compensation of Referees.

Subdivision (6) must be considered in pari materia with at least two other statutes, §§ 1-7 and 1A-1, Rule 41(d). Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

Referees' Fees May Be Apportioned. — Originally, under the Code of 1883, § 533, referees' fees were taxed, like other costs, against the losing party, but by amendment (Laws 1889, ch. 37) the court was authorized to apportion them in its discretion. Cobb v. Rhea, 137 N.C. 295, 49 S.E. 161 (1904).

Where, in a suit to obtain advice and instruction of the court for the proper distribution of the assets of the estate, the cause is referred to a referee, the taxing of the referee's fee is within the discretion of the court, and order of the court prorating the referee's fee between the funds derived from sale of realty to make assets and the personal property of the estate will not be disturbed. Williams v. Johnson, 230 N.C. 338, 53 S.E.2d 277 (1949).

The apportionment of the compensation for a referee and the court reporter employed by him is within the discretionary power given the court by this section. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Same — Analogy to Allowance to Receiver. — The allowance to the receiver is a part of the costs of the action, and usually taxable against the losing party. Whether the receiver's fees should be divided is a matter in the discretion of the presiding judge, as is now the case also with referees' fees. Simmons v. Allison, 119 N.C. 556, 26 S.E. 171 (1896).

Apportionment Not Precluded by Former Judgment. — A former judgment, Horner v. Oxford Water & Elec. Co., 153 N.C. 535, 69 S.E. 607, 138 Am. St. R. 681 (1910), appealed from and affirmed by the Supreme Court, "that the defendants do recover against the plaintiff and the surety on his prosecution bond the costs of this action," does not preclude a subsequent trial judge from taxing the cost of reference "against either party or apportioning it among the parties in his discretion" under this section. Horner v. Oxford Water & Elec. Co., 156 N.C. 494, 72 S.E. 624 (1911).

Award of Costs on Appeal Does Not Include Referee's Fee. — Where, upon the trial in the superior court upon appeal from the referee, judgment is entered in the superior court in favor of plaintiffs, entitling plaintiffs to recover costs in the trial, such recovery does not include compensation of the referee. Cody v. England, 221 N.C. 40, 19 S.E.2d 10 (1942).

Fee Ordered Paid by Estate Not to Be Taxed Against Executor. — Ordinarily, in litigation over a fund in the nature of an in rem proceeding, such items of costs as referee's allowances and stenographic reporter's bills, are paid out of the fund, although taxable in the discretion of the court, but in Lightner v. Boone, 222 N.C. 421, 23 S.E.2d 313 (1942), it was held that, when such costs have been ordered paid from the estate, they cannot afterwards be taxed against an executor personally.

Authority of Assistant Clerk to Tax Cost of Deposition. — An assistant clerk of the superior court had the authority to tax the cost of a deposition against a plaintiff who took a voluntary dismissal of his case before it reached the trial calendar. Thigpen v. Piver, 37 N.C. App. 382, 246 S.E.2d 67, cert. denied, 295 N.C. 653, 248 S.E.2d 257 (1978).

F. Partition or Sale of Property.

Costs in Partition. — The taxing of costs among the parties to proceedings to partition land is left in the discretion of the court, and will not be reviewed on appeal. Fortune v. Hunt, 152 N.C. 715, 68 S.E. 213 (1910).

Where, in a petition for partition, defendant pleads sole seizin, and the trial of such issue results in a verdict for plaintiffs, and in judgment that the parties are tenants in common and appointing a commissioner to make sale, plaintiff is entitled to all costs from the filing of the answer through the final judgment below, that is, while the case was pending on the civil issue docket. This does not include costs of reference, which may be taxed in the discretion of the court. Costs of the partition proceeding, exclusive of the issue of sole seizin, may be apportioned. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1943).

G. Actions Not Covered by This Section.

A civil action to enjoin the issuance of county bonds and to restrain the disbursement of county funds is not one of the actions enumerated by this section in which attorney's fees may be taxed as part of the costs. Rider v. Lenoir County, 238 N.C. 632, 78 S.E.2d 745 (1953).

Defense of Tort Action. — The expense of employing attorneys in the successful defense of a suit for damages for tort is allowable as part of the costs or recoverable in the absence of an express agreement therefor. Queen City Coach Co. v. Lumberton Coach Co., 229 N.C. 534, 50 S.E.2d 288 (1948).

Specific Performance of Property Agreement. — An action between husband and wife seeking specific performance of an agreement between them to "pool" their property and assets, to declare a resulting trust, and for an accounting, did not involve construction of a trust agreement and the attorneys' fees of the respective parties did not come within the statutory exceptions to the general rule and could not be taxed as a part of the costs. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

Writing Insufficient as Trust Instrument. — In a declaratory judgment action in which the paper writing in question was insufficient as a trust instrument and was not executed as a will, the trial judge erred in ordering that plaintiff's counsel fees should be taxed against decedent's estate since the action did not involve a caveat or the construction of a trust instrument within the purview of this section. Baxter v. Jones, 283 N.C. 327, 196 S.E.2d 193 (1973).

§ 6-21.1. Allowance of counsel fees as part of costs in certain cases.

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is five thousand dollars ($5,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs. (1959, c. 688; 1963, c. 1193; 1967, c. 927; 1969, c. 786; 1979, c. 401.)

Legal Periodicals. — For a note on the availability of general and punitive damages for an insurer's unjustified failure to pay policy benefits, see 13 Wake Forest L. Rev. 685 (1977).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

I. General Consideration.
II. Who May Award.
III. Procedure.
IV. Settlement.

I. GENERAL CONSIDERATION.

The obvious purpose of this section is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973); Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (1975); In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981).

In such a situation the legislature apparently concluded that the defendant, though at fault, would have an unjustly superior bargaining power in settlement negotiations. A great majority of such claims arise out of automobile accidents in which the alleged wrongdoer is insured and his insurance carrier controls the litigation. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

Section Does Not Guarantee Compensation in All Cases. — While this section is aimed at encouraging injured parties to press their meritorious but pecuniarily small claims, it was not intended to encourage parties to refuse reasonable settlement offers and give rise to needless litigation by guaranteeing that counsel will, in all cases, be compensated. Harrison v. Herbin, 35 N.C. App. 259, 241 S.E.2d 108, cert. denied, 295 N.C. 90, 244 S.E.2d 258 (1978).

This section, being remedial, should be construed liberally to accomplish the purpose of the legislature and to bring within it all cases fairly falling within its intended scope. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973); Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (1975); In re Kirkman, 302 N.C. 164, 273 S.E.2d 712 (1981).

This section should be construed liberally by the presiding judge to accomplish the obvious purpose to provide relief for a person who has a claim so small that, if he must pay an attorney out of his recovery, it may not be economically feasible to bring suit. DeBerry v. American Motorists Ins. Co., 33 N.C. App. 639, 236 S.E.2d 380 (1977).

Attorneys' Fees Not Recoverable As Costs In Absence of Statute. — Attorneys' fees are not now regarded as part of court costs in this jurisdiction, except as otherwise provided by statute. Perkins v. American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

Ordinarily, attorneys' fees are not recoverable as an item of damages or part of the costs in litigation. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970); Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

In the absence of statutory authority therefor, a court may not include an allowance of attorneys' fees as part of the costs recoverable by the successful party to an action or proceeding. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

But the legislature has enacted an exception to this general rule and allows the trial judge to award attorneys' fees in certain situations under this section. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970).

This section creates an exception to the general rule that attorney's fees are not allowable as part of the costs in civil actions. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

Discretion of Judge. — The allowance of counsel fees under the authority of this section is, by express language of this section, in the discretion of the presiding judge. Callicutt v. Hawkins, 11 N.C. App. 546, 181 S.E.2d 725 (1971); Hubbard v. Lumbermen's Mut. Cas. Co., 24 N.C. App. 493, 211 S.E.2d 544, cert. denied, 286 N.C. 723, 213 S.E.2d 721 (1975); Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

Without a showing of any abuse of the trial judge's discretion, an assignment of error to a denial of a motion for allowance of attorneys' fees is overruled. Callicutt v. Hawkins, 11 N.C. App. 546, 181 S.E.2d 725 (1971).

Because this section provides for the award of "a reasonable attorney fee," the court has a large measure of discretion in fixing or recommending the amount to be paid. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

Former § 25-8 Became Part of Contracts. — Provisions in notes executed prior to the repeal in 1965 of former § 25-8 that required the debtors to pay reasonable attorneys' fees for collection of the notes were rendered unenforceable by that section, notwithstanding the enactment in 1967 of this section permitting such

provisions, since the former section became a part of the contracts between the parties and this section could not vary the terms of those contracts. Register v. Griffin, 10 N.C. App. 191, 178 S.E.2d 95 (1970).

Section Not Applicable to Workmen's Compensation Cases. — This section refers to personal injury damage suits and property damage suits tried in a court where there is a presiding trial judge and is not applicable in Workmen's Compensation cases. Bowman v. Comfort Chair Co., 271 N.C. 702, 157 S.E.2d 378 (1967).

II. WHO MAY AWARD.

"Presiding Judge" Means Judge Presiding over Court in Which Action Instituted. — The term "presiding judge" means the judge presiding over the court in which the action is instituted. Such judge can, without danger of injustice, fix a reasonable fee for the attorney of the party recovering damages by settlement prior to trial. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

The legislature contemplated that the judge who presided at the trial would determine whether a fee for the attorney of the party recovering damages should be allowed and, if so, the amount. Such judge would be in a better position than any other to make this determination. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

When Judge Other Than Trial Judge May Make Allowance. — While it is proper that the trial judge in an action which proceeds to trial may allow a reasonable attorney fee to the successful litigant under this section, the presiding judge of the court in which the suit is instituted may allow such fee when judgment is obtained without the necessity for trial. In cases where the judge who presided at the trial is unable because of death, disability, or other valid reason to make such allowance, the presiding judge of the court in which the suit is instituted would have such authority. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Presiding judge may award compensation for legal services rendered on appeal. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

The clerk has no authority to determine whether a fee should be allowed as part of the costs or to fix the amount of such fee. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

III. PROCEDURE.

Plaintiff Need Not Plead for Award in Complaint. — This section does not require that a plaintiff seeking attorney fees under the statute affirmatively plead for such an award as a separate claim in the complaint. Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

Findings of Fact Required. — In awarding reasonable counsel fees under this section, the judge presiding must make some findings of fact to support the award. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

And Such Findings May Be Limited. — Since this section determines the nature of an action and limits the amount involved, the findings of fact may be limited to the quantity and quality of all the services rendered by the attorney for his client until the final determination of the action for which the judge presiding, in his discretion, allows an attorney fee. Hill v. Jones, 26 N.C. App. 168, 215 S.E.2d 168, cert. denied, 288 N.C. 240, 217 S.E.2d 664 (1975).

But Separate Findings under Rule 52(a) Not Required. — This section does not require the trial judge to make separate findings and conclusions to support an award of attorney fees in accordance with § 1A-1, Rule 52(a). Black v. Standard Guar. Ins. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

Finding of Unwarranted Refusal to Pay Claim Required. — It is only when the suit is brought against an insurance company by the insured or beneficiary, as plaintiff, under a policy issued by such insurance company, that there must be a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim before attorney fees may be allowed as a part of the costs when the judgment for recovery of damages is one thousand dollars or less (now $5,000 or less). Rogers v. Rogers, 2 N.C. App. 668, 163 S.E.2d 645 (1968).

Under this section to support an award for an attorney fee from an insurance company the presiding judge must first find "an unwarranted refusal" to pay the claim. DeBerry v. American Motorists Ins. Co., 33 N.C. App. 639, 236 S.E.2d 380 (1977).

A trial court improperly awarded attorneys' fees to a judgment holder in the latter's action against an automobile liability insurer, where it made no finding that there was an unwarranted refusal by the insurer to pay the claim constituting the basis of the judgment holder's suit against the insured. U.S. Piping, Inc. v. Travelers Indem. Co., 9 N.C. App. 561, 176 S.E.2d 835 (1970).

The plaintiff may properly move for an award of attorney's fees after a verdict has been returned in its favor. Black v. Standard Guar. Inc. Co., 42 N.C. App. 50, 255 S.E.2d 782, cert. denied, 298 N.C. 293, 259 S.E.2d 910 (1979).

IV. SETTLEMENT.

Effect of Settlement. — To hold that use of the adjective "presiding" shows the legislature intended that no fee be allowed in any case settled without actual trial is to give this word an unreasonably strict construction and would defeat its purpose. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

This section refers specifically to the "institution" of a suit, not its trial, and allows an attorney fee to be awarded without regard to how that judgment is obtained. To permit an offer of judgment, or indeed any settlement prior to a completed trial, to avoid the payment of a reasonable attorney fee in the discretion of the court would defeat in large measure the purpose of the statute. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Attorneys' Fees Allowed. — Where there is a clear indication in the record that an application for attorney fee as a part of the costs was to be considered by the court, and the settlement was effected with knowledge of this proposed application, allowance should be made for fees. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Fee Is Allowed as Part of Costs. — This section does not provide for the recovery of a reasonable attorney's fee in addition to the court costs but "as a part of the court costs." Where the acceptance by the plaintiff of an offer of judgment for a specified sum plus "costs" proceeded from a reasonable interpretation by the plaintiff that "costs" included attorneys' fees, then if such interpretation was not intended by the defendant, the misunderstanding was due to ambiguous language used by the defendant in making his offer and the defendant must bear any loss resulting therefrom. Hicks v. Albertson, 284 N.C. 236, 200 S.E.2d 40 (1973).

If a party wishes to avoid payment of attorney fee in cases in which this section may be applicable, he should make his offer of settlement before the suit is instituted. Hicks v. Albertson, 18 N.C. App. 599, 197 S.E.2d 624, aff'd, 284 N.C. 236, 200 S.E.2d 40 (1973).

Applied in Smith v. Whisenhunt, 259 N.C. 234, 130 S.E.2d 334 (1963); Brady v. Smith, 18 N.C. App. 293, 196 S.E.2d 580 (1973).

Stated in In re King, 281 N.C. 533, 189 S.E.2d 158 (1972).

Cited in Whitley v. City of Durham, 256 N.C. 106, 122 S.E.2d 784 (1961); Foster v. Foster, 264 N.C. 694, 142 S.E.2d 638 (1965); Mims v. Dixon, 272 N.C. 256, 158 S.E.2d 91 (1967); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Caison v. Nationwide Ins. Co., 36 N.C. App. 173, 243 S.E.2d 429 (1978); Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

OPINIONS OF ATTORNEY GENERAL

Section Is Applicable to Actions against Hospital Service Corporation Organized under § 57-1. — See opinion of Attorney General to Mr. Bobby H. Griffin, Union County Attorney, 43 N.C.A.G. 357 (1974).

§ 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:

(1) If such note, conditional sale contract or other evidence of indebtedness provides for attorneys' fees in some specific percentage of the "outstanding balance" as herein defined, such provision and obligation shall be valid and enforceable up to but not in excess of fifteen percent (15%) of said "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the "outstanding balance" owing on said note, contract or other evidence of indebtedness.

(3) As to notes and other writing(s) evidencing an indebtedness arising out of a loan of money to the debtor, the "outstanding balance" shall mean the principal and interest owing at the time suit is instituted to enforce any security agreement securing payment of the debt and/or to collect said debt.

(4) As to conditional sale contracts and other such security agreements which evidence both a monetary obligation and a security interest in or a lease of specific goods, the "outstanding balance" shall mean the "time price balance" owing as of the time suit is instituted by the secured party to enforce the said security agreement and/or to collect said debt.

(5) The holder of an unsecured note or other writing(s) evidencing an unsecured debt, and/or the holder of a note and chattel mortgage or other security agreement and/or the holder of a conditional sale contract or any other such security agreement which evidences both a monetary obligation and a security interest in or a lease of specific goods, or his attorney at law, shall, after maturity of the obligation by default or otherwise, notify the maker, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the "outstanding balance" shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the "outstanding balance" without the attorneys' fees. If such party shall pay the "outstanding balance" in full before the expiration of such time, then the obligation to pay the attorneys' fees shall be void, and no court shall enforce such provisions.

Notwithstanding the foregoing, however, if debtor has defaulted or violated the terms of the security agreement and has refused, on demand, to surrender possession of the collateral to the secured party as authorized by § 25-9-503, with the result that said secured party is required to institute an ancillary claim and delivery proceeding to secure possession of said collateral; no such written notice shall be required before enforcement of the provisions relative to payment of attorneys' fees in addition to the "outstanding balance." (1967, c. 562, s. 4.)

Editor's Note. — For effective date of Session Laws 1967, c. 562, see Editor's note to § 25-1-201.

Legal Periodicals. — For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

CASE NOTES

Purposes. — Some of the purposes underlying the enactment of this section are to simplify, clarify, and modernize the law governing commercial transactions among the various jurisdictions, and to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Supplements Principles Applicable to Commercial Transactions. — Although this section was not itself codified as a constituent section of Chapter 25 of the General Statutes (the Uniform Commercial Code), its legislative history clearly demonstrates that it was intended to supplement those principles of law generally applicable to commercial transactions. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Liberal Construction. — This section, being remedial, should be construed liberally to accomplish the purpose of the legislature and to bring within it all cases fairly falling within its intended scope. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Attorneys' fees are not now regarded as part of court costs in this jurisdiction, except as otherwise provided by statute. Perkins v.

American Mut. Fire Ins. Co., 4 N.C. App. 466, 167 S.E.2d 93 (1969).

This section represents a far reaching exception to the well-established rule against attorney's fees obligations. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

But this section only validates attorney's fees obligations in certain carefully defined instances and imposes a ceiling on the amount of attorney's fees a party can obtain. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Meaning of "Evidence of Indebtedness." — The term "evidence of indebtedness" as used in this section has reference to any printed or written instrument, signed or otherwise executed by the obligor(s), which evidences on its face a legally enforceable obligation to pay money. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 N.E.2d 812 (1980).

Evidence of indebtedness within the meaning of this section signifies a written agreement or acknowledgment of debt, such as a promissory note or conditional sales contract, which is executed and signed by the party obligated under the terms of the instrument. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Same — A paragraph of a construction contract providing for a 10 percent attorney's fee in the event of litigation was held not to be "other evidence of indebtedness" within the meaning of this section. Yeargin Constr. Co. v. Futren Dev. Corp., 29 N.C. App. 731, 225 S.E.2d 623, cert. denied, 290 N.C. 660, 228 S.E.2d 459 (1976). But see Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Same — A "note" and "conditional sales contract" are the primary types of "evidence of indebtedness" contemplated by this section. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Same — Sales receipt and three-day invoice containing provision for attorney's fees is not an "evidence of indebtedness" within the meaning of this section. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976). But see Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Same — A formal credit agreement executed by the parties prior to the establishment of the open account would suffice as an evidence of indebtedness; and if such an agreement contains a provision for attorney's fees, it will be valid and enforceable pursuant to this section. State Whsle. Supply, Inc. v. Allen, 30 N.C. App. 272, 227 S.E.2d 120 (1976).

Same — Lease Contract. — A contract for the lease of personalty constitutes an "evidence of indebtedness" within the meaning of this section since the contract acknowledges a legally enforceable obligation by the lessee to remit rental payments to the lessor as they become due in exchange for the use of the property which is the subject of the lease. Therefore, a provision of the lease allowing the lessor reasonable attorney fees should the lease obligation be collected by an attorney after maturity is enforceable under the provision of this section. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

A lease does not constitute evidence of indebtedness within the meaning of this section, and attorney's fees may not be allowed, even though they were expressly provided for in the contract. Equitable Leasing Co. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980). But see Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Meaning of "Security Agreement". — As used in the Commercial Code, the general term "security agreement" is ordinarily understood to embrace chattel mortgages, conditional sales contracts, assignments of accounts receivable, trust receipts, etc. The term has a similar connotation in subdivision (5) of this section. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

A guaranty contract is not a "security agreement" within the language of subdivision (5) of this section. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

Guaranty of Payment Alone Does Not Render Guarantors Liable for Attorneys' Fees. — This section does not authorize collection of attorneys' fees if the guaranty contract sued upon does not so provide. Guaranty of payment alone does not render the guarantors liable for attorneys' fees which the principal debtor, by the terms of the note, is bound to pay. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

Nor Does Provision in Promissory Note Requiring Debtor to Pay Attorneys' Fees. — Where a promissory note contained a provision requiring the debtor to pay reasonable attorneys' fees of the creditor in collection of the note, but a guaranty of payment of the note contained no such provision, the guarantors were not liable under this section for attorneys' fees incurred by the creditor in an action on the guaranty contract. EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972).

This section contemplates liability on the part of endorsers of a note since it provides for the giving of notice to endorsers by the holder or his attorney that the provision for attorneys' fees, in addition to the outstanding

balance, shall be enforced. Wachovia Bank & Trust Co. v. Peace Broadcasting Corp., 32 N.C. App. 655, 233 S.E.2d 687, cert. denied, 292 N.C. 734, 235 S.E.2d 788 (1977).

Specific Percentage Not Specified in Unsecured Promissory Note. — Where an unsecured promissory note provided for the payment of reasonable attorneys' fees upon default by the debtor, without specifying any specific percentage, the trial court properly allowed the plaintiff to recover as reasonable attorneys' fees 15% of the balance due on the note, as provided by this section. Binning's, Inc. v. Roberts Constr. Co., 9 N.C. App. 569, 177 S.E.2d 1 (1970).

Notice Need Not Be Given prior to Institution of Action. — The only requirement in this section as to when notice is to be given is that it be given "after maturity of the obligation by default or otherwise." This does not mean that the notice must be given prior to the institution of an action. Binning's, Inc. v. Roberts Constr. Co., 9 N.C. App. 569, 177 S.E.2d 1 (1970).

Subdivision (5) of this section sets no time limit on the giving of the notice required. First Citizens Bank & Trust Co. v. Larson, 22 N.C. App. 371, 206 S.E.2d 775, cert. denied, 286 N.C. 214, 209 S.E.2d 315 (1974).

Applied in Armel Mgt. Corp. v. Stanhagen, 35 N.C. App. 571, 241 S.E.2d 713 (1978).

Cited in International Harvester Credit Corp. v. Ricks, 16 N.C. App. 491, 192 S.E.2d 707 (1972); Phil Mechanic Constr. Co. v. Gibson, 30 N.C. App. 385, 226 S.E.2d 837 (1976); Nytco Leasing, Inc. v. Dan-Cleve Corp., 31 N.C. App. 634, 230 S.E.2d 559 (1976); North Carolina Nat'l Bank v. Burnette, 38 N.C. App. 120, 247 S.E.2d 648 (1978).

§ 6-21.3. Remedies for returned check.

In an action by a holder to recover the sum payable of a check drawn by the defendant on which payment has been refused by the payor bank because the drawer had no account or insufficient funds, upon a determination that the plaintiff has prevailed the presiding judge or magistrate shall add to the amount due to the plaintiff the sum of ten dollars ($10.00) to defray the costs of processing the returned check, and the presiding judge or magistrate shall tax to the defendant, as part of the court costs payable, a reasonable attorney's fee to the duly licensed attorney representing the plaintiff in such suit upon a finding (i) that at least 10 days prior to instituting the action the plaintiff mailed the defendant written notice at the defendant's last known address of the intent to file such suit if payment for the check was not received, and (ii) that the defendant failed to deliver payment or evidence of bank error to the plaintiff within 10 days after mailing of such notice. (1975, c. 129, s. 1; 1981, c. 781, s. 2.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "ten dollars ($10.00)" for "five dollars ($5.00)" near the middle of the section. Session Laws 1981, c. 781, s. 3, makes the act applicable to checks written on or after July 1, 1981.

§ 6-21.4. Allowance of counsel fees and costs in certain cases involving principals or teachers.

In any civil action brought against a public school principal or teacher as defined in G.S. 115C-390 arising or resulting from the use of corporal punishment, upon a determination that the principal or teacher has prevailed and that the plaintiff's action was frivolous or without substantial merit, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the principal or teacher. The attorney's fee shall be taxed as part of the court costs. (1981, c. 381, s. 1; c. 682, s. 22.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "G.S. 115C-390" for "G.S. 115-146" near the beginning of the section.

§ 6-22. Petitioner to pay costs in certain cases.

The petitioner shall pay the costs in the following proceedings:

(1) In petitions for draining or damming lowlands where the petitioner alone is benefited.

(2) In petitions for condemnation of water millsites when the petitioner is allowed to erect the mill; but when he is not allowed to erect the mill, the costs shall be paid by the person who is allowed to do so.

(3) In petitions for condemnation of land for railroads, street railways, telegraph, telephone or electric power or light companies, or for water supplies for public institutions, or for the use of other quasi-public or municipal corporations; unless in the opinion of the superior court the defendant improperly refused the privilege, use or easement demanded, in which case the costs must be adjudged as to the court may appear equitable and just.

(4) When the petition is refused. (Code, ss. 1299, 1855, 2013; 1893, c. 63; 1903, c. 562; Rev., s. 1269; C. S., s. 1245; 1945, c. 635.)

CASE NOTES

Condemnation Proceedings. — In proceedings brought by a railroad where it was found by the jury on appeal that the defendant's benefit exceeded his damages and then found they were equal, it was held that the plaintiff was taxable with costs up to the time of appeal. Madison County Ry. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912).

§ 6-23. Defendant unreasonably defending after notice of no personal claim to pay costs.

In case of a defendant, against whom no personal claim is made, the plaintiff may deliver to such defendant with the summons, a notice subscribed by the plaintiff or his attorney, setting forth the general object of the action, a brief description of the property affected by it, if it affects real or personal property, and that no personal claim is made against such defendant. If a defendant on whom such notice is served unreasonably defends the action, he shall pay costs to the plaintiff. (Code, s. 216; Rev., s. 1270; C. S., s. 1246.)

CASE NOTES

Cited in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

§ 6-24. Suits in forma pauperis; no costs unless recovery.

When any person sues as a pauper, no officer shall require of him any fee, and he shall recover no costs, except in case of recovery by him. (1868-9, c. 96, s. 3; Code, s. 212; 1895, c. 149; Rev., s. 1265; C. S., s. 1247.)

Cross References. — As to when suits in forma pauperis may be permitted, see § 1-110.

Legal Periodicals. — For comment on access of indigents into the civil courtroom, see 49 N.C.L. Rev. 683 (1971).

CASE NOTES

Right Not Extended to Appeals. — The leave to sue as a pauper does not extend in civil actions beyond the trial in the superior court. Speller v. Speller, 119 N.C. 356, 26 S.E. 160 (1896).

Costs of Witnesses Not to Be Recovered. — One suing in forma pauperis is not entitled to recover costs of his witnesses. Draper v. Buxton, 90 N.C. 182 (1884). Nor does the section excuse the pauper from liability for his witnesses. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

This provision deprives all officers of costs, and the last clause is very sweeping, and manifestly embraces the costs of witnesses. Compensation to witnesses is part of the cost of an action, as much so as any other statutory charges in and about the same. Booshee v. Surles, 85 N.C. 90 (1881); Hall v. Younts, 87 N.C. 285 (1882); Draper v. J.A. Buxton & Co., 90 N.C. 182 (1884).

§ 6-25. Party seeking recovery on usurious contracts; no costs.

No costs shall be recovered by any party, whether plaintiff or defendant, who may endeavor to recover upon any usurious contract. (1895, c. 69; Rev., s. 1271; C. S., s. 1248.)

Cross References. — As to usury generally, see §§ 24-1, 24-2.

§ 6-26. Costs in special proceedings.

The costs in special proceedings shall be as allowed in civil actions, unless otherwise specially provided. (Code, s. 541; Rev., s. 1272; C. S., s. 1249.)

Cross References. — As to special proceedings generally, see § 1-393 et seq.

§ 6-27: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-28. Costs of laying off homestead and exemption.

The costs and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution, shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner, they shall be paid by such owner, and the latter costs shall be a lien on said homestead. (Code, s. 510; Rev., s. 1274; C. S., s. 1251.)

Local Modification. — Pitt: 1953, c. 1276.

Cross References. — As to appraisal and laying off of homestead and personal property exemptions, see §§ 1-372, 1-378. As to costs in reallotment of homestead for increase in value, see § 6-21, subdivision (9).

CASE NOTES

Payment of Fees as Condition. — Where the judgment debtor claims his personal property from execution, the sheriff is justified in refusing to proceed further till such exemptions are properly set apart, and the payment of his fees for the purpose by the plaintiff in the action, except when the suit is brought in forma pauperis. Whitmore-Ligon Co. v. Hyatt, 175 N.C. 117, 95 S.E. 38 (1918).

Applied in Beavans v. Goodrich, 98 N.C. 217, 3 S.E. 516 (1887); Long v. Walker, 105 N.C. 90, 10 S.E. 658 (1890).

§ 6-29. Costs of reassessment of homestead.

If the superior court at term shall confirm the appraisal or assessment, or shall increase the exemption allowed the debtor or claimant, the levy shall stand only upon the excess remaining, and the creditor shall pay all the costs of the proceeding in court. If the amount allowed the debtor or claimant is reduced, the costs of the proceeding in court shall be paid by the debtor or claimant, and the levy shall cover the excess then remaining. (Code, s. 521; Rev., s. 1275; C. S., s. 1252.)

Cross References. — As to reassessment of homestead, see § 1-381. As to costs in reallotment of homestead for increase in value, see § 6-21, subdivision (9).

CASE NOTES

Applied in Beavans v. Goodrich, 98 N.C. 217, 3 S.E. 516 (1887).

§ 6-30. Costs against infant plaintiff; guardian responsible.

When costs are adjudged against an infant plaintiff, the guardian by whom he appeared in the action shall be responsible therefor. (Code, s. 534; Rev., s. 1276; C. S., s. 1253.)

§ 6-31. Costs where executor, administrator, trustee of express trust, or person authorized by statute a party.

In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs shall be chargeable only upon or collected out of the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in such action or defense. And when any claim against a deceased person is referred, the prevailing party shall be entitled to recover the fees of referees and witnesses, and other necessary disbursements, to be taxed according to law. (Code, s. 535; Rev., s. 1277; C. S., s. 1254.)

Cross References. — As to liability of personal representative for denial of claim, see §§ 28A-13-10, 28A-19-18. As to when costs against representative are allowed, see § 28A-19-18. As to liability of guardian for costs for defaults, see § 33-30. As to reference of disputed claim generally, see §§ 28A-19-15, 28A-19-16.

CASE NOTES

When Fiduciary Personally Liable. — By virtue of this section costs should be taxed against the estate in the hands of a trustee, and not against him personally, except when the court adjudges that the trustee has been guilty of mismanagement, or bad faith, in such action or defense. Smith v. King, 107 N.C. 273, 12 S.E. 57 (1890); Sugg v. Bernard, 122 N.C. 155, 29 S.E. 221 (1898); Lance v. Russell, 165 N.C. 626, 81 S.E. 922 (1914).

The same rule is applied to actions against administrators and executors, State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890); Varner v. Johnston, 112 N.C. 570, 17 S.E. 483 (1893), with the additional limitation prescribed by § 28-115 (now § 28A-19-18), Whitaker v.

Whitaker, 138 N.C. 205, 50 S.E. 630 (1905). See § 28A-19-18 and note.

This Section Includes Next Friends. — While "next friends" may not be embraced in the strict letter of this section, they come within its purview. Smith v. Smith, 108 N.C. 365, 12 S.E. 1045, 13 S.E. 113 (1891). And it is error to tax "next friends" who are not parties without a finding of mismanagement or bad faith. Hockoday v. Lawrence, 156 N.C. 319, 72 S.E. 387 (1911).

Limitation on Payment of Costs. — A trustee, as against those for whose benefit the trust is created, will be allowed to apply so much of the funds to the payment of costs and expenses, including counsel fees, as may be necessary to protect it, but he will not be allowed such disbursements against one who establishes an adverse title to the property. Chemical Co. v. Johnson, 101 N.C. 223, 7 S.E. 770 (1888).

Cited in In re Will of Hargrove, 206 N.C. 307, 173 S.E. 577 (1934).

§ 6-32. Costs against assignee after action brought.

In actions in which the cause of action becomes by assignment after the commencement of the action, or in any other manner, the property of a person not a party to the action, such person shall be liable for the costs in the same manner as if he were a party. (Code, s. 539; Rev., s. 1278; C. S., s. 1255.)

CASE NOTES

Assignments Must Be Absolute and Complete. — The assignments contemplated by this section are only such as are absolute, and that such as are intended to be a collateral security only for a continuing obligation or claim are not within the purview of the section. Nor does the section apply when the assignment is only of a part and not of the whole cause of action. Davis & Schenck v. Higgins, 92 N.C. 203 (1885).

ARTICLE 4.

Costs on Appeal.

§ 6-33. Costs on appeal generally.

On appeal from a magistrate or any court of the General Court of Justice, if the appellant recovers judgment, he shall recover the costs of the appeal and also those costs he ought to have recovered below had the judgment of that court been correct. If in any court of appeal there is judgment for a new trial, or for a new jury, or if the judgment appealed from is not wholly reversed, but partly affirmed and partly disaffirmed, the costs shall be in the discretion of the appellate court. (Code, s. 540; Rev., s. 1279; C. S., s. 1256; 1969, c. 44, s. 19; 1971, c. 269, s. 7.)

CASE NOTES

Judgment Prerequisite to Awarding of Costs. — The first part of this section manifestly refers not only to a reversal of the judgment below, but to a judgment in favor of the appellant on the merits and not merely to an order for a new trial. The trial court cannot ordinarily tax the costs of an action in favor of either party unless there is a judgment, costs being an incident of the judgment. Williams v. Hughes, 139 N.C. 17, 51 S.E. 790 (1905).

Where the subject matter of the action is destroyed before the appeal is heard, the judgment below is presumed to be correct until reversed, and no part of the costs should be adjudged against the appellee. Taylor v. Vann, 127 N.C. 243, 37 S.E. 263 (1900).

Where Lower Court Judgment Modified. — In McLean v. Breece, 113 N.C. 390, 18 S.E. 694 (1893), where the judgment was modified in the Supreme Court, the costs were taxed

against the appellee. And where the plaintiffs recovered a part judgment on their demand, by establishing a mechanic's lien, they were entitled to costs of appeal. See Hogsed v. Gloucester Lumber Co., 170 N.C. 529, 87 S.E. 337 (1915).

Where the judgment of the court below is modified and affirmed, the appellate division may apportion the costs on appeal between the parties in the exercise of its discretion. Hoskins v. Hoskins, 259 N.C. 704, 131 S.E.2d 326 (1963).

The superior court is without power to modify former orders of the appellate court taxing costs on former appeals, as costs thus incurred are no part of superior court costs, but are taxed by, and executions issue out of, the appellate court. Bailey v. Hayman, 222 N.C. 58, 22 S.E.2d 6 (1942).

Partial Affirmance and Partial Reversal. — Where the judgment appealed from is partly affirmed and partly reversed, in the exercise of the discretion permitted by this section, the costs in the appellate court may be divided so that each party pays his own costs. Smith v. Old Dominion Bldg. & Loan Ass'n, 119 N.C. 249, 26 S.E. 41 (1896); Hawkins v. Richmond Cedar Works, 122 N.C. 87, 30 S.E. 13 (1898).

Reversal Necessary to Tax Costs Against Appellee. — Unless the court upon the merits reverses the judgment below, it cannot adjudge any part of the costs against the appellee. Commissioners of Vance County v. Gill, 126 N.C. 86, 35 S.E. 228 (1900).

Case Remanded. — Where an appellant fails to show that he was prejudiced by the order appealed from, he may be taxed with the costs of the appeal, though the case be remanded. Harrington v. Rawls, 136 N.C. 65, 48 S.E. 571 (1904).

New Trial. — The taxing of the costs on appeal, by partial new trial being granted, is in the discretion of the court. Satterthwaite v. Goodyear, 137 N.C. 302, 49 S.E. 205 (1904).

Under this section, where the appellant was awarded a partial new trial only, as to one issue only out of several, the costs of the appeal are in the discretion of the court. Rayburn v. Casualty Co., 142 N.C. 376, 55 S.E. 296 (1906).

Where a new trial is granted, the awarding of costs is discretionary. Universal Metal Co. v. Durham & C.R.R., 145 N.C. 293, 59 S.E. 50 (1907).

Motion in Superior Court to Recover Costs of Appellate Transcript Prohibited. — The cost of preparing the transcription of the record is a part of the costs in the appellate division, and the judge of the superior court upon the subsequent trial is without jurisdiction to entertain a motion for the recovery of such costs. Ward v. Cruse, 236 N.C. 400, 72 S.E.2d 835 (1952).

Applied in Kincaid v. Graham, 92 N.C. 154 (1885); Ebert v. Disher, 216 N.C. 546, 5 S.E.2d 716 (1939).

§§ 6-34, 6-35: Repealed by Session Laws 1971, c. 269, s. 15.

ARTICLE 5.

Liability of Counties in Criminal Actions.

§§ 6-36 to 6-39: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-40. Liability of counties, where trial removed from one county to another.

When a prisoner is sent from one county to another to be held for trial, or for any other cause or purpose, the county from which he is sent shall pay his jail expenses, unless they are collected from the prisoner. (1889, c. 354; 1901, c. 718; Rev., s. 1285; C. S., s. 1263; 1971, c. 269, s. 8.)

§§ 6-41 to 6-44: Repealed by Session Laws 1971, c. 269, s. 15.

ARTICLE 6.

Liability of Defendant in Criminal Actions.

§§ 6-45, 6-46: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-47. Judgment confessed; bond given to secure fine and costs.

In cases where a court permits a defendant convicted of any criminal offense to give bond or confess judgment, with sureties to secure the fine and costs which may be imposed, the acceptance of such security shall be upon the condition that it shall not operate as a discharge of the original judgment against the defendant nor as a discharge of his person from the custody of the law until the fine and costs are paid. (1879, c. 264; Code, s. 749; 1885, c. 364; Rev., s. 1293; C. S., s. 1269; 1971, c. 269, s. 9.)

CASE NOTES

The power of the courts to suspend judgment in criminal cases should only be upheld when sanctioned by usage, and where the consent of the defendant was expressly given or would be implied from the fact that the order was made in the defendant's presence without his objection, and that its evident purpose was to save the defendant from a more grievous penalty permitted or required by law. State v. Hilton, 151 N.C. 687, 65 S.E. 1011 (1909).

Quoted in State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

Cited in State v. Smith, 196 N.C. 438, 146 S.E. 73 (1929).

§ 6-48. Arrest for nonpayment of fine and costs.

In default of payment of such fine and costs, it is the duty of the court at any subsequent term thereof, on motion of the solicitor of the State, to order a capias to issue to the end that such defendant may be again arrested and held for the fine and costs until discharged according to law. (1879, c. 264; Code, s. 750; 1885, c. 364; Rev., s. 1294; C. S., s. 1270; 1971, c. 269, s. 10.)

CASE NOTES

Cited in State v. Smith, 196 N.C. 438, 146 S.E. 73 (1929).

ARTICLE 7.

Liability of Prosecuting Witness for Costs.

§ 6-49. Prosecuting witness liable for costs in certain cases; court determines prosecuting witness.

In all criminal actions in any court, if the defendant is acquitted, nolle prosequi entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees

of all witnesses whom the judge before whom the trial took place shall certify to have been proper for the defense and prosecution, shall be paid by the prosecuting witness, whether marked on the bill or warrant or not, whenever the judge is of the opinion that there was not reasonable ground for the prosecution, or that it was not required by the public interest. If a greater number of witnesses have been summoned than were, in the opinion of the court, necessary to support the charge, the court may, even though it is of the opinion that there was reasonable ground for the prosecution, order the prosecuting witness to pay the attendance fees of such witnesses, if it appear that they were summoned at the prosecuting witness's special request.

Every judge is authorized to determine who the prosecuting witness is at any stage of a criminal proceeding, whether before or after the bill of indictment has been found, or the defendant acquitted: Provided, that no person shall be made a prosecuting witness after the finding of the bill, unless he shall have been notified to show cause why he should not be made the prosecuting witness of record. (1799, c. 4, s. 19, P. R.; 1880, c. 558, P. R.; R. C., c. 35, s. 37; 1868-9, c. 277; 1874-5, c. 151; 1879, c. 49; Code, s. 737; 1889, c. 34; Rev., s. 1295; C. S., s. 1271; 1947, c. 781; 1953, c. 675, s. 1; 1971, c. 269, s. 11.)

CASE NOTES

General Consideration. — This section was intended to enlarge the power of the courts over the question of costs in criminal actions. State v. Norwood, 84 N.C. 794 (1881). Its enactment was within the power of the legislature. State v. Cannady, 78 N.C. 539 (1878).

Standing to Challenge Constitutionality of Section. — The plaintiff lacks standing to put in issue the constitutionality of this section where he is under no present threat of prosecution under these statutes, the likelihood that he will run afoul of them in the future is remote and speculative in the extreme, and it can be safely assumed that he does not contemplate either presently or in the future the institution of a prosecution in this State. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

The mere fact that earlier the plaintiff was caught in the net of the challenged statutes gives him no standing, where his earlier encounter with the statutes has become moot, the costs assessed have been paid, and he is no longer restrained. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

Intervention by Federal Court in Operation of Section. — The taxing of costs to a prosecuting witness is a constituent part of the criminal procedure of North Carolina. Comity precludes not only the injunction of criminal proceedings in the state courts, but also any disruptive interference thereof. Therefore only when the whole proceeding may be enjoined does the federal district court have jurisdiction to intervene in any way in the operation of this section. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

Declaratory Judgment as to Validity of Section Denied. — A grant of declaratory relief that this section was invalid and unconstitutional was held to be outside the equitable jurisdiction of the court for the reasons that no bad faith had been alleged, nor any harassment, nor was there shown any impediment to the resolution of the constitutional validity of this section in the general district courts of North Carolina. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

Certifying Witnesses as Proper for Defense. — Where the court below taxed the costs of an unsuccessful prosecution against the prosecutor without finding that the defendant's witnesses were proper for the defense, as required by this section, judgment would still be allowed to stand if the court below would make and certify the requisite finding that the said witnesses were proper for the defense. State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

In State v. Owens, 87 N.C. 565 (1882), it was stated that this section included such witnesses for the defense as were certified by the counsel to have been proper for the defense, and the Supreme Court approved that judgment. But this was not the point in the appeal, and was only incidentally presented. See State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889). In State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890), which was also a judgment taxing the prosecutor with the costs, the judge did not find and certify that the prosecution was frivolous, malicious or was not for the public good. The Supreme Court held that this judgment was erroneous, and that the statute only allowed a party to be taxed as prosecutor with the costs

upon the findings of these facts. State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

Notice to Prosecutor Prior to Taxing Costs. — It is necessary for the trial court, in order to adjudge the prosecution of a criminal action to be frivolous and malicious and tax the costs against the prosecutors who have employed attorneys to assist the solicitor, to give the prosecutors notice of such action and hear the matter according to the "law of the land." State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915).

The object of notice is only to give the party a day in court, and it matters not how he gets the notice, if he appears and defends under it. This may be done on motion of the defendant's counsel or by the court of its own motion. State v. Hughes, 83 N.C. 665 (1880); State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890). The court should find the facts, and when this is done the findings are not reviewable in the appellate court. State v. Owens, 87 N.C. 565 (1882); State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890); State v. Jones, 117 N.C. 768, 23 S.E. 247 (1895).

A notice to mark one as prosecutor under this section need not be in writing. Where it was announced in open court, upon the calling and continuance of a State case, that a motion would be made at the next term to mark a witness as prosecutor (all the witnesses being present), and on the argument of the motion it was announced that all the parties were present, it was held to be sufficient evidence that such notice was given, and warranted the court in ordering the witness to be marked as prosecutor. State v. Norwood, 84 N.C. 794 (1881).

Not Required by the Public Interest. — A finding by the trial judge that a prosecution of a criminal action "was not for the public interest" is equivalent to a finding that it "was not required by the public interest." State v. Baker, 114 N.C. 812, 19 S.E. 145 (1894).

Conclusiveness of Court Finding. — A judgment that a prosecution is frivolous and not required by the public interest, and that the prosecutor pay the costs, is conclusive and not appealable. State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890).

The finding by the judge below that a criminal prosecution was frivolous and malicious is conclusive, and will support a judgment that the prosecutor pay costs, or in default thereof be imprisoned. State v. Lance, 109 N.C. 789, 14 S.E. 110 (1891).

But where the trial judge has dismissed a criminal action as being frivolous and malicious, and taxed the prosecutors with costs, and it appears from his findings of record that he has done so without any proper consideration of their affidavits in support of their position, and relevant to the issue, so as to deprive them of the benefits of the due process of law, his order will be set aside on appeal, leaving the matter open for proper adjudication. State v. Collins, 169 N.C. 323, 84 S.E. 1049 (1915).

In this latter case it is said: "In the disposition made of this appeal we do not intend to impair or qualify our former decisions on the subject, notably State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890), and State v. Roberts, 106 N.C. 662, 10 S.E. 900 (1890), to the effect that, on a hearing of this character, the findings of fact by the trial judge are conclusive. In the disposition of these and like motions there must necessarily be some tribunal having the power to determine the ultimate facts on which the rights of the parties depend, and we think the cases which refer this power to the trial judge, who is present and has opportunity to personally observe and note the circumstances and attendant conditions, are grounded in good reason; but, on the facts as they appear from his honor's findings, and we think it not improper to say that he has spread them on the record with commendable candor, we are of opinion that these men, as heretofore stated, have had no proper hearing, within the meaning of the constitutional provision, and that the judgment against them must be set aside."

Insolvent Prosecutor — County Liable. — When a judge below orders an insolvent prosecutor to pay costs, and he fails or is unable to pay, the county in which the offense was committed becomes liable to pay the same. Pegram v. Commissioners of Guilford County, 75 N.C. 120 (1876).

Applied in State v. Darr, 63 N.C. 516 (1869).

OPINIONS OF ATTORNEY GENERAL

Findings of Fact Required. — The presiding judge, prior to taxing costs against a prosecuting witness, is required to make specific findings of fact. See opinion of Attorney General to Gary B. Tash, Judge, 21st Judicial District Court, 49 N.C.A.G. 142 (1980).

Mere Failure to Convict Not Ground For Assessment. — This section does not empower the court to assess costs against the prosecuting witness solely because prosecution does not result in a conviction of the accused. See opinion of Attorney General to Gary B. Tash, Judge, 21st Judicial District Court, 49 N.C.A.G. 142 (1980).

§ 6-50. Imprisonment of prosecuting witness for willful nonpayment of costs if prosecution frivolous.

Every such prosecuting witness may be adjudged not only to pay the costs, but he shall also be imprisoned for the willful nonpayment thereof, when the judge before whom the case was tried shall adjudge that the prosecution was frivolous or malicious. (1800, c. 558; R. C., c. 35, s. 37; 1879, c. 49; 1881, c. 176; Code, s. 738; Rev., s. 1297; C. S., s. 1272; 1971, c. 269, s. 11.1.)

CASE NOTES

Constitutionality. — This section is constitutional. State v. Cannady, 78 N.C. 539 (1878); State v. Hamilton, 106 N.C. 660, 10 S.E. 854 (1890).

Same — Standing to Challenge. — The plaintiff lacked standing to put in issue the constitutionality of this section where he was under no present threat of prosecution under these statutes, the likelihood that he would run afoul of them in the future was remote and speculative in the extreme, and it could be safely assumed that he did not contemplate either presently or in the future the institution of a prosecution in North Carolina. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

The mere fact that earlier the plaintiff was caught in the net of the challenged statutes gave him no standing, where his earlier encounter with the statutes had become moot, the costs assessed were paid, and he was no longer restrained. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

The mere fact that the statutes may chill in some indefinable way the urge to prosecute is of no moment in the absence of any real likelihood that plaintiff has or will have reason to prosecute someone in North Carolina. Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973).

Same — Jurisdiction of Federal Court. — A grant of a declaratory judgment that this section was invalid and unconstitutional was held to be outside the equitable jurisdiction of the federal court for the reasons that no bad faith had been alleged, nor any harassment, nor any impediment to the resolution of the constitutional validity in the General Court of Justice of North Carolina. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

The taxing of costs to a prosecuting witness is a constituent part of the criminal procedure of North Carolina. Comity precludes not only the injunction of criminal proceedings in the state courts, but also any disruptive interference thereof. Therefore only when the whole proceeding may be enjoined does the federal district court have jurisdiction to intervene in any way in the operation of this section. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

Costs of Prosecution Not a Debt. — Costs of prosecution against a prosecutor (upon acquittal of the accused or nolle prosequi entered), or against the accused upon a verdict of guilty, or a fine imposed, do not constitute a debt within the meaning of N.C. Const., Art. I, § 16, (now Art. 1, § 28) and hence the defendant may be imprisoned for nonpayment of the same. State v. Wallin, 89 N.C. 578 (1883).

Where Bill Ignored. — No power is conferred by this section to tax a prosecutor with costs when the bill is ignored. State v. Cockerham, 23 N.C. 381 (1841); State v. Horton, 89 N.C. 581 (1883); State v. Gates, 107 N.C. 832, 12 S.E. 319 (1890).

ARTICLE 8.

Fees of Witnesses.

§ 6-51. Not entitled to fees in advance.

Witnesses are not entitled to receive their fees in advance; but no witness in a civil action or special proceeding, unless summoned on behalf of the State or a municipal corporation, shall be compelled to attend more than one day, if the party by or for whom he was summoned shall, after one day's attendance, on request and presentation of a certificate, fail or refuse to pay what then may be due for traveling to the place of examination and for the number of days of attendance. (1868-9, c. 279, subch. 11, s. 3; Code, s. 1368; Rev., s. 1298; C. S., s. 1273.)

Cross References. — As to attendance of witnesses, see § 8-63.

§ 6-52: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-53. Witness to prove attendance; action for fees.

Every person summoned, who shall attend as a witness in any suit, shall, before the clerk of the court, or before the referee or officer taking the testimony, ascertain by his own oath or affirmation the sum due for traveling to and from court, attendance and ferriage, which shall be certified by the clerk; and on failure of the party, at whose instance such witness was summoned (witnesses for the State and municipal corporations excepted), to pay the same previous to the departure of the witness from court, such witness may at any time sue for and recover the same from the party summoning him; and the certificate of the clerk shall be sufficient evidence of the debt. (1777, c. 115, s. 46, P. R.; 1796, c. 458, P. R.; R. C., c. 31, s. 73; 1868-9, c. 279, subch. 11, ss. 2, 4; Code, s. 1369; Rev., s. 1299; C. S., s. 1274; 1971, c. 269, s. 12.)

Cross References. — As to attendance of witnesses generally, see § 8-59.

CASE NOTES

Right to Payment Statutory. — Payment of witnesses by the sovereign is neither given by common law nor is it an inherent right. It is granted at the discretion of the court and only within the limits authorized by statute. State v. Massey, 104 N.C. 877, 10 S.E. 608 (1889). See State v. Wheeler, 141 N.C. 773, 53 S.E. 358 (1906).

The court's power to tax costs is entirely dependent upon statutory authorization. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

Witnesses Must Be Subpoenaed and Examined or Tendered for Examination. — It has always been the recognized practice that, inasmuch as only two witnesses of the successful party to prove any single fact can be taxed against the losing party, the purport of the evidence of the witnesses so sought to be taxed shall be demonstrated by examination on the trial, or at least that the losing party may have an opportunity to ascertain the materiality of the evidence of such witnesses and prevent being taxed with an excessive number upon any single point by such witnesses being sworn and tendered to the opposite party for examination. Porter v. Durham, 79 N.C. 596 (1878). It is true that in Loftis v. Raxter, 66 N.C. 340 (1872), it is said that the witnesses must be "sworn or tendered," but this is an inadvertent expression for "sworn and examined or tendered," i.e., witnesses subpoenaed by the successful party cannot be taxed against the losing party unless sworn and examined by the successful party, or sworn and tendered to the losing party to be examined, that their materiality may be shown. Otherwise, a successful party may oppress the losing party by subpoenaing and swearing any number of witnesses and having their attendance taxed, while examining only the few necessary to gain the action. Merely swearing the witnesses would be no assurance of this materiality. They must be examined or tendered to the opposite party to be examined, should he so choose, and if examined by the opposite party they are to be examined as the witnesses of the party summoning such witnesses, and under the rules of cross-examination pertaining to the examination of an adversary's witnesses. Sitton v. Edward-Eversole Lumber Co., 135 N.C. 540, 47 S.E. 609 (1904).

When a cause has been tried, only those witnesses of the successful party who have been sworn and either examined or tendered to the opposite party can be taxed against the other. Hobbs v. Atlantic Coast Line R.R., 151 N.C. 134, 65 S.E. 755 (1909); Chadwick v. Life Ins. Co., 158 N.C. 380, 74 S.E. 115 (1912).

The losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Same — Witnesses Who Are Not Summoned or Who Are Nonresidents. — There is no provision in our law authorizing the taxation as costs, of the fees for attendance and mileage of witnesses who have not been summoned, nor of witnesses who have been sum-

moned but who are nonresidents of the State. Stern v. Herren, 101 N.C. 516, 8 S.E. 221 (1888).

Same — Expert Witnesses. — Where neither expert witness testified in obedience to a subpoena, the court was without authority to allow either of them an expert fee or to tax the losing party with the amount of the fee as a part of the costs. Couch v. Couch, 18 N.C. App. 108, 196 S.E.2d 64 (1973).

Witnesses Summoned by Both Parties. — A witness summoned by each party to a suit is entitled to compensation from each. Peace v. Person, 5 N.C. 188 (1808).

Party Giving Evidence in His Own Behalf. — The legislature never intended, in allowing parties to be witnesses for themselves, to put them on a par with other witnesses in respect to witness fees, when they attend the trial to give evidence in their own favor. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

If a successful party is not entitled to have a witness fee for himself taxed against his losing adversary he is not entitled to have taxed an expert witness fee for himself. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Testimony of Expert Must Be Material. — Expert witness fees can be taxed against an adverse party only when the testimony of the witness examined or tendered was or would have been material and competent. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Effect of Nonsuit. — The costs of the defendant's witnesses who are present when the case is brought for trial, but are not sworn, because the plaintiff takes a nonsuit, are properly taxed against the latter. Henderson v. Williams, 120 N.C. 339, 27 S.E. 30 (1897).

Assignment of Witness Tickets Not Necessary. — The party to an action summoning witnesses to testify in his behalf is liable for their witness fees which may be recovered in an action against him, and when it appears of record entry of the judgment by the clerk of the superior court that these fees have been taxed against the party recovering the judgment, and paid by him, such party is entitled to recover them against the losing party to the action without showing that the witnesses had transferred or assigned their tickets to him. McClure v. Fulbright, 196 N.C. 450, 146 S.E. 74 (1929).

A pauper is not excused from liability for his witnesses. Bailey v. Brown, 105 N.C. 127, 10 S.E. 1054 (1890).

§§ 6-54 to 6-56: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-57: Repealed by Session Laws 1947, c. 781.

§§ 6-58, 6-59: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-60. No more than two witnesses may be subpoenaed to prove single material fact; liability for fees of such witnesses; one fee for day's attendance.

No district attorney shall direct that more than two witnesses be subpoenaed for the State to prove a single material fact, nor shall the State or defendant in any such prosecution be liable for the fees of more than two witnesses to prove a single material fact, unless the court, upon satisfactory reasons appearing, otherwise directs. And no witness subpoenaed in a criminal action shall be paid by the State for attendance in more than one case for any one day. (1871-2, c. 186; 1879, c. 264; Code, s. 744; Rev., s. 1303; C. S., s. 1284; 1971, c. 269, s. 13; 1973, c. 47, s. 2.)

§ 6-61: Repealed by Session Laws 1971, c. 269, s. 15.

§ 6-62. District attorney to announce discharge of State's witnesses.

It is the duty of all district attorneys prosecuting in the several courts, as each criminal prosecution is disposed of by trial, removal, continuance or otherwise, to call, in open court, and announce the discharge of witnesses for

the State, either finally or otherwise as the disposition of the case may require. (1879, c. 264; 1881, c. 312; Code, s. 746; Rev., s. 1305; C. S., s. 1286; 1935, c. 26; 1971, c. 269, s. 14; 1973, c. 47, s. 2.)

Cross References. — As to discharge of witnesses generally, see § 8-63.

§ 6-63: Repealed by Session Laws 1971, c. 269, s. 15.

Article 9.

Criminal Costs before Justices, Mayors, County or Recorders' Courts.

§§ 6-64, 6-65: Repealed by Session Laws 1971, c. 269, s. 15.

Chapter 7.

Courts.

SUBCHAPTER I. SUPREME COURT.

Article 1.

Organization and Terms.

Sec.

7-1 to 7-7. [Repealed.]

Article 2.

Jurisdiction.

7-8 to 7-21. [Repealed.]

Article 3.

Officers of Court.

7-22 to 7-29.1. [Repealed.]

Article 4.

Supreme Court Library.

7-30 to 7-33. [Repealed.]

Article 5.

Supreme Court Reports.

7-34, 7-35. [Repealed.]

Article 6.

Salaries of Supreme Court Employees.

7-36 to 7-39. [Repealed.]

Article 6A.

Retirement of Justices; Recall to Serve as Emergency Justices.

7-39.1 to 7-39.15. [Repealed.]

SUBCHAPTER II. SUPERIOR COURTS.

Article 7.

Organization.

7-40, 7-41. [Repealed.]
7-42. [Transferred.]
7-43 to 7-51.2. [Repealed.]
7-52 to 7-55. [Transferred.]
7-56, 7-57. [Repealed.]
7-58. [Transferred.]
7-59. [Repealed.]
7-60. [Transferred.]
7-61. [Repealed.]
7-61.1, 7-62. [Transferred.]

Article 8.

Jurisdiction.

7-63, 7-64. [Repealed.]
7-65. [Transferred.]
7-66, 7-67. [Repealed.]

Article 9.

Judicial and Solicitorial Districts and Terms of Court.

Sec.

7-68 to 7-70.1. [Repealed.]
7-70.2. [Transferred.]
7-71 to 7-71.2. [Repealed.]
7-72 to 7-73.1. [Transferred.]
7-74, 7-75. [Repealed.]
7-76. [Transferred.]

Article 10.

Special Terms of Court.

7-77. [Repealed.]
7-78. [Transferred.]
7-79. [Repealed.]
7-80. [Transferred.]
7-81, 7-82. [Repealed.]
7-83. [Transferred.]
7-84, 7-85. [Repealed.]

Article 11.

Special Regulations.

7-86 to 7-92.4. [Repealed.]

SUBCHAPTER III. COMMISSION FOR IMPROVEMENT OF LAWS.

Article 12.

Commission for Improvement of Laws.

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Editor's Note. — These sections had been previously repealed by Session Laws 1967, c. 1049, s. 6.

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Editor's Note. — This section had been previously repealed by Session Laws 1967, c. 1049, s. 6.

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Editor's Note. — The seventh paragraph of § 7-89 was transferred to § 8-85 by Session Laws 1971, c. 377, s. 1.

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§ 7A-1. Short title.

This Chapter shall be known and may be cited as the "Judicial Department Act of 1965." (1965, c. 310, s. 1.)

CASE NOTES

Chapter 50 of the General Statutes was extensively rewritten during the 1967 session of the General Assembly and is not a part of the Judicial Department Act of 1965, although in some respects they must be construed with reference to each other. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Cited in Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969).

§ 7A-2. Purpose of Chapter.

This Chapter is intended to implement Article IV of the Constitution of North Carolina and promote the just and prompt disposition of litigation by:

(1) Providing a new chapter in the General Statutes into which, at a time not later than January 1, 1971, when the General Court of Justice is fully operational in all counties of the State, all statutes concerning the organization, jurisdiction and administration of each division of the General Court of Justice may be placed;

(2) Amending certain laws with respect to the superior court division to conform them to the laws set forth in this Chapter, to the end that each trial division may be a harmonious part of the General Court of Justice;

(3) Creating the district court division of the General Court of Justice, and the Administrative Office of the Courts;

(4) Establishing in accordance with a fixed schedule the various district courts of the district court division;

(5) Providing for the organization, jurisdiction and procedures necessary for the operation of the district court division;

(6) Providing for the financial support of the judicial department, and for uniform costs and fees in the trial divisions of the General Court of Justice;

(7) Providing for an orderly transition from the present system of courts to a uniform system completely operational in all counties of the State not later than January 1, 1971;

(8) Repealing certain laws inconsistent with the foregoing purposes; and

(9) Effectuating other purposes incidental and supplemental to the foregoing enumerated purposes. (1965, c. 310, s. 1.)

SUBCHAPTER I. GENERAL COURT OF JUSTICE.

ARTICLE 1.

Judicial Power and Organization.

§ 7A-3. Judicial power; transition provisions.

Except for the judicial power vested in the court for the trial of impeachments, and except for such judicial power as may from time to time be vested by the General Assembly in administrative agencies, the judicial power of the State is vested exclusively in the General Court of Justice. Provided, that all existing courts of the State inferior to the superior courts, including justice of the peace courts and mayor's courts, shall continue to exist and to exercise the judicial powers vested in them by law until specifically abolished by law, or until the establishment within the county of their situs of a district court, or until January 1, 1971, whichever event shall first occur. Judgments of inferior courts which cease to exist under the provisions of this section continue in force and effect as though the issuing court continued to exist, and the General Court of Justice is hereby vested with jurisdiction to enforce such judgments. (1965, c. 310, s. 1.)

§ 7A-4. Composition and organization.

The General Court of Justice constitutes a unified judicial system for purposes of jurisdiction, operation and administration, and consists of an appellate division, a superior court division, and a district court division. (1965, c. 310, s. 1.)

CASE NOTES

Quoted in Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

ARTICLE 1A.

[Reserved.]

ARTICLE 1B.

Age Limits for Service as Justice or Judge.

§ 7A-4.20. Age limit for service as justice or judge; exception.

No justice or judge of the appellate division of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventy-second birthday, and no judge of the superior court or district court division of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventieth birthday, but justices and judges so retired may be recalled for periods of temporary service as provided in Subchapters II and III of this Chapter. (1971, c. 508, s. 1; c. 1194; 1973, c. 248; 1977, c. 736, s. 5; 1981, c. 455, s. 1.)

Editor's Note. — Session Laws 1971, c. 508, s. 5, provides that the act shall become effective Jan. 1, 1973, if the amendment adding N.C. Const., Art. IV, § 8, proposed by Session Laws 1971, c. 451, was approved by the voters. The amendment was approved by the voters at the general election held November 7, 1972. Session Laws 1971, c. 508, s. 4, contains a severability clause.

Effect of Amendments. — The 1981 amendment rewrote this section.

CASE NOTES

Resignation of District Judge Created Legal and Actual Vacancy. — Where a district court judge resigned upon the discovery of his legal infirmity, his resignation from office created an actual vacancy in that position. Hence, upon the resignation, there was no one legally entitled to hold office by virtue of an election, nor under § 128-7 was there an incumbent with the legal right to continue in office until a successor was elected or appointed. The judge, therefore, created a legal as well as an actual vacancy in office under N.C. Const., Art. IV, § 19. People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978).

§ 7A-4.21. Validation of official actions of district court judges of twenty-fifth judicial district performed after mandatory retirement age.

No official action performed by any judge of the twenty-fifth judicial district of the district court division of the General Court of Justice shall be declared to be invalid by reason of the fact that the judge was beyond the mandatory retirement age set out in G.S. 7A-4.20 at the time of his performing any such act; provided this section shall only apply to those official actions performed prior to May 1, 1977. (1977, c. 389.)

SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 2.

Appellate Division Organization.

§ 7A-5. Organization.

The appellate division of the General Court of Justice consists of the Supreme Court and the Court of Appeals. (1965, c. 310, s. 1; 1967, c. 108, s. 1.)

Editor's Note. — As enacted in 1965, this article was designated "Article 1A. Appellate Division Organization and Terms," and consisted of former § 7A-5, which read, "The appellate division of the General Court of Justice consists of the Supreme Court of North Carolina. (Chapter 7, subchapter I, articles 1-6, of the General Statutes, is applicable.)" The former section derived from c. 310, s. 1, Session Laws 1965.

CASE NOTES

Stated in Fetherbay v. Sharpe Motor Lines, 8 N.C. App. 58, 173 S.E.2d 589 (1970); Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972).

Cited in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968); In re Annexation Ordinance, 300 N.C. 337, 266 S.E.2d 661 (1980).

§ 7A-6. Appellate division reporters; reports.

(a) The Supreme Court shall appoint one or more reporters for the appellate division, to serve at its pleasure. It shall be the duty of the reporters to prepare for publication the opinions of the Supreme Court and the Court of Appeals. The salary of the reporters shall be fixed by the Admininistrative Officer of the Courts, subject to the approval of the Supreme Court.

(b) The Administrative Officer of the Courts shall contract for the printing of the reports of the Supreme Court and the Court of Appeals, and for the advance sheets of each court. He shall select a printer for the reports and prescribe such contract terms as will insure issuance of the reports as soon as practicable after a sufficient number of opinions are filed. He shall make such contract after consultation with the Department of Administration and comparison of prices for similar work in other states to such an extent as may be practicable. He shall also sell the reports and advance sheets of the appellate division, to the general public, at a price not less than cost nor more than cost plus ten percent (10%), to be fixed by him in his discretion. Proceeds of such sales shall be remitted to the State treasury.

(c) The Administrative Officer of the Courts shall furnish, without charge, one copy of the advance sheets of the appellate division to each justice and judge of the General Court of Justice, to each superior court district attorney, to each superior court clerk, to each district court prosecutor, to each special counsel at regional psychiatric facilities, and, in such numbers as may be reasonably necessary, to the Supreme Court library. (1967, c. 108, s. 1; c. 691, s. 57; 1969, c. 1190, s. 1; 1971, c. 377, s. 2; 1975, c. 879, s. 46; 1977, c. 721, s. 1.)

§ 7A-7. Law clerks; secretaries and stenographers.

(a) Each justice and judge of the appellate division is entitled to the services of one research assistant, who must be a graduate of an accredited law school. The salaries of research assistants shall be set by the Administrative Officer of the Courts, subject to the approval of the Supreme Court.

(b) The Administrative Officer of the Courts shall determine the number and salaries of all secretaries and stenographers in the appellate division. (1967, c. 108, s. 1.)

§§ 7A-8, 7A-9: Reserved for future codification purposes.

Article 3.

The Supreme Court.

§ 7A-10. Organization; compensation of justices.

(a) The Supreme Court shall consist of a Chief Justice and six associate justices, elected by the qualified voters of the State for terms of eight years. Before entering upon the duties of his office, each justice shall take an oath of office. Four justices shall constitute a quorum for the transaction of the business of the court. Sessions of the court shall be held in the city of Raleigh, and scheduled by rule of court so as to discharge expeditiously the court's business.

(b) The Chief Justice and each of the associate justices shall receive the annual salary provided in the budget appropriations act. Each justice is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally. (1967, c. 108, s. 1.)

§ 7A-10.1. Authority to prescribe standards of judicial conduct.

The Supreme Court is authorized, by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice. (1973, c. 89.)

§ 7A-11. Clerk of the Supreme Court; salary; bond; fees; oath.

The clerk of the Supreme Court shall be appointed by the Supreme Court to serve at its pleasure. The annual salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court. The clerk may appoint assistants in the number and at the salaries fixed by the Administrative Officer of the Courts. The clerk shall perform such duties as the Supreme Court may assign, and shall be bonded to the State, for faithful performance of duty, in the same manner as the clerk of superior court, and in such amount as the Administrative Officer of the Courts shall determine. He shall adopt a seal of office, to be approved by the Supreme Court. A fee bill for services rendered by the clerk shall be fixed by rule of the Supreme Court, and all such fees shall be remitted to the State treasury, except that charges to litigants for the reproduction of appellate records and briefs shall be fixed and administered as provided by rule of the Supreme Court. The State Auditor shall audit the financial accounts of the clerk at least once a year. Before entering upon the duties of his office, the clerk shall take the oath of office prescribed by law. (1967, c. 108, s. 1; 1969, c. 1190, s. 2; 1973, c. 750.)

§ 7A-12. Supreme Court marshal.

The Supreme Court may appoint a marshal to serve at its pleasure, and to perform such duties as it may assign. The marshal shall have the criminal and civil powers of a sheriff, and any additional powers necessary to execute the orders of the appellate division in any county of the State. His salary shall be fixed by the Administrative Officer, subject to the approval of the Supreme Court. The marshal may appoint such assistants, and at such salaries, as may be authorized by the Administrative Officer of the Courts. The Supreme Court, in its discretion, may appoint the Supreme Court librarian, or some other suitable employee of the court, to serve in the additional capacity of marshal. (1967, c. 108, s. 1.)

§ 7A-13. Supreme Court library; functions; librarian; library committee; seal of office.

(a) The Supreme Court shall appoint a librarian of the Supreme Court library, to serve at the pleasure of the court. The annual salary of the librarian shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Supreme Court. The librarian may appoint assistants in numbers and at salaries to be fixed by the Administrative Officer of the Courts.

(b) The primary function of the Supreme Court library is to serve the appellate division of the General Court of Justice, but it may render service to the trial divisions of the General Court of Justice, to State agencies, and to the general public, under such regulations as the librarian, subject to the approval of the library committee, may promulgate.

(c) The library shall be maintained in the city of Raleigh, except that if the Court of Appeals sits regularly in locations other than the city of Raleigh, branch libraries may be established at such locations for the use of the Court of Appeals.

(d) The librarian shall promulgate rules and regulations for the use of the library, subject to the approval of a library committee, to be composed of two justices of the Supreme Court appointed by the Chief Justice, and one judge of the Court of Appeals appointed by the Chief Judge.

(e) The librarian may adopt a seal of office.

(f) The librarian may operate a copying service by means of which he may furnish certified or uncertified copies of all or portions of any document, paper, book, or other writing in the library that legally may be copied. When a certificate is made under his hand and attested by his official seal, it shall be received as prima facie evidence of the correctness of the matter therein contained, and as such shall receive full faith and credit. The fees for copies shall be approved by the library committee, and the fees so collected shall be administered in the same manner as the charges to litigants for the reproduction of appellate records and briefs. (1967, c. 108, s. 1.)

Cross References. — For rules and regulations governing use of library, see Appendix X in Volume 4A.

§ 7A-14. Reprints of Supreme Court Reports.

The Supreme Court is authorized to have such of the Reports of the Supreme Court of the State of North Carolina as are not on hand for sale, republished and numbered consecutively, retaining the present numbers and names of the reporters and by means of star pages in the margin retaining the original numbering of the pages. The Supreme Court is authorized to have such Reports

reprinted without any alteration from the original edition thereof, except as may be directed by the Supreme Court. The contract for such reprinting and republishing shall be made by the Administrative Office of the Courts in the manner prescribed in G.S. 7A-6. Such republication shall thus continue until the State shall have for sale all of such Reports; and hereafter when the editions of any number or volume of the Supreme Court Reports shall be exhausted, it shall be the duty of the Supreme Court to have the same reprinted under the provisions of this section and G.S. 7A-6. In reprinting the Reports that have already been annotated, the annotations and the additional indexes therein shall be retained. (Code, s. 3634; 1885, c. 309; 1889, c. 473, ss. 1-4, 6; Rev., s. 5361; 1907, c. 503; 1917, cc. 201, 292; C. S., s. 7671; 1923, c. 176; 1929, c. 39, s. 2; 1975, c. 328.)

Editor's Note. — This section was formerly § 147-52. It was revised and transferred to its present position by Session Laws 1975, c. 328.

§ 7A-15: Reserved for future codification purposes.

ARTICLE 4.

Court of Appeals.

§ 7A-16. Creation and organization.

The Court of Appeals is created effective January 1, 1967. It shall consist initially of six judges, elected by the qualified voters of the State for terms of eight years. The Chief Justice of the Supreme Court shall designate one of the judges as Chief Judge, to serve in such capacity at the pleasure of the Chief Justice. Before entering upon the duties of his office, a judge of the Court of Appeals shall take the oath of office prescribed for a judge of the General Court of Justice.

The Governor on or after July 1, 1967, shall make temporary appointments to the six initial judgeships. The appointees shall serve until January 1, 1969. Their successors shall be elected at the general election for members of the General Assembly in November, 1968, and shall take office on January 1, 1969, to serve for the remainder of the unexpired term which began on January 1, 1967.

Upon the appointment of at least five judges, and the designation of a Chief Judge, the court is authorized to convene, organize, and promulgate, subject to the approval of the Supreme Court, such supplementary rules as it deems necessary and appropriate for the discharge of the judicial business lawfully assigned to it.

Effective January 1, 1969, the number of judges is increased to nine, and the Governor, on or after March 1, 1969, shall make temporary appointments to the additional judgeships thus created. The appointees shall serve until January 1, 1971. Their successors shall be elected at the general election for members of the General Assembly in November, 1970, and shall take office on January 1, 1971, to serve for the remainder of the unexpired term which began on January 1, 1969.

Effective January 1, 1977, the number of judges is increased to 12; and the Governor, on or after July 1, 1977, shall make temporary appointments to the additional judgeships thus created. The appointees shall serve until January 1, 1979. Their successors shall be elected at the general election for members of the General Assembly in November, 1978, and shall take office on January 1, 1979, to serve the remainder of the unexpired term which began on January 1, 1977.

The Court of Appeals shall sit in panels of three judges each. The Chief Judge insofar as practicable shall assign the members to panels in such fashion that each member sits a substantially equal number of times with each other member. He shall preside over the panel of which he is a member, and shall designate the presiding judge of the other panel or panels.

Three judges shall constitute a quorum for the transaction of the business of the court, except as may be provided in § 7A-32.

In the event the Chief Judge is unable, on account of absence or temporary incapacity, to perform the duties placed upon him as Chief Judge, the Chief Justice shall appoint an acting Chief Judge from the other judges of the Court, to temporarily discharge the duties of Chief Judge. (1967, c. 108, s. 1; 1969, c. 1190, s. 3; 1973, c. 301; 1977, c. 1047.)

Legal Periodicals. — For article on "The North Carolina Court of Appeals — An Outline of Appellate Procedure," see 46 N.C.L. Rev. 705 (1968).

CASE NOTES

Cited in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968); Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972); In re Annexation Ordinance, 300 N.C. 337, 266 S.E.2d 661 (1980).

§ 7A-17: Repealed by Session Laws 1969, c. 1190, s. 57, effective July 1, 1969.

§ 7A-18. Compensation of judges.

The Chief Judge and each associate judge of the Court of Appeals shall receive the annual salary provided in the budget appropriations act. Each judge is entitled to reimbursement for travel and subsistence expenses at the rate allowed State employees generally. (1967, c. 108, s. 1.)

§ 7A-19. Seats and sessions of court.

(a) The Court of Appeals shall sit in Raleigh, and at such other locations within the State as the Supreme Court may designate.

(b) The Department of Administration shall provide adequate quarters for the Court of Appeals.

(c) The Chief Judge shall schedule sessions of the court as required to discharge expeditiously the court's business. (1967, c. 108, s. 1.)

§ 7A-20. Clerk; oath; bond; salary; assistants; fees.

(a) The Court of Appeals shall appoint a clerk to serve at its pleasure. Before entering upon his duties, the clerk shall take the oath of office prescribed for the clerk of the Supreme Court, conformed to the office of clerk of the Court of Appeals, and shall be bonded, in the same manner as the clerk of superior court, in an amount prescribed by the Administrative Officer of the Courts, payable to the State, for the faithful performance of his duties. The salary of the clerk shall be fixed by the Administrative Officer of the Courts, subject to the approval of the Court of Appeals. The number and salaries of his assistants, and their bonds, if required, shall be fixed by the Administrative Officer of the Courts. The clerk shall adopt a seal of office, to be approved by the Court of Appeals.

(b) Subject to approval of the Supreme Court, the Court of Appeals shall promulgate from time to time a fee bill for services rendered by the clerk, and

such fees shall be remitted to the State Treasurer, except that charges to litigants for the reproduction of appellate records and briefs shall be fixed and administered as provided by rule of the Supreme Court. The State Auditor shall audit the financial accounts of the clerk at least once a year. (1967, c. 108, s. 1.)

§ 7A-21. Marshal; powers; salary.

The Court of Appeals may appoint a marshal to serve at its pleasure and to perform such duties as it may assign. The marshal shall have the criminal and civil powers of a sheriff and any additional powers necessary to execute the orders of the appellate division in any county of the State. His salary shall be fixed by the Administrative Officer, subject to the approval of the Court of Appeals. (1981, c. 485.)

§§ 7A-22 to 7A-24: Reserved for future codification purposes.

ARTICLE 5.

Jurisdiction.

§ 7A-25. Original jurisdiction of the Supreme Court.

The Supreme Court has original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; the decisions shall be reported to the next session of the General Assembly for its action. The court shall by rule prescribe the procedures to be followed in the proper exercise of the jurisdiction conferred by this section. (1967, c. 108, s. 1.)

CASE NOTES

Section Unconstitutional. — Even if the General Assembly did not intend to repeal this section by ratification of the 1971 revision of N.C. Const., Art. IV, this section is unconstitutional. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

This section was rendered null and void when the electorate approved revised N.C. Const., Art. IV, which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. Smith v. State, 289 N.C. 303, 212 S.E.2d 412 (1976).

Legislative Intent to Repeal. — It was the intent of the General Assembly that upon the ratification of the 1971 revision of N.C. Const., Art. IV, this section be repealed, since the jurisdiction which this section purports to give to the Supreme Court exceeded that granted to it in revised Article IV of the State Constitution. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

No Execution to Enforce Judgment Available from Supreme Court. — In the event a plaintiff is successful in establishing a claim for breach of contract against the State, he cannot obtain execution from the Supreme Court to enforce the judgment. Smith v. State, 289 N.C. 303, 222 S.E.2d 412 (1976).

§ 7A-26. Appellate jurisdiction of the Supreme Court and the Court of Appeals.

The Supreme Court and the Court of Appeals respectively have jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference, in accordance with the system of appeals provided in this Article. (1967, c. 108, s. 1.)

Legal Periodicals. — For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Appeals in Civil Causes Distinguished from Appeals in Criminal Causes. — The constitutional and statutory structure of the General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals in criminal causes must first go to the superior court. State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

Supreme Court Has Authority to Give Relief for Error of Law. — Supreme Court has authority to review the record on appeal and to give appropriate relief for an error of law committed by the trial court. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

But No Authority to Grant Relief from Criminal Trial Free from Error of Law. — Supreme Court has no authority to grant relief to a defendant convicted of a criminal offense in a trial free from an error of law for the reason that it disagrees with the jury concerning the credibility of a witness for the State. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Supreme Court must accept as conclusive the verdict of the jury, so far as the credibility of witnesses is concerned. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

Objections and Exceptions Necessary to Preserve Legal Questions on Appeal. — Jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

When Findings of Trial Court Conclusive on Appeal. — Where evidence properly in the record fully supports the findings of fact which the trial court made, and the record itself does not disclose that these findings were based on information obtained by the trial judge in a manner violative of plaintiff's rights, the trial court's findings are conclusive on appeal. Horton v. Horton, 12 N.C. App. 526, 183 S.E.2d 794, cert. denied, 279 N.C. 727, 184 S.E.2d 884 (1971).

It is not the function of the Court of Appeals to make findings of fact. Horton v. Horton, 12 N.C. App. 526, 183 S.E.2d 794, cert. denied, 279 N.C. 727, 184 S.E.2d 884 (1971).

The Court of Appeals has no jurisdiction to entertain a motion for summary judgment made for the first time on appeal. Britt v. Allen, 12 N.C. App. 399, 183 S.E.2d 303 (1971).

Quoted in State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968).

Cited in State v. Morris, 41 N.C. App. 164, 254 S.E.2d 241 (1979).

§ 7A-27. Appeals of right from the courts of the trial divisions.

(a) From a judgment of a superior court which includes a sentence of death or imprisonment for life, unless the judgment was based on a plea of guilty or nolo contendere, appeal lies of right directly to the Supreme Court.

(b) From any final judgment of a superior court, other than one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, appeal lies of right to the Court of Appeals.

(c) From any final judgment of a district court in a civil action appeal lies of right directly to the Court of Appeals.

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

(e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals. (1967, c. 108, s. 1; 1971, c. 377, s. 3; 1973, c. 704; 1977, c. 711, s. 4.)

Legal Periodicals. — For a survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For survey of 1978 law on civil procedure, see 57 N.C.L. Rev. 891 (1979).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

CASE NOTES

I. General Consideration.
II. Sentence of Death or Life Imprisonment.
III. Final Judgments.
IV. Interlocutory Orders.
A. Generally.
B. Particular Orders.

I. GENERAL CONSIDERATION.

This section was not repealed or nullified by the enactment of Chapter 1A of the General Statutes prescribing the presently effective Rules of Civil Procedure. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

For all practical purposes there is an unlimited right of appeal in North Carolina to the Appellate Division of the General Court of Justice from any final judgment of the superior court or the district court in civil and criminal cases. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

The right to appeal must be exercised in accordance with the established rules of practice and procedure. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

Right to Counsel. — Section 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Duty to Dismiss Appeal. — It is the duty of an appellate court to dismiss an appeal if there is no right to appeal. Pasour v. Pierce, 46 N.C. App. 636, 265 S.E.2d 652 (1980).

Where an appealing party has no right to appeal, an appellate court should on its own motion dismiss the appeal even though the question of appealability has not been raised by the parties themselves. Metcalf v. Palmer, 46 N.C. App. 622, 265 S.E.2d 484 (1980).

Applied in State v. Henry, 1 N.C. App. 409, 161 S.E.2d 622 (1968); State v. Lentz, 5 N.C. App. 177, 167 S.E.2d 887 (1969); Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969); State v. Moore, 276 N.C. 142, 171 S.E.2d 453 (1970); State v. Tomblin, 276 N.C. 273, 171 S.E.2d 901 (1970); State v. Henderson, 276 N.C. 430, 173 S.E.2d 291 (1970); State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972); State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972); State v. Cox, 281 N.C. 275, 188 S.E.2d 356 (1972); State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Edwards, 282 N.C. 578, 193 S.E.2d 736 (1973); State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800 (1973); State v. Washington, 283 N.C. 175, 195 S.E.2d 534 (1973); State v. Davis, 284 N.C. 701, 202 S.E.2d 770 (1974); Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974); State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974); State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974); National Home Life Assurance Co. v. Ingram, 21 N.C. App. 591, 205 S.E.2d 313 (1974); State v. Lowery, 286 N.C. 698, 213 S.E.2d 255 (1975); State v. Smathers, 287 N.C. 226, 214 S.E.2d 112 (1975); State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975); State v. Brunson, 287 N.C. 436, 215 S.E.2d 94 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. King, 287 N.C. 645, 215 S.E.2d 540 (1975); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. McMorris, 290 N.C. 286, 225 S.E.2d 553 (1976); State v. Thompson, 290 N.C. 431, 226 S.E.2d 487 (1976); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976); State v. Cawthorne, 290 N.C. 639, 227 S.E.2d 528 (1976); State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976); State v. Hicks, 290 N.C. 767, 228 S.E.2d 252 (1976); State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976); State v. Monk, 291

N.C. 37, 229 S.E.2d 163 (1976); State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976); State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976); State v. Miley, 291 N.C. 431, 230 S.E.2d 537 (1976); Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Britt, 291 N.C. 528, 231 S.E.2d 644 (1977); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Locklear, 291 N.C. 598, 231 S.E.2d 256 (1977); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977); State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977); State v. Stanfield, 292 N.C. 357, 233 S.E.2d 574 (1977); State v. Herndon, 292 N.C. 424, 233 S.E.2d 557 (1977); State v. Womble, 292 N.C. 455, 233 S.E.2d 454 (1977); State v. Jones, 292 N.C. 513, 234 S.E.2d 555 (1977); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Willard, 292 N.C. 567, 234 S.E.2d 587 (1977); State v. Beeson, 292 N.C. 602, 234 S.E.2d 595 (1977); State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979); State v. Reynolds, 298 N.C. 380, 259 S.E.2d 843 (1979); Whalehead Properties v. Coastland Corp., 299 N.C. 270, 261 S.E.2d 899 (1980); State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980); State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980); State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980); McGinnis v. McGinnis, 44 N.C. App. 381, 261 S.E.2d 491 (1980).

Stated in In re Annexation Ordinance, 300 N.C. 337, 266 S.E.2d 661 (1980); Stahl-Rider, Inc. v. State, 48 N.C. App. 380, 269 S.E.2d 217 (1980).

Cited in State v. Lipscomb, 274 N.C. 436, 163 S.E.2d 788 (1968); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970); State v. Blackwell, 276 N.C. 714, 174 S.E.2d 534 (1970); Shaw v. Stiles, 13 N.C. App. 173, 185 S.E.2d 268 (1971); Fishel v. Grifton United Methodist Church, 13 N.C. App. 238, 185 S.E.2d 322 (1971); State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975); State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975); State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975); State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976); State v. Harrill, 289 N.C. 186, 221 S.E.2d 325 (1976); State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976); State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976); State v. Biggs, 289 N.C. 522, 223 S.E.2d 371 (1976); State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976); State v. Perry, 293 N.C. 97, 235 S.E.2d 52 (1977); State v. White, 293 N.C. 91, 235 S.E.2d 55 (1977); State v. Bishop, 293 N.C. 84, 235 S.E.2d 214 (1977); State v. Cole, 293 N.C. 328, 237 S.E.2d 814 (1977); State v. Constance, 293 N.C. 581, 238 S.E.2d 294 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Foster, 293 N.C. 674, 239 S.E.2d 449 (1977); State v. Garrison, 294 N.C. 270, 240 S.E.2d 377 (1978); State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978); State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978); State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978); State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Freeman, 295 N.C. 210, 244 S.E.2d 680 (1978); State v. Connley, 295 N.C. 327, 245 S.E.2d 663 (1978); State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978); State v. Berry, 295 N.C. 534, 246 S.E.2d 758 (1978); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Mason, 295 N.C. 584, 248 S.E.2d 241 (1978); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); Digsby v. Gregory, 35 N.C. App. 59, 240 S.E.2d 491 (1978); Hamilton v. Hamilton, 36 N.C. App. 755, 245 S.E.2d 399 (1978); Williams v. Holland, 39 N.C. App. 141, 249 S.E.2d 821 (1978); State v. Wade, 296 N.C. 454, 251 S.E.2d 407 (1979); State v. Scott, 296 N.C. 519, 251 S.E.2d 414 (1979); State v. Henley, 296 N.C. 547, 251 S.E.2d 463 (1979); State v. Hunt, 297 N.C. 131, 254 S.E.2d 19 (1979); State v. Ford, 297 N.C. 144, 254 S.E.2d 14 (1979); State v. Stinson, 297 N.C. 168, 254 S.E.2d 23 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Barnes, 297 N.C. 442, 255 S.E.2d 386 (1979); State v. Davis, 297 N.C. 566, 256 S.E.2d 184 (1979); State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979); State v. Keller, 297 N.C. 674, 256 S.E.2d 710 (1979); State v. Colvin, 297 N.C. 691, 256 S.E.2d 689 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Spaulding, 298 N.C. 149, 257 S.E.2d 391 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979); State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Perry, 298 N.C. 502, 259 S.E.2d 496 (1979); State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); State v. Wetmore, 298 N.C. 743, 259 S.E.2d 870 (1979); State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980); State v. Ashford, 301 N.C. 512, 272 S.E.2d 126 (1980); Nichols v. State Employees' Credit Union, 46 N.C. App. 294, 264 S.E.2d 793 (1980).

II. Sentence of Death or Life Imprisonment.

The term "imprisonment for life" as it is used in this section means only a determinate life sentence and does not include an indeterminate sentence merely because the stated maximum is a life term. State v. Ferrell, 300 N.C. 157, 265 S.E.2d 210 (1980).

Petitions to Review Judgments in Habeas Corpus Proceedings. — By analogy, subsection (a) of this section, § 15-180.2 (now repealed) and App. R. 21(b) are logically applicable to petitions for certiorari to review judgments in habeas corpus proceedings involving the restraint of prisoners under sentences of death or life imprisonment. State v. Niccum, 293 N.C. 276, 238 S.E.2d 141 (1977).

Appeal to Supreme Court under § 15A-979 When Charge Is Death or Life Imprisonment. — Section 15A-979 does not specify whether an appeal lies to the Court of Appeals or to the Supreme Court. Subsection (a) of this section, however, stipulates that there is an appeal of right to the Supreme Court from a superior court judgment imposing a sentence of death or life imprisonment. When these two statutes are considered together, it is proper to appeal directly to the Supreme Court if the punishment for the charge(s) is either death or life imprisonment. State v. Silhan, 295 N.C. 636, 247 S.E.2d 902 (1978).

III. Final Judgments.

Denial of Application for Certiorari Is Not Final Judgment. — A "judgment" of the superior court denying defendant's application to that court for a writ of certiorari to review the proceedings of the district court in a criminal case was not a final judgment within the meaning of subsection (b) of this section, and defendant was not authorized to appeal therefrom to the Court of Appeals as a matter of right; defendant's only remedy was by petition for certiorari to the Court of Appeals. State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970).

Appeal from Order of Superior Court Affirming Annexation Ordinance. — By this section initial appellate jurisdiction of an appeal from an order of the superior court affirming an annexation ordinance is given to the Court of Appeals, subject, however, to the provisions of § 7A-31. Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972).

IV. Interlocutory Orders.

A. Generally.

"Interlocutory Order" Defined. — An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978).

When Interlocutory Order Appealable Generally. — Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is appealable. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

This section in effect provides that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Citicorp Person-to-Person Fin. Center, Inc. v. Stallings, 601 Sales, Inc., 49 N.C. App. 187, 270 S.E.2d 567 (1980).

An appeal does not lie from an interlocutory order unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

A nonappealable interlocutory order which involves the merits and necessarily affects the judgment is reviewable on appropriate exception upon an appeal from the final judgment in the cause. An earlier appeal from such an interlocutory order is fragmentary and premature, and will be dismissed. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

The General Assembly did not restrict the right of appeal provided by § 1-277 and subsection (d) of this section by engrafting Rule 54(b) requirements upon them. Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976).

The effect of both § 1-277 and subsection (d) of this section is to provide that no appeal will lie to an appellate court from an interlocutory order or ruling of a trial court unless such order or ruling deprives the appellant of a substantial right which he will lose if the order or ruling is not reviewed before final judgment. Clark v. Clark, 42 N.C. App. 84, 255 S.E.2d 568 (1979).

An interlocutory order which does not affect a "substantial right" of one of the parties under § 1-277 and subsection (d) of this section is not appealable, and the avoidance of a rehearing or trial is not considered to be such a "substantial right." Davis v. Mitchell, 46 N.C. App. 272, 265 S.E.2d 248 (1980).

Appellate Court as Dispatcher of Appeals. — To the extent that judgments as to one or more but fewer than all parties are determined by the appellate courts of this State to affect a "substantial right" of one of the litigants under § 1-277 and subsection (d) of this section, the procedure for trial court certification of such judgments as appealable established in § 1A-1, Rule 54(b), is bypassed and the appellate court is substituted as the true dispatcher of appeals. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

Rule against Allowing Appeal from Interlocutory Orders Strictly Construed. — Strict construction of the rule against allowing appeal from an interlocutory order of the trial court serves the purpose of eliminating the unnecessary delay and expense of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

Effect of Procedures for Staying Execution of Judgment. — The existence of the procedures under §§ 1-269, 1-289 and 1A-1, Rule 62, for staying execution on the judgment does not prevent the entry of the judgment from affecting a substantial right of the judgment debtor. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

No Appeal as Matter of Right from Interlocutory Orders in Criminal Cases. — In this section there is no provision for an appeal as a matter of right from interlocutory orders in criminal cases. State v. Lance, 1 N.C. App. 620, 162 S.E.2d 154 (1968); State v. Smith, 4 N.C. App. 491, 166 S.E.2d 870 (1969).

In a criminal case there is no provision in the statute for an appeal to the Court of Appeals as a matter of right from an interlocutory order entered therein. State v. Black, 7 N.C. App. 324, 172 S.E.2d 217 (1970).

Subsection (d) of this section makes no provision for an appeal as a matter of right from an interlocutory order in a criminal action. State v. Bryant, 12 N.C. App. 530, 183 S.E.2d 824 (1971), rev'd on other grounds, 280 N.C. 407, 185 S.E.2d 854 (1972).

B. Particular Orders.

Order Denying Motion for Change of Venue. — Defendant's purported appeal from an interlocutory order denying defendant's motion for a change of venue pursuant to § 1-83(2) for the convenience of the witnesses and the ends of justice was dismissed as premature. Furches v. Moore, 48 N.C. App. 430, 269 S.E.2d 635 (1980).

Order Regarding Interrogatories Interlocutory. — Trial court's order sustaining objections to, and granting a motion to strike, certain interrogatories, denying defendants' motion to compel answers to those interrogatories, and also denying defendants' motion to permit them to respond to plaintiff's request for admissions was interlocutory, and defendants' appeal was fragmentary and premature. First Union Nat'l Bank v. Olive, 42 N.C. App. 574, 257 S.E.2d 100 (1979).

Order granting the right of intervention is not appealable, as any of the original parties may appeal from an adverse decision granting the intervenor relief on the merits. Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

An order granting intervention may be reviewed upon appeal from the final judgment in the cause. Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

Although the rule is not absolute, ordinarily no appeal will lie from an order permitting intervention of parties unless the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment. The rule applies with equal vigor without regard to whether the trial court grants a motion to intervene as a matter of right pursuant to § 1A-1, Rule 24(a) or as permissive intervention pursuant to § 1A-1, Rule 24(b). Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640, cert. denied, 295 N.C. 264, 245 S.E.2d 781 (1978).

Denial of Motion to Dismiss. — Ordinarily, there is no right of appeal from the refusal of a motion to dismiss. The refusal to dismiss the action generally will not seriously impair any right of defendant that cannot be corrected upon appeal from final judgment. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

An order denying defendant's motion to dismiss plaintiff's claim for punitive damages is not immediately appealable. Williams v. East Coast Sales, Inc., 50 N.C. App. 565, — S.E.2d — (1981).

Where defendant was ordered by the trial court through an interlocutory order to pay plaintiff's legal fees, and where defendant did not perfect his appeal from such judgment, defendant did not lose his right to attack the judgment since the record indicated that the appeal was not taken because of an agreement between the parties' counsel to vacate the order in question. Stroupe v. Stroupe, 301 N.C. 656, 273 S.E.2d 434 (1981).

Same — Failure to State Claim. — The trial court's refusal to allow defendant's motion to dismiss for failure to state a claim upon which relief can be granted pursuant to subsection (b)(6) of § 1A-1, Rule 12 did not put an end to the action or seriously impair any substantial right of defendant that could not be corrected upon appeal from final judgment.

Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Same — Failure to Join Necessary Party. — No substantial right of the defendant was impaired by the trial court's denial of the motion to dismiss for failure to join a necessary party pursuant to subsection (b)(7) of § 1A-1, Rule 12. The trial court did not rule that other parties were not necessary to be joined. It ruled that the action should not be dismissed for that purpose. Defendant still had adequate opportunity in the trial court for a determination on the question of joinder of parties. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

Order Granting Motion to Amend and Denying Motion for Judgment on the Pleadings. — An order granting a motion to amend and denying a motion for judgment on the pleadings is obviously not a final judgment but is interlocutory. Consequently, no appeal lies of right. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).

But denial of motion to amend answer to allege compulsory counterclaim affects a substantial right and is immediately appealable. Hudspeth v. Bunzey, 35 N.C. App. 231, 241 S.E.2d 119, appeal dismissed, 294 N.C. 736, 244 S.E.2d 154 (1978).

Appeal from Contempt Order. — See Willis v. Duke Power Co., 291 N.C. 19, 229 S.E.2d 191 (1976).

Appeal from Order Granting Summary Judgment. — The order granting summary judgment denies plaintiff a jury trial on the issue of its claim against the bank and, in effect, determines the claim in favor of the bank. Thus the order affects a substantial right and is appealable under § 1-277 and this section. Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

Order Granting Partial Summary Judgment. — The trial court's entry of summary judgment for a monetary sum against one of two defendants affected a "substantial right" of that defendant, and such judgment was therefore immediately appealable under § 1-277 and this section, notwithstanding the absence of an express determination by the trial judge that there was "no just reason for delay" as required by § 1A-1, Rule 54(b). Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

Same — Where Injunction Part of Order. — While ordinarily, the allowance of a motion for summary judgment on the issue of liability, reserving for trial the issue of damages, will not be appealable, where a mandatory injunction was part of the order for partial summary judgment, it clearly affected a "substantial right" of the defendant and the allowance of the motion for partial summary judgment was appealable. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, cert. denied, 297 N.C. 609, 257 S.E.2d 217 (1979).

Where defendants would immediately suffer the consequences of complying with the mandatory injunction order that they remove anchors and boat slips constructed on plaintiff's submerged lands, this affected a substantial right of defendants, giving them the right to appeal from the interlocutory order granting summary judgment for plaintiffs except on the issue of damages. Steel Creek Dev. Corp. v. James, 300 N.C. 631, 268 S.E.2d 205 (1980).

Partial summary judgment holding that third party defendant must indemnify defendant for any judgment on plaintiff's claim is interlocutory and not appealable under § 1-277 or subsection (d) of this section since the judgment will not work injury to third party defendant if not corrected before appeal from a final judgment. Cook v. Export Leaf Tobacco Co., 47 N.C. App. 187, 266 S.E.2d 754 (1980).

The denial of summary judgment is interlocutory in nature and not appealable under § 1-277 and this section, unless a substantial right of one of the parties would be affected if the appeal were not heard prior to final judgment. Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980).

An order setting aside without prejudice a summary judgment on the grounds of procedural irregularity, is interlocutory and not immediately appealable. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978).

Order Limiting Scope of Lis Pendens in Action to Quiet Title. — In an action to quiet title to property which defendants have incorporated into a residential subdivision, an order limiting the scope of lis pendens filed by plaintiffs only to the area of the subdivision which they claim was interlocutory and not immediately appealable. Whyburn v. Norwood, 37 N.C. App. 610, 246 S.E.2d 540 (1978).

An order denying a motion to cancel a notice of lis pendens is not immediately appealable where the property owner fails to show that a substantial right of his has been impaired. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979).

An order requiring payment of alimony pendente lite and attorneys' fees affects a substantial right from which an appeal lies as a matter of right. Peeler v. Peeler, 7 N.C. App. 456, 172 S.E.2d 915 (1970).

An order requiring the defendant husband to vacate premises which had been occupied by him and his wife as their home affected a substantial right and was appealable to the Court of Appeals, where the order was made after a hearing and before the case was tried. Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978).

§ 7A-28. Decisions of Court of Appeals on post-trial motions for appropriate relief final.

Decisions of the Court of Appeals upon review of motions for appropriate relief listed in G.S. 15A-1415(b) are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise. (1981, c. 470, s. 1.)

Editor's Note. — Session Laws 1981, c. 470, s. 4, provides: "This act shall become effective Oct. 1, 1981, and shall apply to all decisions of the Court of Appeals on G.S. 15A-1415(b) motions made on or after that date."

The original § 7A-28, which was substantially similar to this section, was enacted by Session Laws 1967, c. 108, s. 1, and repealed by Session Laws 1977, c. 711, s. 33.

§ 7A-29. Appeals of right from certain administrative agencies.

From any final order or decision of the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-290 and 105-342, or an appeal from the Commissioner of Insurance pursuant to G.S. 58-9.4 or from the Governor pursuant to the Waste Management Act of 1981, G.S. 130-166.17B and G.S. 104E-6.2, appeal as of right lies directly to the Court of Appeals. (1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28.)

Cross References. — As to the scope of judicial review of orders of the Property Tax Commission, see §§ 105-345 through 105-346.

Effect of Amendments. — The 1981 amendment inserted "or from the Governor pursuant to the Waste Management Act of 1981, G.S. 130-166.17B and G.S. 104E-6.2" near the end of the section.

Session Laws 1981, c. 704, ss. 1 and 2, provides:

"Section 1. Short title. This act may be referred to as the Waste Management Act of 1981.

"Sec. 2. Purpose. The purpose of this act is to provide for a comprehensive system for management of hazardous and low-level radioactive waste in North Carolina as reflected in the 1981 Report of the Governor's Task Force on Waste Management."

Session Laws 1981, c. 704, s. 26, provides that the act shall be liberally construed to carry out the policies set forth in the act.

Session Laws 1981, c. 704, s. 27, contains a severability clause.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For survey of 1979 tax law, see 58 N.C.L. Rev. 1548 (1980).

CASE NOTES

Right of Appeal Expressly Granted. — The right of appeal from any final order or decision of the Utilities Commission is expressly granted by this section. Morgan v. Duke Power Co., 22 N.C. App. 497, 206 S.E.2d 507, appeal dismissed, 285 N.C. 759, 209 S.E.2d 282 (1974).

No appeal lies from an interlocutory order of the industrial commission. There is a right of appeal only from a final order. Vaughn v. North Carolina Dep't of Human Resources, 37 N.C. App. 86, 245 S.E.2d 892, aff'd, 296 N.C. 683, 251 S.E.2d 792 (1978).

No appeal lies from an interlocutory order of the North Carolina Industrial Commission. Only from a final order or decision of the industrial commission is there an appeal of right to the appellate court. Lynch v. M.B. Kahn Constr. Co., 41 N.C. App. 127, 254 S.E.2d 236, cert. denied, 298 N.C. 298, 259 S.E.2d 914 (1979).

An order of the hearing commission of the State Bar denying defendant's motion to dismiss on the ground of lack of jurisdiction is interlocutory; therefore, he cannot appeal therefrom as a matter of right. North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979).

Applied in Morgan v. VEPCO, 22 N.C. App. 300, 206 S.E.2d 338 (1974).

Cited in State ex rel. Utilities Comm'n v. General Tel. Co., 17 N.C. App. 727, 195 S.E.2d 311 (1973).

§ 7A-30. Appeals of right from certain decisions of the Court of Appeals.

Except as provided in § 7A-28, from any decision of the Court of Appeals rendered in a case

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State, or

(2) In which there is a dissent, or

(3) Which involves review of a decision of the North Carolina Utilities Commission in a general rate-making case, an appeal lies of right to the Supreme Court. (1967, c. 108, s. 1.)

Editor's Note. — The original § 7A-28, referred to in this section, was repealed by Session Laws 1977, c. 711, s. 33, but a new and substantially similar § 7A-28 was enacted by Acts 1981, c. 470, s. 1.

Legal Periodicals. — For a statistical analysis of all of the opinions of the North Carolina Supreme Court for the year 1977, see 15 Wake Forest L. Rev. 39 (1979).

CASE NOTES

Legislative Intent. — The General Assembly of North Carolina intended to insure a review by the Supreme Court of questions on which there was a division in the intermediate appellate court; no such review was intended for claims joined or consolidated in the lower appellate court and on which that court rendered unanimous decision. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971); State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

In establishing the North Carolina Court of Appeals, defining its jurisdiction, and providing a system of appeals, the General Assembly followed the basic principle that there should be only one trial on the merits and one appeal on the law, as of right, in every case. Consequently, double appeals as of right — first to the Court of Appeals and then to the Supreme Court — are authorized only in the three instances specified by this section. State v. Cumber, 280 N.C. 127, 185 S.E.2d 141 (1971).

Had the General Assembly intended to limit double appeals in criminal cases to the defendant only, it would have said so. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Requirement of Constitutional Question. — The constitutional question must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Dismissal Where Involvement of Substantial Constitutional Question Not Shown. — An appellant seeking a second review by the Supreme Court as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such question or suffer dismissal. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

This section requires that an appellant must either allege and show the existence of a real and substantial constitutional question which has not already been the subject of conclusive judicial determination or suffer dismissal. Thompson v. Thompson, 288 N.C. 120, 215 S.E.2d 606 (1975).

Respondent's appeal based solely on the assertion that the district court's allowance of an amendment to a juvenile petition deprived him of a constitutional right was dismissed by the Supreme Court, ex mero motu, because it did not directly involve a substantial constitutional question within the meaning of this section. In re Jones, 279 N.C. 616, 184 S.E.2d 267 (1971).

Mouthing of Constitutional Phrases Will Not Avoid Dismissal. — Mere mouthing of constitutional phrases like "due process of law" and "equal protection of the law" will not avoid dismissal. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968), cert. denied, 393 U.S. 1087,

89 S. Ct. 876, 21 L. Ed. 2d 780 (1969); Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Question Should Be Raised and Passed on in Trial Court. — Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. State v. Mitchell, 276 N.C. 404, 172 S.E.2d 527 (1970); State v. Cumber, 280 N.C. 127, 185 S.E.2d 141 (1971).

Where there was failure to show involvement of a substantial constitutional question which was raised and passed upon in the trial court and properly brought forward for consideration by the Court of Appeals, there was no legal basis for an appeal to the Supreme Court, and the appeal was dismissed. State v. Cumber, 280 N.C. 127, 185 S.E.2d 141 (1971).

And Preserved by Appropriate Objection, etc., Assignment of Error and Argument in Brief. — The Supreme Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court, unless, at the time the alleged violation of such right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief. State v. Mitchell, 276 N.C. 404, 172 S.E.2d 527 (1970).

Dissent Allows Appeal as a Matter of Right. — The aggrieved party, whether the State or the defendant, may appeal to the Supreme Court as of right from any decision of the Court of Appeals in which there is a dissent. State v. Campbell, 282 N.C. 125, 191 S.E.2d 752 (1972).

Scope of Review. — When the Supreme Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by § 7A-31, grants certiorari to review the decision of the Court of Appeals, only the decision of the Court of Appeals is before the Supreme Court for review. The Supreme Court inquires into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Its inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in the Supreme Court, except in those instances in which the Supreme Court elects to exercise its general power of supervision of courts inferior to the Supreme Court. Supreme Court review of a decision by the Court of Appeals upon an appeal from it to the Supreme Court as a matter of right, pursuant to this section, is similarly limited. State v. Williams, 274 N.C. 328, 163 S.E.2d 353 (1968).

Once involvement of a substantial constitutional question is established, the Supreme Court will retain the case and may, in its discretion, pass upon any or all assignments of error, constitutional or otherwise, allegedly committed by the Court of Appeals and properly presented for review. State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968); Bundy v. Ayscue, 276 N.C. 81, 171 S.E.2d 1 (1969).

Right to Counsel. — Section 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Applied in State v. Cavallaro, 274 N.C. 480, 164 S.E.2d 168 (1968); Southern Ry. v. City of Winston-Salem, 275 N.C. 465, 168 S.E.2d 396 (1969); State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969); State v. Bumper, 275 N.C. 670, 170 S.E.2d 457 (1969); State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970); State v. Barrow, 276 N.C. 381, 172 S.E.2d 512 (1970); State v. McCloud, 276 N.C. 518, 173 S.E.2d 753 (1970); North Carolina State Hwy. Comm'n v. Asheville School, Inc., 276 N.C. 556, 173 S.E.2d 909 (1970); Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970); State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); Goldman v. Parkland of Dallas, Inc., 277 N.C. 223, 176 S.E.2d 784 (1970); State v. Gaiten, 277 N.C. 236, 176 S.E.2d 778 (1970); State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970); Marrone v. Long, 277 N.C. 246, 176 S.E.2d 762 (1970); State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970); State v. Jordan, 277 N.C. 341, 177 S.E.2d 289 (1970); State v. Hatcher, 277 N.C. 380, 177 S.E.2d 892 (1970); Williamson v. McNeill, 277 N.C. 447, 177 S.E.2d 859 (1970); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); In re Johnson, 277 N.C. 688, 178 S.E.2d 470 (1971); Southern Ry. v. City of Raleigh, 277 N.C. 709, 178 S.E.2d 422 (1971); Keiger v. Winston-Salem Bd. of Adjustment, 278 N.C. 17, 178 S.E.2d 616 (1971); Blackwell v. Butts, 278 N.C. 615, 180 S.E.2d 835 (1971); State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); Watkins v. Central Motor Lines, 279 N.C. 132, 181 S.E.2d 588 (1971); Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co., 279 N.C. 240, 182 S.E.2d 571 (1971); Brewer v. Harris, 279 N.C. 288, 182 S.E.2d 345 (1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Hunter, 279 N.C. 498, 183 S.E.2d 665 (1971); First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971); Pleasant v. Motors Ins. Co., 280 N.C. 100, 185 S.E.2d 164 (1971); State v. Jackson, 280 N.C. 122, 185 S.E.2d 202 (1971); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972); State v.

Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972); In re Tew, 280 N.C. 612, 187 S.E.2d 13 (1972); State v. Greenwood, 280 N.C. 651, 187 S.E.2d 8 (1972); Willis v. J.M. Davis Indus., Inc., 280 N.C. 709, 186 S.E.2d 913 (1972); State v. Harvey, 281 N.C. 1, 187 S.E.2d 706 (1972); Roberts v. William N. & Kate B. Reynolds Mem. Park, 281 N.C. 48, 187 S.E.2d 721 (1972); State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972); State ex rel. Banking Comm'n v. Lexington State Bank, 281 N.C. 108, 187 S.E.2d 747 (1972); State v. Spencer, 281 N.C. 121, 187 S.E.2d 779 (1972); EAC Credit Corp. v. Wilson, 281 N.C. 140, 187 S.E.2d 752 (1972); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972); Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972); Robbins v. Nicholson, 281 N.C. 234, 188 S.E.2d 350 (1972); State v. Accor, 281 N.C. 287, 188 S.E.2d 332 (1972); Stevenson v. 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S.E.2d 849 (1980); Tanglewood Land Co. v. Byrd, 299 N.C. 260, 261 S.E.2d 655 (1980); State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980); National Mtg. Corp. v. American Title Ins. Co., 299 N.C. 369, 261 S.E.2d 844 (1980); State ex rel. Utilities Comm'n v. Edmisten, 299 N.C. 432, 263 S.E.2d 583 (1980); Thompson v. Soles, 299 N.C. 484, 263 S.E.2d 599 (1980); State ex rel. Utilities Comm'n v. CF Indus., Inc., 299 N.C. 504, 263 S.E.2d 559 (1980); State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980); Kinnard v. Mecklenburg Fair, Ltd., 301 N.C. 522, 271 S.E.2d 909 (1980); Morris v. Morris, 301 N.C. 525, 272 S.E.2d 1 (1980).

§ 7A-31. Discretionary review by the Supreme Court.

(a) In any cause in which appeal is taken to the Court of Appeals, except a cause appealed from the North Carolina Utilities Commission, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-345, or the Commissioner of Insurance pursuant to G.S. 58-9.4, or a motion for appropriate relief embracing subject matter covered by G.S. 7A-28, the Supreme Court may, in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals. The effect of such certification is to transfer the cause from the Court of Appeals to the Supreme Court for review by the Supreme Court. If the cause is certified for transfer to the Supreme Court before its determination in the Court of Appeals, review is not had in the Court of Appeals but the cause is forthwith transferred for review in the first instance by the Supreme Court. If the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals.

Except in motions within the purview of G.S. 7A-28, the State may move for certification for review of any criminal cause, but only after determination of the cause by the Court of Appeals.

(b) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court before determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or
(2) The cause involves legal principles of major significance to the jurisprudence of the State, or
(3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or
(4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

(c) In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the Supreme Court:

(1) The subject matter of the appeal has significant public interest, or
(2) The cause involves legal principles of major significance to the jurisprudence of the State, or
(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

Interlocutory determinations by the Court of Appeals, including orders remanding the cause for a new trial or for other proceedings, shall be certified for review by the Supreme Court only upon a determination by the Supreme Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm.

(d) The procedure for certification by the Supreme Court on its own motion, or upon petition of a party, shall be prescribed by rule of the Supreme Court. (1967, c. 108, s. 1; 1969, c. 1044; 1975, c. 555; 1977, c. 711, s. 5; 1981, c. 470, s. 2.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, rewrote the first sentence of subsection (a), and deleted the former second sentence of subsection (a), which read: "A cause appealed to the Court of Appeals from the Utilities Commission or the Industrial Commission may be certified in similar fashion but only after determination of the cause in the Court of Appeals." The amendment also added "Except in motions within the purview of G.S. 7A-28," at the beginning of the second paragraph of subsection (a), and deleted "the" preceding "certification" near the middle of that paragraph. Session Laws 1981, c. 470, s. 4, provides: "This act shall become effective October 1, 1981, and shall apply to all decisions of the Court of Appeals on G.S. 15A-1415(b) motions made on or after that date."

Legal Periodicals. — For note discussing the right to counsel on discretionary appeal, see 53 N.C.L. Rev. 560 (1974).

CASE NOTES

Scope of Review. — When the Supreme Court, after a decision of a cause by the Court of Appeals and pursuant to the petition of a party thereto as authorized by this section, grants certiorari to review the decision of the Court of Appeals, only the decision of the Court of Appeals is before the Supreme Court for review. The Supreme Court inquires into proceedings in the trial court solely to determine the correctness of the decision of the Court of Appeals. Its inquiry is restricted to rulings of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by arguments or the citation of authorities with reference thereto in the brief filed by the petitioner in the Supreme Court, except in those instances in which the Supreme Court elects to exercise its general power of supervision of courts inferior to the Supreme Court. Supreme Court review of a decision by the Court of Appeals upon an appeal from it to the Supreme Court as a matter of right, pursuant to § 7A-30, is similarly limited. State v. Williams, 274 N.C. 328, 163 S.E.2d 353 (1968); Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973); State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

The Supreme Court reviews the decision of the Court of Appeals for errors of law allegedly committed by it and properly brought forward for review. State v. Parrish, 275 N.C. 69, 165 S.E.2d 230 (1969); State v. Miller, 282 N.C. 633, 194 S.E.2d 353 (1973).

The Supreme Court will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was timely raised and passed upon in the trial court if it could have been, or in the Court of Appeals if the question arose after the trial. State v. Parrish, 275 N.C. 69, 165 S.E.2d 230 (1969).

When the Supreme Court grants certiorari pursuant to this section, review is ordinarily restricted to the rulings of the Court of Appeals which are assigned as error in the petition for certiorari and brought forward in petitioner's brief. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674, rehearing denied, 409 U.S. 898, 93 S. Ct. 99, 34 L. Ed. 2d 157 (1972).

In a criminal case in which the State petitioned for certiorari and the Court of Appeals ruled on only one of defendant's assignments of error in granting a new trial, the Supreme Court elected to depart from the general rule (that review under this section is ordinarily restricted to the rulings of the Court of Appeals which are assigned as error) and to consider the remaining assignments of error not considered by the Court of Appeals. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674, rehearing denied, 409 U.S. 898, 93 S. Ct. 99, 34 L. Ed. 2d 157 (1972).

As a general rule the Supreme Court will consider only those aspects of a decision of the Court of Appeals which are assigned as error in the petition for certiorari and which are preserved by argument or the citation of authority with reference thereto in the brief filed by the petitioner in the Supreme Court. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

Under this section the Supreme Court is to review only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by the Supreme Court. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

The failure of plaintiff to petition for a writ of certiorari to review the interlocutory decree of the Court of Appeals does not preclude the Supreme Court from granting certiorari after final judgment and thereupon considering and rectifying any errors which occurred at any stage of the proceedings. Spartan Leasing, Inc.

v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

The Supreme Court may review the entire proceedings and consider any errors which have occurred during the course of the litigation, provided that the parties have taken the proper steps to preserve the questions for appellate review. Spartan Leasing, Inc. v. Brown, 285 N.C. 689, 208 S.E.2d 649 (1974).

The denial of a writ of certiorari imports no expression of opinion upon the merits of the case and such denial does not mean that the Supreme Court has determined that the decision of the Court of Appeals is correct. Denial may simply mean that in the opinion of the Supreme Court the case does not require further review under the provisions of this section. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

Where defendant in its petition for certiorari to the Supreme Court assigned as error decisions of the trial court and of the Court of Appeals throughout the course of the litigation and preserved these assignments by arguments or citation of authorities in its brief filed in the Supreme Court, the previous denials of certiorari in prior appeals to the Supreme Court in this case did not constitute approval of either the reasoning or the merits of the prior decisions of the Court of Appeals. Peaseley v. Virginia Iron, Coal & Coke Co., 282 N.C. 585, 194 S.E.2d 133 (1973).

Section 7A-451 Does Not Give Indigent Right to Counsel. — An indigent is entitled to have a lawyer at his trial, and for direct review of that trial, but § 7A-451 is not intended to cover the discretionary power of the North Carolina Supreme Court to grant a writ of certiorari under this section. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

And Equal Protection Clause Does Not Require Free Counsel for Discretionary Appeals. — The equal protection clause does not require North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari to the Supreme Court. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

The duty of the State is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

A defendant is not denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking discretionary review in that court. At that stage he will have a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and often an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis on which to base its decision to grant or deny review. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Equally Divided Court. — Where one member of the Supreme Court does not participate in the consideration or decision of a case, and the remaining six justices are equally divided as to whether the decision of the Court of Appeals should be affirmed or reversed, the decision of the Court of Appeals is affirmed without becoming a precedent. Greenhill v. Crabtree, 301 N.C. 520, 271 S.E.2d 908 (1980); Wayfaring Home, Inc. v. Ward, 301 N.C. 518, 272 S.E.2d 121 (1980).

Applied in State v. Horton, 275 N.C. 651, 170 S.E.2d 466 (1969); State v. McBane, 276 N.C. 60, 170 S.E.2d 913 (1969); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970); Hoyle v. City of Charlotte, 276 N.C. 292, 172 S.E.2d 1 (1970); King v. Baldwin, 276 N.C. 316, 172 S.E.2d 12 (1970); Smith v. Mercer, 276 N.C. 329, 172 S.E.2d 489 (1970); State v. Riera, 276 N.C. 361, 172 S.E.2d 535 (1970); Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970); State Educ. Assistance Auth. v. Bank of Statesville, 276 N.C. 576, 174 S.E.2d 551 (1970); Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970); Home Sec. Life Ins. Co. v. McDonald, 277 N.C. 275, 177 S.E.2d 291 (1970); Whitney Stores, Inc. v. Clark, 277 N.C. 322, 177 S.E.2d 418 (1970); Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970); State v. McVay, 277 N.C. 410, 177 S.E.2d 874 (1970); In re Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970); State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970); State Keg, Inc. v. State Bd. of Alcoholic Control, 277 N.C. 450, 177 S.E.2d 861 (1970); Styers v. Phillips, 277 N.C. 460, 178 S.E.2d 583 (1971); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); Stegall v. Housing Auth., 278 N.C. 95, 178 S.E.2d 824 (1971); State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971); Strickland v. Powell, 279 N.C. 183, 181 S.E.2d 464 (1971); Joyner v. Garrett, 279 N.C. 226, 182 S.E.2d 553 (1971); Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971); Mutual Sav. & Loan Ass'n v. Lanier, 279 N.C. 299, 182 S.E.2d 368 (1971); Cogdill v. North Carolina State Hwy. Comm'n, 279 N.C. 313, 182 S.E.2d 373 (1971); Dr. T.C. Smith Co. v. North Carolina State Hwy. Comm'n, 279 N.C. 328, 182 S.E.2d 383 (1971); State v. Allred, 279 N.C. 398, 183 S.E.2d 553 (1971); State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Fields, 279 N.C. 460, 183 S.E.2d 666 (1971); State v. Battle, 279

N.C. 484, 183 S.E.2d 641 (1971); State v. Allen, 279 N.C. 492, 183 S.E.2d 659 (1971); State v. Roberts, 279 N.C. 500, 183 S.E.2d 647 (1971); State v. Smith, 279 N.C. 505, 183 S.E.2d 649 (1971); State v. Collins, 279 N.C. 508, 183 S.E.2d 549 (1971); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Gladden, 279 N.C. 566, 184 S.E.2d 249 (1971); Steelman v. City of New Bern, 279 N.C. 589, 184 S.E.2d 239 (1971); State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971); State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971); Sutton v. Figgatt, 280 N.C. 89, 185 S.E.2d 97 (1971); Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971); State v. Burleson, 280 N.C. 112, 184 S.E.2d 869 (1971); Forrester v. Garrett, 280 N.C. 117, 184 S.E.2d 858 (1971); State v. Williams, 280 N.C. 132, 184 S.E.2d 875 (1971); State v. Tart, 280 N.C. 172, 184 S.E.2d 842 (1971); State v. Allison, 280 N.C. 175, 184 S.E.2d 857 (1971); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972); State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972); State v. Jackson, 280 N.C. 563, 187 S.E.2d 27 (1972); Hall v. Wake County Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972); Adams-Millis Corp. v. Town of Kernersville, 281 N.C. 147, 187 S.E.2d 704 (1972); City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972); In re Strong Tire Serv., Inc., 281 N.C. 293, 188 S.E.2d 306 (1972); State v. McIntyre, 281 N.C. 304, 188 S.E.2d 304 (1972); Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972); North Carolina State Hwy. Comm'n v. Farm Equip. Co., 281 N.C. 459, 189 S.E.2d 272 (1972); State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Lutz v. Board of Educ., 282 N.C. 208, 192 S.E.2d 463 (1972); Albemarle Elec. Membership Corp. v. Alexander, 282 N.C. 402, 192 S.E.2d 811 (1972); State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973); State v. Beach, 283 N.C. 261, 196 S.E.2d 214 (1973); State v. Sawyer, 283 N.C. 289, 196 S.E.2d 250 (1973); City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973); Baxter v. Jones, 283 N.C. 327, 196 S.E.2d 193 (1973); State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973); State v. Black, 283 N.C. 344, 196 S.E.2d 225 (1973); State v. Allen, 283 N.C. 354, 196 S.E.2d 256 (1973); Rayfield v. Clark, 283 N.C. 362, 196 S.E.2d 197 (1973); Smoky Mountain Enterprises, Inc. v. Rose, 283 N.C. 373, 196 S.E.2d 189 (1973); State v. Glover, 283 N.C. 379, 196 S.E.2d 207 (1973); State v. Bumgarner, 283 N.C. 388, 196 S.E.2d 210 (1973); State v. Moses, 283 N.C. 390, 196 S.E.2d 211 (1973); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Williams, 283 N.C. 550, 196 S.E.2d 756 (1973); State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706 (1973); In re Hanes Dye & Finishing Co., 285 N.C. 598, 207 S.E.2d 729 (1974); Greene v. City of Winston-Salem, 287 N.C. 66, 213 S.E.2d 231 (1975); United Tel. Co. v. Universal Plastics, Inc., 287 N.C. 232, 214 S.E.2d 49 (1975); State v. Hunt, 287 N.C. 360, 215 S.E.2d 40 (1975); Dean v. Carolina Coach Co., 287 N.C. 515, 215 S.E.2d 89 (1975); State v. Wortham, 287 N.C. 541, 215 S.E.2d 131 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); Pritchett v. Clapp, 288 N.C. 329, 218 S.E.2d 406 (1975); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975); Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976); State v. Scott, 289 N.C. 712, 224 S.E.2d 185 (1976); Cedar Creek Enterprises, Inc. v. State Dep't of Motor Vehicles, 290 N.C. 450, 226 S.E.2d 336 (1976); Shore v. Edmisten, 290 N.C. 628, 227 S.E.2d 553 (1976); Nasco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976); State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976); State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Smith, 291 N.C. 438, 230 S.E.2d 644 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); Whitten v. Bob King's AMC/Jeep, Inc., 292 N.C. 84, 231 S.E.2d 891 (1977); State v. Tilley, 292 N.C. 132, 233 S.E.2d 433 (1977); State ex rel. Dorothea Dix Hosp. v. Davis, 292 N.C. 147, 232 S.E.2d 81 (1977); State v. Siler, 292 N.C. 543, 234 S.E.2d 733 (1977); State v. Willard, 292 N.C. 567, 234 S.E.2d 587 (1977); State v. McFadden, 292 N.C. 609, 234 S.E.2d 742 (1977); State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980); State v. Ward, 300 N.C. 150, 266 S.E.2d 581 (1980); in re Rogers, 300 N.C. 747, 268 S.E.2d 221 (1980); Goodman Toyota, Inc. v. City of Raleigh, 301 N.C. 84, S.E.2d (1980).

Cited in Carolina Beach Fishing Pier v. Town of Carolina Beach, 274 N.C. 362, 163 S.E.2d 363 (1968); Sykes v. Clayton, 274 N.C. 398, 163 S.E.2d 775 (1968); Duke Power Co. v. Clayton, 274 N.C. 505, 164 S.E.2d 289 (1968); S.S. Kresge Co. v. Tomlinson, 275 N.C. 1, 165 S.E.2d 236 (1969); Hughes v. North Carolina State Hwy. Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969); Colonial Pipeline Co. v. Clayton, 275 N.C. 215, 166 S.E.2d 671 (1969); State v. Core Banks Club Properties, 275 N.C. 328, 167 S.E.2d 385 (1969); Nationwide Mut. Ins. Co. v. Hayes, 276 N.C. 620, 174 S.E.2d 511 (1970); Kale v. Forrest, 278 N.C. 1, 178 S.E.2d 622 (1971); State v. Winford, 278 N.C. 67, 178 S.E.2d 777 (1971); Kelly v. International

Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); State v. Woods, 278 N.C. 210, 179 S.E.2d 358 (1971); Ervin v. Clayton, 278 N.C. 219, 179 S.E.2d 353 (1971); In re Filing by Auto. Rate Office, 278 N.C. 302, 180 S.E.2d 155 (1971); City of Statesville v. Bowles, 278 N.C. 497, 180 S.E.2d 111 (1971); Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971); In re Annexation Ordinance, 278 N.C. 641, 180 S.E.2d 851 (1971); State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971); Glusman v. Trustees of Univ. of N.C., 281 N.C. 629, 190 S.E.2d 213 (1972); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Keiger v. Winston-Salem Bd. of Adjustment, 281 N.C. 715, 190 S.E.2d 175 (1972); Plemmer v. Matthewson, 281 N.C. 722, 190 S.E.2d 204 (1972); State v. Joyner, 286 N.C. 366, 211 S.E.2d 320 (1975); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976); State v. Dietz, 289 N.C. 488, 223 S.E.2d 357 (1976); Tennessee-Carolina Transp., Inc. v. Strick Corp., 289 N.C. 587, 223 S.E.2d 346 (1976); In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976); State v. Cole, 293 N.C. 328, 237 S.E.2d 814 (1977); State v. Wills, 293 N.C. 546, 240 S.E.2d 328 (1977); Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); People ex rel. Duncan v. Beach, 294 N.C. 713, 242 S.E.2d 796 (1978); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978); State v. Abernathy, 295 N.C. 147, 244 S.E.2d 373 (1978); State v. Johnson, 295 N.C. 227, 244 S.E.2d 391 (1978); State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978); State v. Curmon, 295 N.C. 453, 245 S.E.2d 503 (1978); Board of Transp. v. Brown, 296 N.C. 250, 249 S.E.2d 803 (1978); State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979); Lloyd v. Babb, 296 N.C. 416, 251 S.E.2d 843 (1979); Martin v. Bonclarken Ass'y, 296 N.C. 540, 251 S.E.2d 403 (1979); Wood v. Wood, 297 N.C. 1, 252 S.E.2d 799 (1979); Mobil Oil Corp. v. Wolfe, 297 N.C. 36, 252 S.E.2d 809 (1979); State v. McCombs, 297 N.C. 151, 253 S.E.2d 906 (1979); Blackwood v. Cates, 297 N.C. 163, 254 S.E.2d 7 (1979); Mitchell v. Freuler, 297 N.C. 206, 254 S.E.2d 762 (1979); Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); State v. Joyner, 297 N.C. 349, 255 S.E.2d 390 (1979); State v. Barnes, 297 N.C. 442, 255 S.E.2d 386 (1979); Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979); State v. Lyles, 298 N.C. 179, 257 S.E.2d 410 (1979); State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979); Seders v. Powell, 298 N.C. 453, 259 S.E.2d 544 (1979); Campbell v. First Baptist Church, 298 N.C. 476, 259 S.E.2d 558 (1979); State v. Sanders, 298 N.C. 512, 259 S.E.2d 258 (1979); Harrington v. Collins, 298 N.C. App. 535, 259 S.E.2d 275 (1979); Rent-A-Car Co. v. Lynch, 298 N.C. 559, 259 S.E.2d 564 (1979); North Carolina State Bar v. DuMont, 298 N.C. 564, 259 S.E.2d 280 (1979); State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979); Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); State v. Jones, 299 N.C. 103, 261 S.E.2d 1 (1980); State v. Bumgarner, 299 N.C. 113, 261 S.E.2d 105 (1980); State v. Ray, 299 N.C. 151, 261 S.E.2d 789 (1980); Woodhouse v. Board of Comm'rs, 299 N.C. 211, 261 S.E.2d 882 (1980); State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980); State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980); Ragland v. Moore, 299 N.C. 360, 261 S.E.2d 666 (1980); Heritage Village Church & Missionary Fellowship, Inc. v. State, 299 N.C. 399, 263 S.E.2d 726 (1980); MacDonald v. University of N.C., 299 N.C. 457, 263 S.E.2d 578 (1980); Hudson v. Hudson, 299 N.C. 465, 263 S.E.2d 719 (1980); Davis v. McRee, 299 N.C. 498, 263 S.E.2d 604 (1980); Kavanau Real Estate Trust v. Debnam, 299 N.C. 510, 263 S.E.2d 595 (1980); State v. Williams, 299 N.C. 529, 263 S.E.2d 571 (1980); In re Annexation Ordinance, 300 N.C. 337, 266 S.E.2d 661 (1980); Weber v. Buncombe County Bd. of Educ., 301 N.C. 83, S.E.2d (1980); State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980); Tarkington v. Tarkington, 301 N.C. 502, 272 S.E.2d 99 (1980); State v. Lang, 301 N.C. 508, 272 S.E.2d 123 (1980).

§ 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

(a) The Supreme Court and the Court of Appeals have jurisdiction, exercisable by any one of the justices or judges of the respective courts, to issue the writ of habeas corpus upon the application of any person described in G.S. 17-3, according to the practice and procedure provided therefor in chapter 17 of the General Statutes, and to rule of the Supreme Court.

(b) The Supreme Court has jurisdiction, exercisable by one justice or by such number of justices as the court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction or in exercise of its general power to supervise and control the proceedings of any of the other courts of the General Court of Justice. The practice and procedure shall be as provided by statute or rule of the Supreme

Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

(c) The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including mandamus, prohibition, certiorari, and supersedeas, in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice, and of the Utilities Commission and the Industrial Commission. The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law. (1967, c. 108, s. 1.)

CASE NOTES

Appeal by Trustees of Charitable Trust. — Although an appeal by the trustees of a charitable trust was subject to dismissal on the ground that there were no parties aggrieved by the order of the superior court modifying the trust, the Court of Appeals nonetheless can consider the appeal, in the exercise of its supervisory power, where the order will affect the interests of a substantial number of public and private hospitals in the State, as well as thousands of persons who will be hospitalized as charity patients. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

Review of Judicial Disciplinary Proceedings. — Under Constitution Article IV, § 12 and this section, the courts of the appellate division have power to review judicial disciplinary proceedings whether the attorney or the State has prevailed in the trial court. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

State Must Seek Review of Disciplinary Proceedings by Writ of Certiorari. — The State may seek review by the appellate division of proceedings disciplining attorneys under the judicial method. However, the State may not appeal in such cases as a matter of right but must seek appellate review by petition for writ of certiorari. In re Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979).

Relief Where Issue Not Presented in Brief. — Plaintiff's failure to present and argue in its brief to the Court of Appeals the propriety of the trial court's judgment as to attorney fees precluded plaintiff from obtaining relief on this point in the Court of Appeals as a matter of right; however, the Court of Appeals, in the exercise of its general supervisory powers under subsection (c) of this section or pursuant to Appellate Rule 2, could consider on its own initiative the question of the attorney fees award and give relief as a matter of appellate grace. Stillwell Enterprises, Inc. v. Interstate Equip. Co., 300 N.C. 286, 266 S.E.2d 812 (1980).

Applied in City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972); Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976); In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976); Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976).

Quoted in State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970).

Stated in Bailey v. Gooding, 301 N.C. 205, 270 S.E.2d 431 (1980).

Cited in North Carolina Fire Ins. Rating Bureau v. Ingram, 29 N.C. App. 338, 224 S.E.2d 229 (1976); Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978); Craver v. Craver, 298 N.C. 231, 258 S.E.2d 357 (1979).

§ 7A-33. Supreme Court to prescribe appellate division rules of practice and procedure.

The Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division. (1967, c. 108, s. 1.)

Cross References. — For North Carolina Rules of Appellate Procedure, see Appendix I (2A), in Volume 4A.

CASE NOTES

Cited in State v. Garnett, 4 N.C. App. 367, 167 S.E.2d 63 (1969).

§ 7A-34. Rules of practice and procedure in trial courts.

The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly. (1967, c. 108, s. 1.)

Legal Periodicals. — For an article entitled, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Applied in Hamm v. Texaco, Inc., 17 N.C. App. 451, 194 S.E.2d 560 (1973).

Cited in Lee v. Rowland, 11 N.C. App. 27, 180 S.E.2d 445 (1971); Terrell v. H. & N. Chevrolet Co., 11 N.C. App. 310, 181 S.E.2d 124 (1971); Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971); State v. Andrews, 12 N.C. App. 421, 184 S.E.2d 69 (1971); Lattimore v. Powell, 15 N.C. App. 522, 190 S.E.2d 288 (1972); Finley v. Finley, 15 N.C. App. 681, 190 S.E.2d 660 (1972); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972); Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973); State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978); Wood v. Wood, 297 N.C. 1, 252 S.E.2d 791 (1979); Clarke v. Clarke, 47 N.C. App. 249, 267 S.E.2d 361 (1980); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980).

§ 7A-35: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-36: Repealed by Session Laws 1969, c. 1190, s. 57.

§§ 7A-37 to 7A-39: Reserved for future codification purposes.

ARTICLE 6.

Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.

§ 7A-39.1. Justice, emergency justice, judge and emergency judge defined.

(a) As herein used "justice of the Supreme Court" includes the Chief Justice of the Supreme Court and "judge of the Court of Appeals" includes the Chief Judge of the Court of Appeals, unless the context clearly indicates a contrary intent.

(b) As used herein, "emergency justice" or "emergency judge" means any justice of the Supreme Court or any judge of the Court of Appeals, respectively, who has retired subject to recall for temporary service in the place of any active member of the court from which he retired. (1967, c. 108, s. 1.)

§ 7A-39.2. Age and service requirements for retirement of justices of the Supreme Court and judges of the Court of Appeals.

(a) Any justice of the Supreme Court or judge of the Court of Appeals who has attained the age of 65 years, and who has served for a total of 15 years, whether consecutive or not, on the Supreme Court, the Court of Appeals, or the superior court, or as Administrative Officer of the Courts, or in any combination of these offices, may retire from his present office and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired.

(b) Any justice of the Supreme Court or judge of the Court of Appeals who has attained the age of 65 years, and who has served as justice or judge, or both, in the Appellate Division for 12 consecutive years may retire and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired.

(c) Any justice or judge of the Appellate Division, who has served for a total of 24 years, whether continuously or not, as justice of the Supreme Court, judge of the Court of Appeals, judge of the superior court, or Administrative Officer of the Courts, or in any combination of these offices, may retire, regardless of age, and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired. In determining eligibility for retirement under this subsection, time served as a district solicitor of the superior court prior to January 1, 1971, may be included, provided the person has served at least eight years as a justice, judge, or Administrative Officer of the Courts, or in any combination of these offices. (1967, c. 108, s. 1; 1971, c. 508, s. 2.)

§ 7A-39.3. Retired justices and judges may become emergency justices and judges subject to recall to active service; compensation for emergency justices and judges on recall.

(a) Justices of the Supreme Court and judges of the Court of Appeals who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have retired under the provisions of G.S. 7A-39.2, or under the Uniform Judicial Retirement Act after having completed 15 years of creditable service, may apply as provided in G.S. 7A-39.6 to become emergency justices and emergency judges of the court from which they retired, and upon being commissioned as an emergency justice or emergency judge shall be subject to temporary recall to active service on that court in the place of any justice of the Supreme Court or judge of the Court of Appeals, respectively, who is temporarily incapacitated to the extent that he cannot perform efficiently and promptly all the duties of his office.

(b) In addition to the compensation or retirement allowance he would otherwise be entitled to receive by law, each emergency justice or emergency judge recalled for temporary active service shall be paid by the State his actual expenses, plus seventy-five dollars ($75.00) for each day of active service rendered upon recall. (1967, c. 108, s. 1; 1973, c. 640, s. 3; 1977, c. 736, s. 1; 1979, c. 884, s. 1; 1981, c. 455, s. 3; c. 859, s. 46.)

Cross References. — For the Uniform Judicial Retirement Act, see §§ 135-50 to 135-71.

Effect of Amendments. — The first 1981 amendment ratified May 26, 1981, and effective on ratification, added to subsection (b) a sentence reading as follows: "However, no recalled retired or emergency justice or judge shall receive from the State total annual compensa-

tion for judicial services in excess of that received by an active justice or judge of the bench to which the justice or judge is recalled."

The second 1981 amendment, ratified July 8, 1981, and effective July 1, 1981, deleted "which" following "retirement allowed" near the beginning of subsection (b), and substituted "seventy-five dollars ($75.00) for each day" for "one hundred dollars ($100.00) for each week" near the end of subsection (b).

Session Laws 1981, c. 859, s. 46, provides "G.S. 7A-39.3(b) is amended to read:" and sets out the subsection without incorporating the sentence added by Session Laws 1981, c. 455, s. 3. The first 1981 amendment has therefore not been given effect in the text of subsection (b) as set out above.

Session Laws 1981, c. 859, s. 97, contains a severability clause.

§ 7A-39.4. Retirement creates vacancy.

The retirement of any justice of the Supreme Court or any judge of the Court of Appeals under the provisions of this Article shall create a vacancy in his office to be filled as provided by law. (1967, c. 108, s. 1.)

§ 7A-39.5. Recall of emergency justice or emergency judge upon temporary incapacity of a justice or judge.

(a) Upon the request of any justice of the Supreme Court who has been advised in writing by a reputable and competent physician that he is temporarily incapable of performing efficiently and promptly all the duties of his office, the Chief Justice may recall any emergency justice who, in his opinion, is competent to perform the duties of an associate justice, to serve temporarily in the place of the justice in whose behalf he is recalled; provided, that when the incapacity of a justice of the Supreme Court is such that he cannot request the recall of an emergency justice to serve in his place, an order of recall may be issued by the Chief Justice upon satisfactory medical proof of the facts upon which the order of recall must be based. Orders of recall shall be in writing and entered upon the minutes of the court.

(b) Upon the request of any judge of the Court of Appeals who has been advised in writing by a reputable and competent physician that he is temporarily incapable of performing efficiently and promptly all the duties of his office, the Chief Judge may recall any emergency judge who, in his opinion, is competent to perform the duties of a judge of the Court of Appeals, to serve temporarily in the place of the judge in whose behalf he is recalled; provided, that when the incapacity of a judge of the Court of Appeals is such that he cannot request the recall of an emergency judge to serve in his place, an order of recall may be issued by the Chief Judge upon satisfactory medical proof of the facts upon which the order of recall must be based. Orders of recall shall be in writing and entered upon the minutes of the court. (1967, c. 108, s. 1.)

§ 7A-39.6. Application to the Governor; commission as emergency justice or emergency judge.

No retired justice of the Supreme Court or retired judge of the Court of Appeals may become an emergency justice or emergency judge except upon his written application to the Governor certifying his desire and ability to serve as an emergency justice or emergency judge. If the Governor is satisfied that the applicant qualifies under G.S. 7A-39.3(a) to become an emergency justice or emergency judge and that he is physically and mentally able to perform the official duties of an emergency justice or emergency judge, he shall issue to such applicant a commission as an emergency justice or emergency judge of the court from which he retired. The commission shall be effective upon the date of its issue and shall terminate when the judge to whom it is issued reaches the maximum age for judicial service under G.S. 7A-4.20(a). (1967, c. 108, s. 1; 1977, c. 736, s. 2; 1979, c. 884, s. 2.)

§ 7A-39.7. Jurisdiction and authority of emergency justices and emergency judges.

An emergency justice or emergency judge shall not have or possess any jurisdiction or authority to hear arguments or participate in the consideration and decision of any cause or perform any other duty or function of a justice of the Supreme Court or judge of the Court of Appeals, respectively, except while serving under an order of recall and in respect to appeals, motions, and other matters heard, considered, and decided by the court during the period of his temporary service under such order; and the justice of the Supreme Court or judge of the Court of Appeals in whose behalf an emergency justice or emergency judge is recalled to active service shall be disqualified to participate in the consideration and decision of any question presented to the court by appeal, motion or otherwise in which any emergency justice or emergency judge recalled in his behalf participated. (1967, c. 108, s. 1.)

§ 7A-39.8. Court authorized to adopt rules.

The Supreme Court shall prescribe rules respecting the filing of opinions prepared by an emergency justice or an emergency judge after his period of temporary service has expired, and any other matter deemed necessary and consistent with the provisions of this Article. (1967, c. 108, s. 1.)

§ 7A-39.9. Chief Justice and Chief Judge may recall and terminate recall of justices and judges; procedure when Chief Justice or Chief Judge incapacitated.

(a) The Chief Justice of the Supreme Court and the Chief Judge of the Court of Appeals are vested with authority to issue orders of recall to emergency justices and judges, respectively, and to perform any and all other acts deemed necessary to effectuate the purposes of this Article, and their decisions, when not in conflict herewith, shall be final.

(b) The Chief Justice or Chief Judge, may, at any time, in his discretion, cancel any order of recall issued by him or fix the termination date thereof.

(c) Whenever the Chief Justice is the justice in whose behalf an emergency justice is recalled to temporary service, the powers vested in him as Chief Justice by this article shall be exercised by the associate justice senior in point of time served on the Supreme Court. Whenever the Chief Judge is the judge in whose behalf an emergency judge is recalled to temporary service the powers vested in him as Chief Judge by this article shall be exercised by the associate judge senior in point of time served on the Court of Appeals. If two or more judges have served the same length of time on the Court of Appeals, the eldest shall be deemed the senior judge. (1967, c. 108, s. 1.)

§ 7A-39.10. Article applicable to previously retired justices.

All provisions of this Article shall apply to every justice of the Supreme Court who has heretofore retired and is receiving compensation as an emergency justice. (1967, c. 108, s. 1.)

§ 7A-39.11. Retirement on account of total and permanent disability.

Every justice of the Supreme Court or judge of the Court of Appeals who has served for eight years or more on the Supreme Court, the Court of Appeals, or the superior court, or as Administrative Officer of the Courts, or in any combination of these offices, and who while in active service becomes totally and permanently disabled so as to be unable to perform efficiently the duties of his office, and who retires by reason of such disability, shall receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant or occupants of the office from which he retired. In determining whether a judge is eligible for retirement under this section, time served as district solicitor of the superior court prior to January 1, 1971, may be included. Whenever any justice or judge claims retirement benefits under this section on account of total and permanent disability, the Governor and Council of State, acting together, shall, after notice and an opportunity to be heard is given the applicant, by a majority vote of said body, make findings of fact from the evidence offered. Such findings of fact shall be reduced to writing and entered upon the minutes of the Council of State. The findings so made shall be conclusive as to such matters and determine the right of the applicant to retirement benefits under this section. Justices and judges retired under the provisions of this section are not subject to recall as emergency justices or judges. (1967, c. 108, s. 1.)

§ 7A-39.12. Applicability of §§ 7A-39.2 and 7A-39.11.

The provisions of G.S. 7A-39.2 and 7A-39.11 shall apply only to justices and judges who entered into office prior to January 1, 1974. The extent of such application is specified in Chapter 135, Article 4 (Uniform Judicial Retirement Act). (1973, c. 640, s. 5.)

§ 7A-39.13. Recall of active and emergency justices and judges who have reached mandatory retirement age.

Justices and judges retired because they have reached the mandatory retirement age, and emergency justices and judges whose commissions have expired because they have reached the mandatory retirement age, may be temporarily recalled to active service under the following circumstances:

(1) The justice or judge must consent to the recall.

(2) The Chief Justice is authorized to recall retired justices, and the Chief Judge is authorized to recall retired judges of the Court of Appeals each to serve on the court from which retired.

(3) The period of recall shall not exceed six months, but it may be renewed for an additional six months if the emergency for which the recall was ordered continues.

(4) Prior to recall, the Chief Justice or the Chief Judge, as the case may be, shall satisfy himself that the justice or judge being recalled is capable of efficiently and promptly performing the duties of the office to which recalled.

(5) Recall is authorized only to replace an active justice or judge who is temporarily incapacitated.

(6) Jurisdiction and authority of a recalled justice or judge is as specified in G.S. 7A-39.7.

(7) The Supreme Court and the Court of Appeals, as the case may be, shall prescribe rules respecting the filing of opinions prepared by a retired

justice or judge after his period of temporary service has expired, and respecting any other matter deemed necessary and consistent with this section.

(8) Compensation of recalled retired justices and judges is the same as for recalled emergency justices and judges under G.S. 7A-39.3(b).

(9) Recall shall be evidenced by a commission signed by the Chief Justice or Chief Judge, as the case may be. (1981, c. 455, s. 2.)

SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 7.

Organization.

§ 7A-40. Composition; judicial powers of clerk.

The Superior Court Division of the General Court of Justice consists of the several superior courts of the State. The clerk of superior court in the exercise of the judicial power conferred upon him as ex officio judge of probate, and in the exercise of other judicial powers conferred upon him by law in respect of special proceedings and the administration of guardianships and trusts, is a judicial officer of the Superior Court Division, and not a separate court. (1965, c. 310, s. 1; 1967, c. 691, s. 1; 1969, c. 1190, s. 4; 1971, c. 377, s. 4.)

Editor's Note. — This section was originally § 7A-39.1. It was transferred and renumbered § 7A-42 by Session Laws 1967, c. 691, s. 1, effective July 1, 1967. It was again transferred, and renumbered § 7A-40, by Session Laws 1969, c. 1190, s. 4, effective July 1, 1969.

CASE NOTES

Stated in Yale v. National Indem. Co., 602 F.2d 642 (4th Cir. 1979).

§ 7A-41. Superior court divisions and districts; judges; assistant district attorneys.

The counties of the State are organized into four judicial divisions and 34 judicial districts, and each district has the counties, the number of regular resident superior court judges, and the number of full-time assistant district attorneys set forth in the following table:

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
First	1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1	5
	2	Beaufort, Hyde, Martin, Tyrrell, Washington	1	3
	3	Carteret, Craven, Pamlico, Pitt	2	8
	4	Duplin, Jones, Onslow, Sampson	2	8

Judicial Division	Judicial District	Counties	No. of Resident Judges	No. of Full-Time Asst. District Attorneys
	5	New Hanover, Pender	2	7
	6	Bertie, Halifax, Hertford, Northampton	1	4
	7	Edgecombe, Nash, Wilson	2	7
	8	Green, Lenoir, Wayne	2	8
Second	9	Franklin, Granville, Person, Vance, Warren	1	5
	10	Wake	4	15
	11	Harnett, Johnston, Lee	1	5
	12	Cumberland, Hoke	3	11
	13	Bladen, Brunswick, Columbus	1	5
	14	Durham	3	8
	15A	Alamance	1	3
	15B	Orange, Chatham	1	3
	16	Robeson, Scotland	1	7
Third	17A	Caswell, Rockingham	1	2
	17B	Stokes, Surry	1	2
	18	Guilford	3	13
	19A	Cabarrus, Rowan	2	5
	19B	Montgomery, Randolph	1	3
	20	Anson, Moore, Richmond, Stanly, Union	2	7
	21	Forsyth	3	9
	22	Alexander, Davidson, Davie, Iredell	2	6
	23	Alleghany, Ashe, Wilkes, Yadkin	1	3
Fourth	24	Avery, Madison, Mitchell, Watauga, Yancey	1	2
	25	Burke, Caldwell, Catawba	2	7
	26	Mecklenburg	5	19
	27A	Gaston	2	5
	27B	Cleveland, Lincoln	1	3
	28	Buncombe	2	5
	29	Henderson, McDowell, Polk, Rutherford, Transylvania	1	4
	30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1	4

In a district having more than one regular resident judge, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge. If two judges are of equal seniority, the oldest judge is the senior regular resident judge. In a single-judge district, the single judge is the senior regular resident judge.

Senior regular resident judges and regular resident judges possess equal

judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

In the event the senior regular resident judge of a multi-judge district is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident judge from the other regular resident judges of the district, to exercise, temporarily, the authority of the senior regular resident judge. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2.)

Editor's Note. — Session Laws 1977, c. 1119, s. 2, effective July 1, 1977, provides: "The additional judges authorized in section 1 of this act shall be appointed by the Governor and shall take office on July 1, 1977. The successors of the Governor's appointees shall be chosen in the manner prescribed by law for other resident superior court judges in the general election of 1978 to serve for the unexpired portion of the term of eight years which began as of January 1, 1977, and their successors shall be chosen thereafter in the manner and serve for terms as prescribed for other resident superior court judges."

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased by one the number of full-time assistant district attorneys in the seventh, thirteenth and sixteenth judicial districts.

The 1981 amendment, effective Sept. 1, 1981, substituted "34 judicial districts" for "33 judicial districts" in the first paragraph, and substituted the listings for judicial districts 17A and 17B for a listing for judicial district 17. The amendment also increased by one the number of resident judges in the twenty-first judicial district, increased by one the number of full-time assistant district attorneys in the fourth, seventh, ninth, tenth, thirteenth, ninetheenth-A, twenty-first, and thirtieth judicial districts, and increased by two the number of full-time assistant district attorneys in the first and eighth judicial districts.

Session Laws 1981, c. 964, s. 2(b) provides:

"All positions authorized by this act for Judicial Districts 17A and 17B are effective September 1, 1981.

"Effective September 1, 1981, the current resident superior court judge assigned to the seventeenth judicial district is allocated to judicial district 17B. The additional resident superior court judge authorized by this subsection for judicial district 17A shall be appointed by the Governor pursuant to subsection (d) of this section.

"Effective September 1, 1981, two of the four current assistant district attorneys allocated to the district attorney in the seventeenth judicial/prosecutorial district are allocated to the district attorney in judicial/prosecutorial district 17A and the remaining two to the district attorney in judicial/prosecutorial district 17B."

Session Laws 1981, c. 964, s. 2(d), provides: "The vacancies in the judgeships authorized by this section shall be filled by appointments by the Governor. The appointees shall serve until the first day of January, 1983. The appointees' successors shall be chosen in the general election of November 1982, to serve an eight-year term beginning the first day of January, 1983."

CASE NOTES

Stated in Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971); Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971).

Cited in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); State v. Braswell, 283 N.C. 332, 196 S.E.2d 185 (1973).

§ 7A-42. Sessions of superior court in cities other than county seats.

(a) Sessions of the superior court shall be held in each city in the State which is not a county seat and which has a population of 35,000 or more, according to the 1960 federal census.

(b) For the purpose of segregating the cases to be tried in any city referred to in subsection (a), and to designate the place of trial, the clerk of superior court in any county having one or more such cities shall set up a criminal docket and a civil docket, which dockets shall indicate the cases and proceedings to be tried in each such city in his county. Such dockets shall bear the name of the city in which such sessions of court are to be held, followed by the word "Division." Summons in actions to be tried in any such city shall clearly designate the place of trial.

(c) For the purpose of determining the proper place of trial of any action or proceeding, whether civil or criminal, the county in which any city described in subsection (a) is located shall be divided into divisions, and the territory embraced in the division in which each such city is located shall consist of the township in which such city lies and all contiguous townships within such county, such division of the superior court to be known by the name of such city followed by the word "Division." All other townships of any such county shall constitute a division of the superior court to be known by the name of the county seat followed by the word "Division." All laws, rules, and regulations now or hereafter in force and effect in determining the proper venue as between the superior courts of the several counties of the State shall apply for the purpose of determining the proper place of trial as between such divisions within such county and as between each of such divisions and any other county of the superior court in North Carolina.

(d) The clerk of superior court of any county with an additional seat of superior court may, but shall not be required to, hear matters in any place other than at his office at the county seat.

(e) The grand jury for the several divisions of court of any county in which a city described in subsection (a) is located shall be drawn from the whole county, and may hold hearings and meetings at either the county seat or elsewhere within the county as it may elect, or as it may be directed by the judge holding any session of superior court within such county; provided, however, that in arranging the sessions of the court for the trial of criminal cases for any county in which any such city is located a session of one week or more shall be held at the county seat preceding any session of one week or more to be held in any such city, so as to facilitate the work of the grand jury, and so as to confine its meetings to the county seat as fully as may be practicable. All petit jurors for all sessions of court in the several divisions of such county shall be drawn, as now or hereafter provided by law, from the whole of the county in which any such city is located for all sessions of courts in the several divisions of such county.

(f) Special sessions of court for the trial of either civil or criminal cases in any city described in subsection (a) may be arranged as by law now or hereafter provided for special sessions of the superior court.

(g) All court records of all such divisions of the superior court of any such county shall be kept in the office of the clerk of the superior court at the county

seat, but they may be temporarily removed under the direction and supervision of the clerk to any such division or divisions. No judgment or order rendered at any session held in any such city shall become a lien upon or otherwise affect the title to any real estate within such county until it has been docketed in the office of the clerk of the superior court at the county seat as now or may hereafter be provided by law; provided, that nothing herein shall affect the provisions of G.S. 1-233 and the equities therein provided for shall be preserved as to all judgments and orders rendered at any session of the superior court in any such city.

(h) It shall be the duty of the board of county commissioners of the county in which any such city is located to provide a suitable place for holding such sessions of court, and to provide for the payment of the extra expense, if any, of the sheriff and his deputies in attending the sessions of court of any such division, and the expense of keeping, housing and feeding prisoners while awaiting trial. (1943, c. 121; 1969, c. 1190, s. 48.)

Editor's Note. — This section was formerly § 7-70.2. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 48.

§ 7A-43: Reserved for future codification purposes.

§§ 7A-43.1 to 7A-43.3: Repealed by Session Laws 1967, c. 1049, s. 6.

§ 7A-44. Salary and expenses of superior court judge.

A judge of the superior court, regular or special, shall receive the annual salary set forth in the Budget Appropriations Act, and in addition shall be paid the same travel allowance as State employees generally by G.S. 138-6(a)(1) and (2), provided that no travel allowance be paid for travel within his county of residence. In addition, a judge of the superior court shall be allowed five thousand five hundred dollars ($5,500) per year, payable monthly, in lieu of necessary subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred for professional education. (Code, ss. 918, 3734; 1891, c. 193; 1901, c. 167; 1905, c. 208; Rev., s. 2765; 1907, c. 988; 1909, c. 85; 1911, c. 82; 1919, c. 51; C. S., s. 3884; 1921, c. 25, s. 3; 1925, c. 227; 1927, c. 69, s. 2; 1949, c. 157, s. 1; 1953, c. 1080, s. 1; 1957, c. 1416; 1961, c. 957, s. 2; 1963, c. 839, s. 2; 1965, c. 921, s. 2; 1967, c. 691, s. 40; 1969, c. 1190, s. 36; 1973, c. 1474; 1975, 2nd Sess., c. 983, s. 13; 1977, c. 802, s. 41.1; 1979, 2nd Sess., c. 1137, s. 28; 1981, c. 964, s. 18.)

Cross References. — As to salaries of judges, see Const., Art. IV, § 20.

Editor's Note. — This section was formerly § 7-42. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 36.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, rewrote the former first sentence as the present first and second sentences of the section.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

The 1981 amendment, effective Jan. 1, 1981, substituted "other professional expenses" for "other professional education expenses" near the end of the second sentence.

CASE NOTES

Additional Compensation Part of Salary. — Additional compensation of one hundred dollars given to a superior court judge by the former wording of § 7-42 for services in holding a special term was a part of his salary. Buxton v. Commissioners of Rutherford, 82 N.C. 91 (1880).

§ 7A-44.1. Secretarial and clerical help.

The senior regular superior court judge of each judicial district is authorized to appoint a judicial secretary to serve the secretarial and clerical needs of the superior court judges of the district under the direction of the senior regular resident superior court judge. The appointment may be full- or part-time and the compensation and allowances of such secretary shall be fixed by the senior regular resident superior court judge, within limits determined by the Administrative Office of the Courts, and paid by the State. (1975, c. 956, s. 3.)

Editor's Note. — Additional secretarial positions are created by Session Laws 1981, c. 964, s. 5.

§ 7A-45. Special judges; appointment; removal; vacancies; authority.

(a) The Governor may appoint eight special superior court judges. A special judge takes the same oath of office and is subject to the same requirements and disabilities as is or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district. Initial appointments made under this section shall be to terms of office beginning July 1, 1967, and expiring June 30, 1971. As the terms expire, the Governor may appoint successors for terms of four years each. All incumbents shall continue in office until their successors are appointed and qualified.

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters whatsoever that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court and in chambers, the same power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired. (1927, c. 206, ss. 1, 2, 5, 7; 1929, c. 137, ss. 1, 2, 5, 7; 1931, c. 29, ss. 1, 2, 5, 7; 1933, c. 217, ss. 1, 2, 5, 7; 1935, c. 97, ss. 1, 2, 5, 7; 1937, c. 72, ss. 1, 2, 5, 7; 1939, c. 31, ss. 1, 2, 5, 7; 1941, c. 51, ss. 1, 2, 5, 7; 1943, c. 58, ss. 1, 2, 5, 7; 1945, c. 153, ss. 1, 2, 5, 7; 1947, c. 24, ss. 1, 2, 5, 7; 1949, c. 681, ss. 1, 2, 5, 7; 1951, c. 78, s. 1; c. 1119, ss. 1, 2, 5, 7; 1953, c. 1322, ss. 1, 2, 5, 7; 1955, c. 1016, s. 1; 1959, c. 465; 1961, c. 34; 1963, c. 1170; 1969, c. 1190, s. 41; 1973, c. 82.)

Editor's Note. — This section combines former §§ 7-54, 7-55, 7-58 and 7-60. The provisions of the former sections were rewritten, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 41.

CASE NOTES

Editor's Note. — Most of the cases cited in the following annotation were decided under former §§ 7-54, 7-55, 7-58 and 7-60.

No Jurisdiction When Not Holding Term of Court. — A special or emergency judge has no authority to determine a controversy without action at chambers when not holding a term of court. Greene v. Stadiem, 197 N.C. 472, 149 S.E. 685 (1929). See Bohannon v. Virginia Trust Co., 198 N.C. 702, 153 S.E. 263 (1930).

Special Judge May Hear Matter Out of Term by Consent. — Once having acquired jurisdiction at term a special or emergency judge, by consent, may hear the matter out of term nunc pro tunc. Shepard v. Leonard, 223 N.C. 110, 25 S.E.2d 445 (1943).

Judicial Notice of Appointment as Special Judge. — The appellate court will take judicial notice on appeal of the appointment of a certain person as a special judge. Greene v. Stadiem, 197 N.C. 472, 149 S.E. 685 (1929).

When necessary for the determination of a case on appeal, the appellate court will take judicial notice of the counties comprising a judicial district, and that a judge holding a term in one of the counties was a special judge appointed by the Governor. Reid v. Reid, 199 N.C. 740, 155 S.E. 719 (1930).

Motions in Cause Made at Term. — Civil actions pending on the civil issue docket of a county are always subject to motion in the cause. These motions may be made before the judge at term. In many instances they may be made out of term. When made at term the judge presiding, whether regular or special, has jurisdiction. To this extent this section has full constitutional sanction. Shepard v. Leonard, 223 N.C. 110, 25 S.E.2d 445 (1943).

Proceeding to Obtain Custody of Child. — A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In re Cranford, 231 N.C. 91, 56 S.E.2d 35 (1949).

Motion for Alimony. — Where a special judge has been authorized under commission of the Governor to hold a term of court in only one county of a district, he may not issue an order for alimony, attorney's fees and costs in a proceeding in an action for divorce a vinculo pending in another county of the district and continued to be heard before a judge regularly holding the terms of court in that district. Public Laws 1929, c. 137, under which the special judge was commissioned, provided that writs, orders and notices should be returnable before special judges only in the county where the suit, proceeding or other cause was pending, unless such special judge was then holding the courts of that district, in which case the same might be returnable before him as before the regular judge. Reid v. Reid, 199 N.C. 740, 155 S.E. 719 (1930).

Applied in Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 220 S.E.2d 806 (1975).

§ 7A-46. Special sessions.

Whenever it appears to the Chief Justice of the Supreme Court that there is need for a special session of superior court in any county, he may order a special session in that county, and order any regular, special, or emergency judge to hold such session. The Chief Justice shall notify the clerk of the superior court of the county, who shall initiate action under Chapter 9 of the General Statutes to provide a jury for the special session, if a jury is required.

Special sessions have all the jurisdiction and powers that regular sessions have. (R. C., c. 31, s. 22; 1868-9, c. 273; 1876-7, c. 44; Code, ss. 914, 915, 916; Rev., ss. 1512, 1513, 1516; C. S., ss. 1450, 1452, 1455; Ex. Sess. 1924, c. 100; 1951, c. 491, ss. 1, 3; 1959, c. 360; 1969, c. 1190, s. 46.)

Editor's Note. — This section combines former §§ 7-78, 7-80 and 7-83. The former sections were revised, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 46.

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former §§ 7-78, 7-80 and 7-83.

Constitutionality. — See State v. Ketchey, 70 N.C. 621 (1874).

The power to order special terms is not restricted to instances where there is accumulation of business, nor when such fact is recited as a reason in the commission is the power of the judge restricted to the trial of indictments found before that term. State v. Register, 133 N.C. 746, 46 S.E. 21 (1903).

No reason need be assigned by the Governor (now the Chief Justice) for calling special terms. State v. Watson, 75 N.C. 136 (1876). He is the sole judge of the evidence necessitating such action. State v. Lewis, 107 N.C. 967, 12 S.E. 457, 13 S.E. 247 (1890).

Regular Order Presumed. — When it appears from the record that a cause was tried at a special term of a superior court, it is presumed prima facie that an order for holding it was duly made, and that it was duly held. Sparkman v. Daughtry, 35 N.C. 168 (1851).

Plea Denying Existence of Court. — A plea of the defendant that the court was unlawfully called because the Governor (now the Chief Justice) was absent from the State when he attempted to order the holding of the court is properly overruled. State v. Hall, 142 N.C. 710, 55 S.E. 806 (1906).

Appointment of Judge. — When the Governor (now the Chief Justice) has ordered a special term to be held in any county of this State, it is his duty to appoint one of the judges of the superior court to hold such term, and to issue to the judge appointed by him a commission authorizing him to hold such court. State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935).

Court Held Outside Judge's District. — A judge specially commissioned to hold court in a certain county outside his district has the same jurisdiction of matters transferred to that court, by consent, from another county, as the judge of the district comprising both counties. Henry v. Hilliard, 120 N.C. 479, 27 S.E. 130 (1897).

Arraignment at Regular Term Not Required. — It is not necessary that a prisoner should be arraigned and plead at a preceding regular term to the special term at which he is tried. State v. Ketchey, 70 N.C. 621 (1874).

Removal of Cause. — A superior court at a special term has the same power to remove a cause to another county that it has at a regular term. Sparkman v. Daughtry, 35 N.C. 168 (1851).

Judgment by Default. — Whether at a regular or special term of the court, notice to the adverse party of a motion in term for judgment by default for want of an answer is not necessary. Reynolds v. Greensboro Boiler & Mach. Co., 153 N.C. 342, 69 S.E. 248 (1910).

Applied in State v. Boykin, 211 N.C. 407, 191 S.E. 18 (1937).

Cited in State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935).

§ 7A-47. Powers of regular judges holding courts by assignment or exchange.

A regular superior court judge, duly assigned to hold the courts of a county, or holding such courts by exchange, shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district has, and his jurisdiction in chambers shall extend until the session is adjourned or the session expires by operation of law, whichever is later. (1951, c. 740; 1969, c. 1190, s. 42.)

Editor's Note. — This section was formerly § 7-61.1. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 42.

§ 7A-47.1. Jurisdiction in vacation or in session.

In any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election. The resident judge of the judicial district and any special superior court judge residing in the district and the judge regularly presiding over the courts of the district have concurrent jurisdiction in all matters and proceedings in which the superior court has jurisdiction out of session; provided, that in all matters and proceedings not requiring a jury or in which a jury is waived, the resident judge

of the district and any special superior court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge and any special superior court judge residing in the district in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court. (1871-2, c. 3; Code, c. 10, s. 230; Rev., s. 1501; C. S., s. 1438; 1939, c. 69; 1945, c. 142; 1951, c. 78, s. 2; 1969, c. 1190, s. 47.)

Editor's Note. — This section was formerly § 7-65. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 47.

Legal Periodicals. — For a survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

"Vacation" or "in Chambers" Jurisdiction Generally. — "It may be said that a regular judge holding the courts of the district has general jurisdiction of all 'in chambers' matters arising in the district. The general 'vacation' or 'in chambers' jurisdiction of a regular judge arises out of his general authority. Usually it may be exercised anywhere in the district and it is never dependent upon and does not arise out of the fact that he is at the time presiding over a designated term of court or in a particular county. As to him, it is limited, ordinarily, to the district to which he is assigned by statute. It may not be exercised even within the district of his residence except when specially authorized by statute." Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

Matters and proceedings not requiring the intervention of a jury, or in which trial by jury has been waived, may be heard in vacation. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Consent of Parties Required. — A judge has no power to render judgment after the expiration of the term of court without the consent of parties. Hardin v. Ray, 89 N.C. 364 (1883).

By consent, the superior court can grant judgment in civil cases in vacation. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless they are such as are cognizable at chambers. May v. National Fire Ins. Co., 172 N.C. 795, 90 S.E. 890 (1916).

The judge holding the courts of a judicial district has authority to act in all matters within the jurisdiction of the superior court, with the consent of the parties, by signing judgments out of term and in or out of the county and out of the district. Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942).

Demurrers May Be Heard in Chambers. — A special judge has jurisdiction in the county of his residence to hear and determine in chambers a demurrer to the complaint in an action pending in the county. Parker v. Underwood, 239 N.C. 308, 79 S.E.2d 765 (1954); Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

As May Controversies without Action. — A special judge in the county of his residence has jurisdiction to hear and determine in chambers a controversy without action. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

And Motions for Judgment of Voluntary Nonsuit. — A resident judge has jurisdiction to hear and determine in chambers a motion for judgment of voluntary nonsuit. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

And Actions Involving Title to Bank Accounts. — A regular judge has jurisdiction to hear and determine in chambers an action involving title to a bank account in which the answer raised no issues of fact. Scott v. Scott, 259 N.C. 642, 131 S.E.2d 478 (1963).

Interlocutory Order. — The superior court has power to make an amendment to an interlocutory order in an ancillary proceeding out of term. Coates Bros. v. Wilkes, 94 N.C. 174 (1886).

Resident judge issued order to defendant wife to appear outside county and outside district to show cause why temporary order awarding custody of children to husband should not be made permanent. It was held that the judge was without jurisdiction to hear the matter outside the district, and an order issued upon the hearing of the order to show cause was void ab initio. Patterson v. Patterson, 230 N.C. 481, 53 S.E.2d 658 (1949).

Mandamus Proceedings in Another District Not within Jurisdiction. — A regular judge of the superior court while assigned by rotation to hold the courts of the judicial district of his residence has no jurisdiction to hear a petition for mandamus in chambers in another judicial district to which he is not assigned to hold court. Baker v. Varser, 239 N.C. 180, 79 S.E.2d 757 (1954).

No Jurisdiction to Order Payment of Expenses Out of the Recovery. — In an action by taxpayers against public officers under § 128-10, to recover public funds unlawfully expended, plaintiffs disclaimed in their complaint any right personally to participate in the recovery. After recovery, and the entry of a consent judgment dismissing appeals, and after payment of the judgment, the resident judge, on petition of one of the original taxpayer plaintiffs, is then without jurisdiction under this section to order payments, out of the recovery, of such petitioner's expenses and counsel fees. Hill v. Stanbury, 224 N.C. 356, 30 S.E.2d 150 (1944), commented on in 23 N.C.L. Rev. 40.

Power of Resident Judge. — The resident judge of a district has no other power within such district in vacation than any other judge of the superior court. State v. Ray, 97 N.C. 510, 1 S.E. 876 (1887).

Concurring Jurisdiction of Judges. — The resident judge of a judicial district and the judge regularly presiding over the courts of the district and any special judge residing in the district have concurrent jurisdiction in all matters and proceedings wherein the superior court has jurisdiction out of term. In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962).

Same — Proceeding to Obtain Custody of Child. — A special judge has concurrent jurisdiction with the judge of the district to hear and determine a proceeding instituted by the mother of a child to obtain its custody, provided the proceeding can be heard and judgment rendered during the term of court the special judge is commissioned to hold. In re Cranford, 231 N.C. 91, 56 S.E.2d 35 (1949).

Applied in Parmele v. Eaton, 240 N.C. 539, 83 S.E.2d 93 (1954); Towne v. Cope, 32 N.C. App. 660, 233 S.E.2d 624 (1977).

§ 7A-48. Jurisdiction of emergency judges.

Emergency superior court judges have the same power and authority in all matters whatsoever, in the courts which they are assigned to hold, that regular judges holding the same courts would have. An emergency judge duly assigned to hold the courts of a county or judicial district has the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, but his jurisdiction in chambers extends only until the session is adjourned or the session expires by operation of law, whichever is later. (Ex. Sess. 1921, c. 94, s. 1; C. S., s. 1435(b); 1925, c. 8; 1941, c. 52, s. 2; 1951, c. 88; 1969, c. 1190, s. 39.)

Editor's Note. — This section was formerly § 7-52. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 39.

CASE NOTES

Limitations on Jurisdiction. — The power and authority given to emergency judges are to be exercised only "in the courts in which they are assigned to hold." The jurisdiction of an emergency judge "in chambers" terminates with the adjournment or termination of the term of court which he is assigned to hold. Lewis v. Harris, 238 N.C. 642, 78 S.E.2d 715 (1953). But the statute places no such limitation on the "in term" jurisdiction of an emergency judge. Strickland v. Kornegay, 240 N.C. 758, 83 S.E.2d 903 (1954).

Cited in Spaugh v. City of Charlotte, 239 N.C. 149, 79 S.E.2d 748 (1954).

§ 7A-49. Orders returnable to another judge; notice.

When any special or emergency judge makes any matter returnable before him, and thereafter he is called upon by the Chief Justice to hold court elsewhere, he shall order the matter heard before some other judge, setting forth in the order the time and place where it is to be heard, and he shall send copies of the order to the attorneys representing the parties in such matter. (Ex. Sess. 1921, c. 94, s. 2; C. S., s. 1435(c); 1951, c. 491, s. 1; 1969, c. 1190, s. 40.)

Editor's Note. — This section was formerly § 7-53. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 40.

§ 7A-49.1. Disposition of motions when judge disqualified.

Whenever a judge before whom a motion is made, either in open court or in chambers, disqualifies himself from determining it, he may in his discretion refer the motion for disposition to the resident judge or any judge regularly holding the courts of the district or of any adjoining district, who shall have full power and authority to hear and determine the motion in the same manner as if he were the presiding judge of the district in which the cause arose. (1939, c. 48; 1961, c. 50; 1969, c. 1190, s. 43.)

Editor's Note. — This section was formerly § 7-62. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 43.

§ 7A-49.2. Civil business at criminal sessions; criminal business at civil sessions.

(a) At criminal sessions of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Motions for confirmation or rejection of referees' reports may also be heard upon 10 days' notice and judgment may be entered on such reports. The court may also enter consent orders and consent judgments, and try uncontested civil actions.

(b) For sessions of court designated for the trial of civil cases only, no grand juries shall be drawn and no criminal process shall be made returnable to any civil session. (1901, c. 28; Rev., ss. 1507, 1508; 1913, c. 196; Ex. Sess. 1913, c. 23; 1915, cc. 68, 240; 1917, c. 13; C. S., ss. 1444, 1445; 1931, c. 394; 1947, c. 25; 1969, c. 1190, s. 44; 1973, c. 503, s. 1.)

Editor's Note. — This section combines former §§ 7-72 and 7-73. The former sections were revised, combined and transferred to their present position by Session Laws 1969, c. 1190, s. 44.

CASE NOTES

Editor's Note. — Most of the cases cited in the following annotation were decided under former sections 7-72 and 7-73.

Failure to Give Notice. — Due notice must be given of motions in civil actions to be heard at a criminal term of court, and where the movant failed to give the statutory notice of his motion, and the superior court ordered a dismissal of the action, the judgment was reversed on appeal. Dawkins v. Phillips, 185 N.C. 608, 116 S.E. 723 (1923).

The superior court has authority to hear motions in civil actions at criminal terms only after due notice to the adverse party, and therefore when it did not affirmatively appear that due notice was given of plaintiff's motion to be allowed to amend, the granting of the motion at a term of court for criminal cases only would be held to be error as being presumptively outside the authority of the court. Beck v. Lexington Coca-Cola Bottling Co., 216 N.C. 579, 5 S.E.2d 855 (1939).

Under § 1A-1, Rule 7, an application for default judgment is considered a motion in a civil action; therefore, where subsection (a) of this section requires notice to be given before motions in civil actions may be heard at criminal sessions of court and no notice was given defendant, default judgment granted plaintiff must be vacated. Miller v. Belk, 18 N.C. App. 70, 196 S.E.2d 44, cert. denied, 283 N.C. 665, 197 S.E.2d 874 (1973).

Motion for New Trial in Criminal Case May Not Be Determined at Civil Term. — A motion which, if allowed, would set aside a verdict and judgment in a case on the criminal docket, specifically, a motion for a new trial on the ground of newly discovered evidence, may not be determined at a term expressly restricted by statute as a term "for the trial of civil cases only." Such a motion is for determination at a term of the court (in which the verdict and judgment to which the motion is addressed were rendered) provided for the trial of criminal cases. In re Renfrow, 247 N.C. 55, 100 S.E.2d 315 (1957).

Contested Divorce Action at Civil Session. — The purported trial of a contested divorce action conducted over defendant's protest and in disregard of his motion for continuance for trial at a civil session was a nullity. Branch v. Branch, 282 N.C. 133, 191 S.E.2d 671 (1972).

Applied in Whedbee v. Powell, 41 N.C. App. 250, 254 S.E.2d 645 (1979).

§ 7A-49.3. Calendar for criminal trial sessions.

(a) At least one week before the beginning of any session of the superior court for the trial of criminal cases, the district attorney shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session. The calendar shall fix a day for the trial of each case listed thereon. The district attorney may place on the calendar for the first day of the session all cases which will require consideration by the grand jury without obligation to call such cases for trial on that day. No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court. Any case docketed after the calendar has been filed with the clerk may be placed on the calendar at the discretion of the district attorney.

(b) All witnesses shall be subpoenaed to appear on the date listed for the trial of the case in which they are witnesses. Witnesses shall not be entitled to prove their attendance for any day or days prior to the day on which the case in which they are witnesses is set for trial, unless otherwise ordered by the presiding judge.

(c) Nothing in this section shall be construed to affect the authority of the court in the call of cases for trial. (1949, c. 169; 1969, c. 1190, s. 45; 1973, c. 47, s. 2.)

Editor's Note. — This section was formerly § 7-73.1. It was revised and transferred to its present position by Session Laws 1969, c. 1190, s. 45.

Legal Periodicals. — For brief comment on section, see 27 N.C.L. Rev. 451.

CASE NOTES

Prosecutor Controls Calendar. — Under North Carolina practice, sanctioned by this section, the prosecutor controls the criminal calendar and decides when to set cases for trial. Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975).

Filing of Calendar Six Days before Session. — Defendant was not prejudiced by the fact that the district attorney filed the calendar of cases to be tried six days before the beginning of the session of the court rather than a full week before the session began as required by this section, particularly where he was not tried until a full week after the calendar had been filed. State v. Miller, 42 N.C. App. 342, 256 S.E.2d 512 (1979).

No Defense Subpoenas until Case Calendared. — Until the prosecutor files his calendar, criminal defendants are unable to subpoena witnesses, for this section requires defense subpoenas to state the date of trial, a detail which, of course, cannot be known until the case is calendared. Shirley v. North Carolina, 528 F.2d 819 (4th Cir. 1975).

OPINIONS OF ATTORNEY GENERAL

Prosecutor's Responsibility for Calendaring Criminal Cases. — See opinion of Attorney General to Mr. Archie Taylor, Solicitor, Fourth Solicitorial District, 41 N.C.A.G. 37 (1970).

ARTICLE 8.

Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.

§ 7A-50. Emergency judge defined.

As used in this Article "emergency judge" means any judge of the superior court who has retired subject to recall to active service for temporary duty. (1967, c. 108, s. 2.)

§ 7A-51. Age and service requirements for retirement of judges of the superior court and of the Administrative Officer of the Courts.

(a) Any judge of the superior court, or Administrative Officer of the Courts, who has attained the age of sixty-five years, and who has served for a total of fifteen years, whether consecutive or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined, may retire and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired.

(b) Any judge of the superior court, or Administrative Officer of the Courts, who has served for twelve years, whether consecutive or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined may, at age sixty-eight, retire and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired.

(c) Any person who has served for a total of twenty-four years, whether continuously or not, as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and as Administrative Officer of the Courts combined, may retire, regardless of age, and receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired. In determining whether a person meets the requirements of this subsection, time served as district attorney of the superior court prior to January 1, 1971, may be included, so long as the person has served at least eight years as a judge of the superior court, or as Administrative Officer of the Courts, or as judge of the superior court and Administrative Officer of the Courts combined.

(d) Repealed by Session Laws 1971, c. 508, s. 3. (1967, c. 108, s. 2; 1971, c. 508, s. 3; 1973, c. 47, s. 2.)

§ 7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.

(a) Judges of the district court and judges of the superior court who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have

retired under the provisions of G.S. 7A-51, or under the Uniform Judicial Retirement Act after having completed 15 years of creditable service, may apply as provided in G.S. 7A-53 to become emergency judges of the court from which they retired. The Chief Justice of the Supreme Court may order any emergency judge of the district or superior court who, in his opinion, is competent to perform the duties of a judge of the court from which such judge retired, to hold regular or special sessions of such court, as needed. Order of assignment shall be in writing and entered upon the minutes of the court to which such emergency judge is assigned.

(b) In addition to the compensation or retirement allowance he would otherwise be entitled to receive by law, each emergency judge of the district or superior court who is assigned to temporary active service by the Chief Justice shall be paid by the State his actual expenses, plus seventy-five dollars ($75.00) for each day of active service rendered upon recall. (1967, c. 108, s. 2; 1973, c. 640, s. 4; 1977, c. 736, s. 3; 1979, c. 878, s. 2; 1981, c. 455, s. 6; c. 859, s. 47.)

Cross References. — For the Uniform Judicial Retirement Act, see §§ 135-50 through 135-71.

Effect of Amendments. The first 1981 amendment, ratified May 26, 1981, and effective on ratification, added to subsection (b) a sentence reading as follows "No recalled retired trial judge shall receive from the State total annual compensation for judicial services in excess of that received by an active judge of the bench to which the judge is recalled."

The second 1981 amendment, ratified July 8, 1981, and effective July 1, 1981, deleted "which" following "retirement allowed" near the beginning of subsection (b), and substituted "seventy-five dollars ($75.00) for each day" for "one hundred dollars ($100.00) for each week" near the end of subsection (b).

Session Laws 1981, c. 859, s. 47, provides "G.S. 7A-52(b) is amended to read:" and sets out the subsection without incorporating the sentence added by Session Laws 1981, c. 455, s. 6. The first 1981 amendment has therefore not been given effect in the text of subsection (b) as set out above.

Session Laws 1981, c. 859, s. 97, contains a severability clause.

§ 7A-53. Application to the Governor; commission as emergency judge.

No retired judge of the district or superior court may become an emergency judge except upon his written application to the Governor certifying his desire and ability to serve as an emergency judge. If the Governor is satisfied that the applicant qualifies under G.S. 7A-52(a) to become an emergency judge and that he is physically and mentally able to perform the official duties of an emergency judge, he shall issue to such applicant a commission as an emergency judge of the court from which he retired. The commission shall be effective upon the date of its issue and shall terminate when the judge to whom it is issued reaches the maximum age for judicial service under G.S. 7A-4.20(a). (1967, c. 108, s. 2; 1977, c. 736, s. 4; 1979, c. 878, s. 3.)

§ 7A-53.1. Jurisdiction of emergency district court judges.

Emergency district court judges have the same power and authority in all matters whatsoever, in the courts which they are assigned to hold, that regular district court judges holding the same courts would have. An emergency district court judge duly assigned to hold district court in a particular county or district has the same powers in the county or district in open court and in chambers as a resident district court judge or any district court judge regularly assigned to hold district court in that district, but his jurisdiction in chambers extends only until the session is adjourned or the session expires by operation of law, whichever is later. (1981, c. 455, s. 5.)

§ 7A-54. Article applicable to judges retired under prior law.

All judges of the superior court who have heretofore retired and who are receiving retirement compensation under the provisions of any judicial retirement law previously enacted shall be entitled to the benefits of this article. All such judges shall be subject to assignment as emergency judges by the Chief Justice of the Supreme Court, except judges retired for total disability. (1967, c. 108, s. 2.)

§ 7A-55. Retirement on account of total and permanent disability.

Every judge of the superior court or Administrative Officer of the Courts who has served for eight years or more on the superior court, or as Administrative Officer of the Courts, or on the superior court and as Administrative Officer of the Courts combined, and who while in active service becomes totally and permanently disabled so as to be unable to perform efficiently the duties of his office, and who retires by reason of such disability, shall receive for life compensation equal to two thirds of the annual salary from time to time received by the occupant of the office from which he retired. In determining whether a person meets the requirements for retirement under this section, time served as district solicitor of the superior court prior to January 1, 1971, may be included. Whenever any judge claims retirement benefits under this section on account of total and permanent disability, the Governor and Council of State, acting together, shall, after notice and an opportunity to be heard is given the applicant, by a majority vote of said body, make findings of fact from the evidence offered. Such findings of fact shall be reduced to writing and entered upon the minutes of the Council of State. The findings so made shall be conclusive as to such matters and determine the right of the applicant to retirement benefits under this section. Judges retired under the provisions of this section are not subject to recall as emergency judges. (1967, c. 108, s. 2.)

§ 7A-56. Applicability of §§ 7A-51 and 7A-55.

The provisions of G.S. 7A-51 and 7A-55 shall apply only to judges (and any Administrative Officer of the Courts) who entered office prior to January 1, 1974. The extent of such application is specified in Chapter 135, Article 4 (Uniform Judicial Retirement Act). (1973, c. 640, s. 6; 1975, c. 19, s. 2.)

§ 7A-57. Recall of active and emergency trial judges who have reached mandatory retirement age.

Superior and district court judges retired because they have reached the mandatory retirement age, and emergency superior and district court judges whose commissions have expired because they have reached the mandatory retirement age, may be recalled to preside over regular or special sessions of the court from which retired under the following circumstances:

(1) The judge must consent to the recall.
(2) The Chief Justice is authorized to order the recall.
(3) Prior to ordering recall, the Chief Justice shall satisfy himself that the recalled judge is capable of efficiently and promptly discharging the duties of the office to which recalled.
(4) Jurisdiction of a recalled retired superior court judge is as set forth in G.S. 7A-48, and jurisdiction of a recalled retired district court judge is as set forth in G.S. 7A-53.1.

(5) Orders of recall and assignment shall be in writing and entered upon the minutes of the court to which assigned.
(6) Compensation of recalled retired trial judges is the same as for recalled emergency trial judges under G.S. 7A-52(b). (1981, ch. 455, s. 4.)

§§ 7A-58, 7A-59: Reserved for future codification purposes.

Article 9.

District Attorneys and Judicial Districts.

§ 7A-60. District attorneys and prosecutorial districts.

(a) Except as provided in subsection (b), effective January 1, 1971, the State shall be divided into prosecutorial districts, the numbers and boundaries of which shall be identical with those of the superior and district court judicial districts, except as provided in this section. In the general election of November 1970, a district attorney shall be elected for a four-year term for each prosecutorial district. The district attorney shall be a resident of the district for which elected, and shall take office on January 1 following the election. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(b) Effective July 1, 1975, the twenty-seventh prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 27-A and 27-B. District 27-A shall consist of Gaston County, and District 27-B shall consist of Cleveland and Lincoln Counties. The current district attorney of the twenty-seventh prosecutorial district shall become the district attorney of Prosecutorial District 27-B, and the senior regular resident superior court judge shall appoint a district attorney for Prosecutorial District 27-A. The appointee shall serve until January 1, 1977, and his successor shall be chosen in the general election of November, 1976. The successor shall serve for the remainder of the term expiring December 31, 1978.

Effective July 15, 1977, the fifteenth prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 15A and 15B. District 15A shall consist of Alamance County, and District 15B shall consist of Orange and Chatham Counties. The current district attorney of the fifteenth prosecutorial district shall become the district attorney for Prosecutorial District 15A, and the Governor shall appoint a district attorney for Prosecutorial District 15B. The appointee shall serve until January 1, 1979, and his successor shall be chosen in the general election of November 1978, to serve a four-year term beginning January 1, 1979.

Effective January 1, 1979, the nineteenth prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 19A and 19B. District 19A shall consist of Cabarrus and Rowan Counties, and District 19B shall consist of Montgomery and Randolph Counties. The current district attorney of the nineteenth prosecutorial district shall become the district attorney for Prosecutorial District 19A, and the Governor shall appoint a district attorney for Prosecutorial District 19B. The appointee shall serve until January 1, 1981, and his successor shall be chosen in the general election of November 1980, to serve a four-year term beginning January 1, 1981.

Effective October 1, 1981, the third prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 3A and 3B. District 3A shall consist of Pitt County, and District 3B shall consist of Craven, Carteret and Pamlico Counties. The current district attorney of the third prosecutorial district shall become the district attorney for Prosecutorial District 3A. The Governor shall appoint a district attorney for Prosecutorial District

3B. The appointee shall serve until January 1, 1983, and his successor shall be chosen in the general election of November 1982, to serve a four-year term beginning January 1, 1983.

Effective September 1, 1981, the seventeenth prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 17A and 17B. District 17A shall consist of Caswell and Rockingham Counties, and District 17B shall consist of Stokes and Surry Counties. The current district attorney of the seventeenth prosecutorial district shall become the district attorney for Prosecutorial District 17B. A new district attorney position is created by this act for Prosecutorial District 17A and shall be filled by appointment by the Governor. The appointee shall serve until January 1, 1983, and his successor shall be chosen in the general election of November, 1982, to serve a four-year term beginning January 1, 1983. (1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3; 1977, 2nd Sess., c. 1238, s. 2; 1981, c. 964, ss. 2, 3.)

Editor's Note. — New secretarial positions are created and allocated to the district attorneys in certain districts by Session Laws 1979, c. 1072, s. 6; 1979, 2nd Sess., c. 1221, s. 5; 1981, c. 964, s. 9.

Effect of Amendments. — The 1981 amendment added "except as provided in this section" at the end of the first sentence of subsection (a), and added the fourth and fifth paragraphs of subsection (b).

§ 7A-61. Duties of district attorney.

The district attorney shall prepare the trial dockets, prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district, advise the officers of justice in his district, and perform such duties related to appeals to the Appellate Division from his district as the Attorney General may require. Effective January 1, 1971, the district attorney shall also represent the State in juvenile cases in which the juvenile is represented by an attorney. Each district attorney shall devote his full time to the duties of his office and shall not engage in the private practice of law. (1967, c. 1049, s. 1; 1969, c. 1190, s. 5; 1971, c. 377, s. 5.1; 1973, c. 47, s. 2.)

Cross References. — As to interchangeability of terms "solicitor" and "district attorney," see § 7A-66.1.

CASE NOTES

The proper role of the district attorney or privately employed counsel in the prosecution of one charged with a criminal offense is the conviction of the guilty, the acquittal of the innocent and punishment of the guilty, appropriate to the circumstances, in the interest of the future protection of society. In the discharge of his duties the prosecuting attorney is not required to be, and should not be, neutral. He is not the judge, but the advocate of the State's interest in the matter at hand. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

This section makes the office of district attorney a full-time job. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

But this Article did not change the role of the district attorney in a criminal case to that of an impartial officer of the court. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

This Article Does Not Prohibit Practice of Employing Private Counsel to Assist District Attorney. — This Article does not prohibit the practice of employing private counsel to assist the district attorney in a criminal case. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

However, the district attorney should not relinquish the duties of his office to privately employed counsel but should remain in charge of and responsible for the prosecution of criminal actions and, except for

the most compelling reasons, the trial judge should not permit the district attorney to abdicate his duties. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771, appeal dismissed, 285 N.C. 763, 209 S.E.2d 287 (1974).

Allowing Special Counsel Is within Discretion of Trial Court. — It is within the discretion of the trial court to allow special counsel to aid the prosecuting attorney in the prosecution of a case. State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

The discretion vested in the trial judge to permit private counsel to appear with the district attorney has existed in our courts from their incipiency. State v. Page, 22 N.C. App. 435, 206 S.E.2d 771, appeal dismissed, 285 N.C. 763, 209 S.E.2d 287 (1974).

Selectivity Required in Preparation of Trial Calendar. — It is the district attorney's statutory duty to prepare the trial docket and prosecute criminal actions in the name of the State. In order to properly perform this duty, he must exercise selectivity in preparing the trial calendar. State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979).

Holding Delinquency Hearing in Absence of District Attorney. — A contention by a juvenile who was represented by counsel that the trial court erred in proceeding with a delinquency hearing in the absence of the district attorney in that the court was cast in the role of a prosecutor was held without merit where the record showed that someone other than the judge examined witnesses of both the petitioner and the juvenile, and that the questions asked by the court were fair and demonstrated no bias. In re Potts, 14 N.C. App. 387, 188 S.E.2d 643, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (1972).

Applied in State v. Mitchell, 298 N.C. 549, 259 S.E.2d 254 (1979).

Cited in State v. Rimmer, 25 N.C. App. 637, 214 S.E.2d 225 (1975); State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184 (1978).

§ 7A-62. Acting district attorney.

When a district attorney becomes for any reason unable to perform his duties, the Governor shall appoint an acting district attorney to serve during the period of disability. An acting district attorney has all the power, authority and duties of the regular district attorney. He shall take the oath of office prescribed for the regular district attorney, and shall receive the same compensation as the regular district attorney. (1967, c. 1049, s. 1; 1973, c. 47, s. 2.)

§ 7A-63. Assistant district attorneys.

Each district attorney shall be entitled to the number of full-time assistant district attorneys set out in this Subchapter, to be appointed by the district attorney, to serve at his pleasure. A vacancy in the office of assistant district attorney shall be filled in the same manner as the initial appointment. An assistant district attorney shall take the same oath of office as the district attorney, and shall perform such duties as may be assigned by the district attorney. He shall devote his full time to the duties of his office and shall not engage in the private practice of law during his term. (1967, c. 1049, s. 1; 1969, c. 1190, s. 6; 1971, c. 377, s. 6; 1973, c. 47, s. 2.)

CASE NOTES

Duties of Assistant District Attorneys. — The legislative intent and the statutory provisions contemplate that an assistant district attorney is fully authorized to carry out such duties of the district attorney as the district attorney may assign to him. State v. Rimmer, 25 N.C. App. 637, 214 S.E.2d 225, cert. denied, 288 N.C. 250, 217 S.E.2d 674 (1975).

Stated in State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

§ 7A-64. Temporary assistance when dockets overcrowded.

When criminal cases accumulate on the dockets of the superior or district courts of a district beyond the capacity of the district attorney and his full-time assistants to keep the dockets reasonably current, the Administrative Officer of the Courts may, on request of the district attorney, supported by facts indicating the need for assistance:

(1) Temporarily assign an assistant district attorney from another district, after consultation with the district attorney thereof, to assist in the prosecution of cases in the requesting district; or

(2) Authorize the temporary appointment, by the requesting district attorney, of a qualified attorney to assist the requesting district attorney.

The length of service and compensation of such temporary appointee shall be fixed by the Administrative Officer of the Courts in each case. (1967, c. 1049, s. 1; 1973, c. 47, s. 2.)

CASE NOTES

Stated in State v. Best, 280 N.C. 413, 186 S.E.2d 1 (1972).

OPINIONS OF ATTORNEY GENERAL

Temporary District Attorney Is Full-Time Public Office as of January 1, 1971. — See opinion of Attorney General to Mr. John C.W. Gardner, 41 N.C.A.G. 192 (1970).

§ 7A-65. Compensation and allowances of district attorneys and assistant district attorneys.

The annual salary of district attorneys and full-time assistant district attorneys shall be as provided in the Budget Appropriations Act. When traveling on official business, each district attorney and assistant district attorneys is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1967, c. 1049, s. 1; 1973, c. 47, s. 2.)

§ 7A-66. Removal of district attorneys.

The following are grounds for suspension of a district attorney or for his removal from office:

(1) Mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent;

(2) Willful misconduct in office;

(3) Willful and persistent failure to perform his duties;

(4) Habitual intemperance;

(5) Conviction of a crime involving moral turpitude;

(6) Conduct prejudicial to the administration of justice which brings the office into disrepute; or

(7) Knowingly authorizing or permitting an assistant district attorney to commit any act constituting grounds for removal, as defined in subdivisions (1) through (6) hereof.

A proceeding to suspend or remove a district attorney is commenced by filing with the clerk of superior court of the county where the district attorney resides a sworn affidavit charging the district attorney with one or more grounds for

removal. The clerk shall immediately bring the matter to the attention of the senior regular resident superior court judge for the district, who shall within 30 days either review and act on the charges or refer them for review and action within 30 days to another superior court judge residing in or regularly holding the courts of the district. If the superior court judge upon review finds that the charges if true constitute grounds for suspension, and finds probable cause for believing that the charges are true, he may enter an order suspending the district attorney from performing the duties of his office until a final determination of the charges on the merits. During the suspension the salary of the district attorney continues. If the superior court judge finds that the charges if true do not constitute grounds for suspension or finds that no probable cause exists for believing that the charges are true, he shall dismiss the proceeding.

If a hearing, with or without suspension, is ordered, the district attorney should receive immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set for hearing not less than 10 days nor more than 30 days thereafter. The matter shall be set for hearing before the judge who originally examined the charges or before another regular superior court judge resident in or regularly holding the courts of the district. The hearing shall be open to the public. All testimony shall be recorded. At the hearing the superior court judge shall hear evidence and make findings of fact and conclusions of law and if he finds that grounds for removal exist, he shall enter an order permanently removing the district attorney from office, and terminating his salary. If he finds that no grounds exist, he shall terminate the suspension, if any.

The district attorney may appeal from an order of removal to the Court of Appeals on the basis of error of law by the superior court judge. Pending decision of the case on appeal, the district attorney shall not perform any of the duties of his office. If, upon final determination, he is ordered reinstated either by the appellate division or by the superior court upon remand his salary shall be restored from the date of the original order of removal. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; c. 148, s. 1; 1977, c. 21, ss. 1, 2.)

§ 7A-66.1. Office of solicitor may be denominated as office of district attorney; "solicitor" and "district attorney" made interchangeable; interchangeable use authorized in proceedings, documents, and quotations.

(a) The constitutional office of solicitor may be denominated as the office of "district attorney" for all purposes, and the terms "solicitor" and "district attorney" shall be identical in meaning and interchangeable in use. All terms derived from or related to the term "solicitor" may embody this denomination.

(b) Repealed by Session Laws 1975, c. 956, s. 5.

(c) The interchangeable use authorized in this section includes use in all forms of oral, written, visual, and other communication including:

(1) Oaths of office;

(2) Other oaths or orations required or permitted in court or official proceedings;

(3) Ballots;

(4) Statutes;

(5) Regulations;

(6) Ordinances;

(7) Judgments and other court orders and records;

(8) Opinions in cases;

(9) Contracts;
(10) Bylaws;
(11) Charters;
(12) Official commissions, orders of appointment, proclamations, executive orders, and other official papers or pronouncements of the Governor or any executive, legislative, or judicial official of the State or any of its subdivisions;
(13) Official and unofficial letterheads;
(14) Campaign advertisements;
(15) Official and unofficial public notices; and
(16) In all other contexts not enumerated.

The interchangeability authorized in this section extends to the privilege of substituting terminology in matter quoted in oral, written, and other modes of communication without making indication of such change, except where such change may result in a substantive misunderstanding. Reprints or certifications of the text of the Constitution of North Carolina made by the Secretary of State, however, must retain the original terminology and indicate in brackets beside the original terminology the appropriate alternative words. (1973, c. 47, s. 1; 1975, c. 956, s. 5.)

§ 7A-67: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-68. Administrative assistants.

(a) Each district attorney shall be entitled to one administrative assistant to be appointed by the district attorney and to serve at his pleasure. The assistant need not be an attorney licensed to practice law in the State of North Carolina.

(b) It shall be the duty of the administrative assistant to assist the district attorney in preparing cases for trial and in expediting the criminal court docket, and to assist in such other duties as may be assigned by the district attorney.

(c) When traveling on official business, each administrative assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1973, c. 807.)

§ 7A-69. Investigatorial assistants.

The district attorney in the third-B, fourth, seventh, tenth, eleventh, twelfth, fourteenth, fifteenth-A, sixteenth, eighteenth, twentieth, twenty-first, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth judicial districts is entitled to one investigatorial assistant to be appointed by the district attorney and to serve at his pleasure. It shall be the duty of the investigatorial assistant to investigate cases preparatory to trial and to perform such other duties as may be assigned by the district attorney. The investigatorial assistant is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally. (1975, c. 956, s. 6; 1977, c. 969, s. 1; 1981, c. 964, s. 2.)

Editor's Note. — Session Laws 1979, c. 1072, s. 8, provides: "A new investigatorial assistant position is created and allocated to the District Attorney of Judicial District 19B."

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted the reference to the third-B judicial district for a reference to the third judicial district in the first sentence.

§ 7A-69.1. Witness assistant coordinator.

New witness assistant coordinator positions are created and allocated to the prosecutorial districts and in the numbers as follows:

District	Witness Assistant Coordinators
10	1
12	1
14	1
15B	1
18	1
21	1
28	1.

(1981, c. 964, s. 8.)

Article 10.

§§ 7A-70 to 7A-94: Reserved for future codification purposes.

Article 11.

Special Regulations.

§ 7A-95. Reporting of trials.

(a) Court reporting personnel shall be utilized if available, for the reporting of trials in the superior court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon the request of the senior regular resident superior court judge.

(b) The Administrative Office of the Courts shall from time to time investigate the state of the art and techniques of recording testimony, and shall provide such electronic or mechanical devices as are found to be most efficient for this purpose.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some person designated by the clerk to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, and transcribe the record as required. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs or other records are the property of the State, and the clerk shall keep them in his custody.

(d) Reporting of any trial may be waived by consent of the parties.

(e) Appointment of a reporter or reporters for superior court proceedings in each district shall be made by the senior regular resident superior court judge. The compensation and allowances of reporters in each district shall be fixed by the senior regular resident superior court judge, within limits determined by the Administrative Officer of the Courts, and paid by the State.

(f) Repealed by Sessions Laws 1971, c. 377, s. 32. (1965, c. 310, s. 1; 1969, c. 1190, s. 7; 1971, c. 377, s. 32.)

Editor's Note. — Additional court reporter positions are created by Session Laws 1981, c. 964, s. 6.

CASE NOTES

Applied in State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969).

Stated in North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Cited in State v. Wray, 35 N.C. App. 682, 242 S.E.2d 635 (1978).

§ 7A-96. Court adjourned by sheriff when judge not present.

If the judge of a superior court shall not be present to hold any session of court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the session, and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day, unless he shall be sooner informed that the judge for any reason cannot hold the session. (Code, s. 926; 1887, c. 13; 1901, c. 269; Rev., s. 1510; C. S., s. 1448; 1969, c. 1190, s. 49.)

Editor's Note. — This section was formerly § 7-76. It was rewritten and transferred to its present position by Session Laws 1969, c. 1190, s. 49.

Legal Periodicals. — For comment on this section, see 21 N.C.L. Rev. 338.

CASE NOTES

Presumption of Adjournment. — Where the record recited that a regular term of a superior court was opened and held Wednesday, instead of on Monday, of the week fixed by the statutes, it was presumed that the sheriff had duly opened the court and adjourned it from day to day as provided in this section. State v. Weaver, 104 N.C. 758, 10 S.E. 486 (1889).

All Matters Carried Over. — This section by operation of law carries all matters over to the next term, in the same plight and condition. State v. Horton, 123 N.C. 695, 31 S.E. 218 (1898).

Newly Elected Judge. — Where a newly elected judge, as successor to one who was to have held the spring term of a court ordered the sheriff to adjourn the court from day to day, not exceeding four days, to enable him to take the oath of office and preside, and the sheriff qualified and held the court, his acts were valid either as those of an officer de jure or as those of an officer de facto, and an exception to the validity of a trial of an action on that ground was untenable. State v. Harden, 177 N.C. 580, 98 S.E. 782 (1919).

Duty of Defendant to Attend Special Term. — A defendant bound over to answer a criminal charge at a regular term of the superior court, which term is not held in consequence of the absence of the judge, is required to attend an intervening special term subsequently appointed and held. State v. Horton, 123 N.C. 695, 31 S.E. 218 (1898).

Stated in State v. McGimsey, 80 N.C. 377 (1879).

§§ 7A-97 to 7A-99: Reserved for future codification purposes.

ARTICLE 12.

Clerk of Superior Court.

§ 7A-100. Election; term of office; oath; vacancy; office and office hours; appointment of acting clerk.

(a) A clerk of the superior court for each county shall be elected by the qualified voters thereof, to hold office for a term of four years, in the manner prescribed by Chapter 163 of the General Statutes. The clerk, before entering

on the duties of his office, shall take the oath of office prescribed by law. If the office of clerk of superior court becomes vacant otherwise than by the expiration of the term, or if the people fail to elect a clerk, the senior regular resident superior court judge for the county shall fill the vacancy by appointment until an election can be regularly held. In cases of death or resignation of the clerk, the senior regular resident superior court judge, pending appointment of a successor clerk, may appoint an acting clerk of superior court for a period of not longer than 30 days.

(b) The county commissioners shall provide an office for the clerk in the courthouse or other suitable place in the county seat. The clerk shall observe such office hours and holidays as may be directed by the Administrative Officer of the Courts. (Const., art. 4, ss. 16, 17, 29; C. C. P., ss. 139-141; 1871-72, c. 136; Code, ss. 74, 76, 78, 80, 114, 115; 1903, c. 467; Rev., ss. 890-893, 895, 909, 910; C.S., ss. 926, 930, 931, 945, 946; 1935, c. 348; 1939, c. 82; 1941, c. 329; 1949, c. 122, ss. 1, 2; 1971, c. 363, s. 1; 1973, c. 240.)

Local Modification. — Brunswick: 1955, c. 1259; Carrituck: 1939, ch. 82, s. 3; Gates: 1959, c. 254; Moore, Richmond: 1939, c. 82, s. 3; Wake: 1955, c. 1168.

Cross References. — As to oath, see §§ 11-6, 11-7, 11-11. As to wilfully failing to discharge duties as ground for removal, see § 14-230. As to bonding requirements, see §§ 109-8, 109-9.

Editor's Note. — This section combines former §§ 2-2, 2-5, 2-6, 2-24, and 2-25. The former sections were revised, combined and transferred to their present position by Session Laws 1971, c. 363, s. 1, effective Oct. 1, 1971.

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former §§ 2-2, 2-5, 2-6, 2-24 and 2-25.

Commissioners' Duty. — A failure on the part of the clerk to give bond must be ascertained by the commissioners before the judge is authorized to declare a vacancy. And in accepting or rejecting the bond tendered, the court cannot interfere in the exercise of their discretion. Buckman v. Commissioners of Beaufort, 80 N.C. 121 (1879).

Conflicting Claimants for Vacant Office. — Where there are conflicting claimants for a vacant office a court must act upon the prima facie evidence of right and admit the one possessing it, leaving the other to pursue the proper legal remedy for the recovery of possession. Clark v. Carpenter, 81 N.C. 309 (1879).

Term of Appointee. — When there is a vacancy and the judge appoints one to fill that vacancy, such appointee holds office only until the next election at which members of the General Assembly are chosen. Rodwell v. Rowland, 137 N.C. 617, 50 S.E. 319 (1905).

§ 7A-101. Compensation.

The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the 1970 federal decennial census, according to the following schedule:

Population	*Salary*
Less than 19,999	$19,056
20,000 to 49,999	22,536
50,000 to 99,999	25,992
100,000 to 199,999	29,460
200,000 and above	35,808

When a county changes from one population group to another as a result of any future decennial census, the salary of the clerk shall be changed to the salary appropriate for the new population group on July 1 of the first full biennium subsequent to the taking of the census (July 1, 1981; July 1, 1991; etc.), except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit increments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the salaries in the table at the end of the first paragraph to their present levels from $13,656, $17,328, $20,484, $23,628, $26,784 and $32,556, respectively.

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

The 1981 amendment deleted a listing for population less than 10,000, and substituted the listing for population less than 19,999 for a listing for population from 10,000 to 19,999.

§ 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(a) The numbers and salaries of assistant clerks, deputy clerks, and other employees in the office of each clerk of superior court shall be determined by the Administrative Officer of the Courts after consultation with the clerk concerned. All personnel in the clerk's office are employees of the State. The clerk appoints the assistants, deputies, and other employees in his office to serve at his pleasure. Assistant and deputy clerks shall take the oath of office prescribed for clerks of superior court, conformed to the office of assistant or deputy clerk, as the case may be.

(b) An assistant clerk is authorized to perform all the duties and functions of the office of clerk of superior court, and any act of an assistant clerk is entitled to the same faith and credit as that of the clerk. A deputy clerk is authorized to certify the existence and correctness of any record in the clerk's office, to take the proofs and examinations of the witnesses touching the execution of a will as required by G.S. 31-17, and to perform any other ministerial act which the clerk may be authorized and empowered to do, in his own name and without reciting the name of his principal. The clerk is responsible for the acts of his assistants and deputies. (1777, c. 115, s. 86; P. R.; R. C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C. S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678.)

Editor's Note. — This section combines former §§ 2-10, 2-12, 2-13, 2-15 and 7A-102. Sections 2-10, 2-12, 2-13 and 2-15 were revised, transferred and combined with § 7A-102, which was also revised, by Session Laws 1971, c. 363, s. 2, effective Oct. 1, 1971.

Additional deputy and assistant clerk of court positions are created by Session Laws 1975, 2nd Sess., c. 983, s. 113, effective July 1, 1976; 1979, c. 1072, s. 5; 1979, 2nd Sess., c. 1221, ss. 3, 4; 1981, c. 964, s. 7.

CASE NOTES

Quoted in Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977).

Stated in Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

§ 7A-102.1. Transfer of sick leave earned as county or municipal employees by certain employees in offices of clerks of superior court.

(a) All assistant clerks, deputy clerks and other employees of the clerks of the superior court of this State, secretaries to superior court judges and district attorneys, and court reporters of the superior courts, who have heretofore been, or shall hereafter be, changed in status from county employees to State employees by reason of the enactment of Chapter 7A of the General Statutes, shall be entitled to transfer sick leave accumulated as a county employee pursuant to any county system and standing to the credit of such employee at the time of such change of status to State employee, without any maximum limitation thereof. Such earned sick leave credit shall be certified to the Administrative Office of the Courts by the official or employee responsible for keeping sick leave records for the county, and the Administrative Office of the Courts shall accord such transferred sick leave credit the same status as if it had been earned as a State employee.

(b) All clerks, assistant clerks, deputy clerks and other employees of any court inferior to the superior court which has been or may be abolished by reason of the enactment of Chapter 7A of the General Statutes, who shall thereafter become a State employee by employment in the Judicial Department, shall be entitled to transfer sick leave earned as a municipal or county employee pursuant to any municipal or county system in effect on the date said court was abolished, without any maximum limitation thereof. Such earned sick leave credit shall be certified to the Administrative Office of the Courts by the official or employee responsible for keeping sick leave records for the municipality or county, and the Adminstrative Office of the Courts shall accord such transferred sick leave credit the same status as if it had been earned as a State employee.

(c) Any employee covered by this section who retires on or after May 22, 1973, shall be given credit for all sick leave accumulated on May 22, 1973. (1967, c. 1187, ss. 1, 2; 1969, c. 1190, s. 8; 1973, c. 47, s. 2; c. 795, ss. 1-3.)

§ 7A-103. Authority of clerk of superior court.

The clerk of superior court is authorized to:

(1) Issue subpoenas to compel the attendance of any witness residing or being in the State, or to compel the production of any document or paper, material to any inquiry in his court.

(2) Administer oaths, and to take acknowledgment and proof of the execution of all instruments or writings.

(3) Issue commissions to take the testimony of any witness within or without the State.

(4) Issue citations and orders to show cause to parties in all matters cognizable in his court, and to compel the appearance of such parties.

(5) Enforce all lawful orders and decrees, by execution or otherwise, against those who fail to comply therewith or to execute lawful process. Process may be issued by the clerk, to be executed in any county of the State, and to be returned before him.

(6) Certify and exemplify, under seal of his court, all documents, papers or records therein, which shall be received in evidence in all the courts of the State.

(7) Preserve order in this court, punish criminal contempts, and hold persons in civil contempt; subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina.

(8) Adjourn any proceeding pending before him from time to time.
(9) Open, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court.
(10) Enter default or judgment in any action or proceeding pending in his court as authorized by law.
(11) Award costs and disbursements as prescribed by law, to be paid personally, or out of the estate or fund, in any proceeding before him.
(12) Compel an accounting by magistrates and compel the return to the clerk of superior court by the person having possession thereof, of all money, records, papers, dockets and books held by such magistrate by virtue or color of his office.
(13) Grant and revoke letters testamentary, letters of administration, and letters of trusteeship.
(14) Appoint and remove guardians and trustees, as provided by law.
(15) Audit the accounts of fiduciaries, as required by law.
(16) Exercise jurisdiction conferred on him in every other case prescribed by law. (C. C. P., ss. 417, 418, 442; Code, ss. 103, 108; 1901, c. 614, s. 2; Rev., s. 901; 1919, c. 140; C. S., s. 938; 1949, c. 57, s. 1; 1951, c. 28, s. 1; 1961, c. 341, s. 2; 1971, c. 363, s. 3; 1979, 2nd Sess., c. 1080, s. 5.)

Editor's Note. — This section was formerly § 2-16. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 3. Former § 7A-103, relating to accounting for fees and other receipts, and annual audit, was renumbered § 7A-108 by section 10 of the same 1971 act.

Cross References. — As to accounts of executors, etc., see §§ 1-406, 28A-20-1 through 28A-21-5, 33-41. As to use of copies of court papers in evidence, see § 8-34. As to depositions, see §§ 8-74 through 8-83. As to revocation of letters testamentary and of administration, see §§ 28A-8-4, 28A-9-1 through 28A-9-7. As to clerks acting as notaries, see § 10-3. As to duty of clerk to name successor to trustee in a deed of assignment for benefit of creditors, see § 23-4. As to probate, see §§ 31-11 through 31-25, 47-1, 47-3, 47-7. As to guardians, see §§ 33-1 through 33-67. As to fixing compensation of commissioners for division of lands, see § 46-7.1. As to reports to Commissioner of Revenue, see § 105-22. As to requirement of being present at the opening of lock boxes of decedents, see § 105-24.

Effect of Amendments. — The 1979, 2nd Sess., amendment rewrote subdivision (7), which formerly read "Preserve order in his court and to punish contempts."

CASE NOTES

Legislature May Take Away or Modify Powers. — The powers and duties of clerks enumerated in this section are given and fixed by legislative enactment, and there is no constitutional barrier to the legislature's taking away, adding to, or modifying them; or authorizing them to be exercised and performed by another. In re Barker, 210 N.C. 617, 188 S.E. 205 (1936).

Issuance of Subpoena Duces Tecum. — It is the long-established practice of clerks of court to issue subpoenas duces tecum as a matter of course upon the oral request of counsel. The issuance of the subpoena is treated merely as a ministerial act which initiates proceedings to have the documents or other items described in the subpoena brought before the court. At the trial, the court will pass upon the competency of the evidence unless the subpoena has been quashed prior thereto. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Customary Use of Subpoena Duces Tecum. — Attorneys have customarily used the subpoena duces tecum only for the purpose for which it was intended, i.e., to require the production of a specific document or items patently material to the inquiry, or as a notice to produce the original of a document. Vaughan v. Broadfoot, 267 N.C. 691, 149 S.E.2d 37 (1966).

Within his jurisdiction the clerk of the superior court has the same power as courts of general jurisdiction to open, vacate, modify, set aside or enter as of a former time, decrees or orders of his court, and to fix time for hearings. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

Jurisdiction — Limited. — The clerk of the superior court is a court of very limited jurisdiction. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950). Such court has only such jurisdiction as is given by statute. It has no common-law or equitable jurisdiction.

McCauley v. McCauley, 122 N.C. 288, 30 S.E. 344 (1898).

Same — Corrections. — The clerk has the jurisdiction to correct a mistake in a partition proceeding. Wahab v. Smith, 82 N.C. 229 (1880); Little v. Duncan, 149 N.C. 84, 62 S.E. 770 (1908).

Or in a proceeding to subject real estate to sale for assets, after a report of the sale is returned and confirmed, he has the right to set aside the sale and order a resale by showing proper cause. Lovinier v. Pearce, 70 N.C. 167 (1874).

The power of a court upon a proper showing to correct its records and supply an inadvertent omission cannot be doubted. Philbrick v. Young, 255 N.C. 737, 122 S.E.2d 725 (1961).

Same — Administrators. — The clerk has the power, for good and sufficient cause, to remove an administrator; or for like cause, as necessarily equivalent, to permit him to resign his trust. Murrill v. Sandlin, 86 N.C. 54 (1882); Tulburt v. Hollar, 102 N.C. 406, 9 S.E. 430 (1889).

It is thus incumbent on the probate judge (now the clerk) to make inquiry, and ascertain for himself the facts upon which the legal discretion reposed in him to remove an incompetent or unfaithful officer is to be exercised. Murrill v. Sandlin, 86 N.C. 54 (1882).

Same — Accounts. — The jurisdiction for auditing accounts of executors, administrators, etc., conferred upon the clerk is an ex parte jurisdiction of examining the accounts and vouchers of such persons, allowing them commissions, etc., as formerly practiced, and does not conclude legatees, etc., or affect suits inter partes upon the same matters. Heilig v. Foard, 64 N.C. 710 (1870).

Same — Probate of Wills. — This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. Brissie v. Craig, 232 N.C. 701, 62 S.E.2d 330 (1950); Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

A reasonable fee for legal advice and assistance in the management of a trust estate is allowable as a necessary expense of the trust estate. Tripp v. Tripp, 17 N.C. App. 64, 193 S.E.2d 366 (1972).

Appeals. — In appeals from the clerk, in that class of cases of which he has jurisdiction in his capacity as clerk, as given under this section, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. Ex parte Spencer, 95 N.C. 271 (1886).

Applied in Braddy v. Pfaff, 210 N.C. 248, 186 S.E. 340 (1936); In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954); Potts v. Howser, 267 N.C. 484, 148 S.E.2d 836 (1966).

Cited in Edwards v. McLawhorn, 218 N.C. 543, 11 S.E.2d 562 (1940).

§ 7A-104. Disqualification; waiver; removal; when judge acts.

(a) The clerk shall not exercise any judicial powers in relation to any estate, proceeding, or civil action:

(1) If he has, or claims to have, an interest by distribution, by will, or as creditor or otherwise;

(2) If he is so related to any person having or claiming such an interest that he would, by reason of such relationship, be disqualified as a juror, but the disqualification on this ground ceases unless the objection is made at the first hearing of the matter before him;

(3) If clerk or the clerk's spouse is a party or a subscribing witness to any deed of conveyance, testamentary paper or nuncupative will, but this disqualification ceases when such deed, testamentary paper, or will has been finally admitted to probate by another clerk, or before the judge of the superior court;

(4) If clerk or the clerk's spouse is named as executor or trustee in any testamentary or other paper, but this disqualification ceases when the will or other paper is finally admitted to probate by another clerk, or before the judge of the superior court. The clerk may renounce the executorship and endorse the renunciation on the will or on some paper attached thereto, before it is propounded for probate, in which case the renunciation must be recorded with the will if it is admitted to probate.

The parties may waive the disqualification specified in subdivisions (1), (2), and (3) of this subsection, and upon the filing of such written waiver, the clerk shall act as in other cases.

(b) When any of the disqualifications specified in this section exist, and there is no waiver thereof, or when there is no renunciation under subdivision (a)(4), of this section, any party in interest may apply to the resident or presiding superior court judge for an order to remove the proceedings to the clerk of superior court of an adjoining county in the same district; or he may apply to the judge to make either in vacation or during a session of court all necessary orders and judgments in any proceeding in which the clerk is disqualified, and the judge in such cases is hereby authorized to make any and all necessary orders and judgments as if he had the same original jurisdiction as the clerk over such proceedings.

(c) In any case in which the clerk of the superior court is executor, administrator, collector, or guardian of an estate at the time of his election or appointment to office, in order to enable him to settle such estate, the resident or presiding judge of the superior court is empowered to make such orders as may be necessary in the settlement of the estate; and he may audit the accounts or appoint a commissioner to audit the accounts of such executor or administrator, and report to him for his approval, and when the accounts are so approved, the judge shall order the proper records to be made by the clerk. (C. C. P., ss. 419-421; 1871-72, cc. 196, 197; Code, ss. 104-107; Rev., ss. 902-905; 1913, c. 70, s. 1; C. S., ss. 939-942; 1935, c. 110, s. 1; 1971, c. 363, s. 4; 1977, c. 546.)

Cross References. — As to probate where clerk is a party, see § 47-7. As to clerk's disqualification to be appointed to sell real estate, see § 47-31. As to order of registration by interested clerk, see § 47-61.

Editor's Note. — This section combines former §§ 2-17, 2-19, 2-20 and 2-21. The former sections were revised, combined and transferred to their present position by Session Laws 1971, c. 363, s. 4. Former § 7A-104 was renumbered § 7A-105 by section 10 of the same 1971 act.

CASE NOTES

The proper practice, in a proceeding against an administrator who at the time was elected clerk, seems to be to make the summons returnable before him, and then transfer the whole proceeding before the district judge, who will make the necessary orders in the premises. Wilson v. Abrams, 70 N.C. 324 (1874).

Disqualification of Interested Clerk. — The clerk is disqualified, both by common-law rules and by this section, to act in any cause wherein he is interested. Gregory v. Ellis, 82 N.C. 225 (1880); White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890); Land Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

And where he is personally interested in the commissions to be allowed the executors, he is excluded from jurisdiction. Barlow v. Norfleet, 72 N.C. 535 (1875).

The probate of a deed by a clerk interested therein is a nullity. Land Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

And when the probate of a deed is a nullity because the clerk was disqualified to act the defect is not cured by the approval of the final decree, under which it is made, by the judge of the superior court. Land Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

Same — Judicial and Ministerial Acts. — The act of "admitting to probate" is a judicial act, and a clerk is prohibited from acting on a deed or deed of trust in which he is grantor or grantee. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890); Freeman v. Person, 106 N.C. 251, 10 S.E. 1037 (1890); Piland v. Taylor, 113 N.C. 1, 18 S.E. 70 (1893); Norman v. Ausbon, 193 N.C. 791, 138 S.E. 162 (1927).

But the issuing of a warrant in attachment, or an order for seizure of property in claim and delivery, are ministerial acts, and can be performed by a deputy, or even by the clerk, in a case to which he is a party. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887); White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

And it has been the practice in this State for clerks to issue process either for or against themselves. Evans v. Etheridge, 96 N.C. 42, 1 S.E. 633 (1887).

A clerk cannot take proof of a deed of which he is the subscribing witness, because he cannot administer oath to himself. Trenwith v. Smallwood, 111 N.C. 132, 15 S.E. 1030 (1892).

Same — Clerk Related to Party. — A clerk is prohibited from acting as such in relation to any estate or proceeding if he is so related to any person having, or claiming to have, such interest that he would by reason of such

relationship be disqualified as a juror. Land Co. v. Jennett, 128 N.C. 3, 37 S.E. 954 (1901).

But probate and private examination taken before an officer are not invalid simply because he is related to the parties. McAllister v. Purcell, 124 N.C. 262, 32 S.E. 715 (1899).

Written Waiver of Clerk's Disqualification. — The waiver must be in writing and made when the opposing parties are present and capable of objecting. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

Cited in In re Estate of Smith, 226 N.C. 169, 37 S.E.2d 127 (1946).

§ 7A-105. Suspension, removal, and reinstatement of clerk.

A clerk of superior court may be suspended or removed from office for willful misconduct or mental or physical incapacity, and reinstated, under the same procedures as are applicable to a superior court district attorney, except that the procedure shall be initiated by the filing of a sworn affidavit with the chief district judge of the district in which the clerk resides, and the hearing shall be conducted by the senior regular resident superior court judge serving the county of the clerk's residence. If suspension is ordered, the judge shall appoint some qualified person to act as clerk during the period of the suspension. (1967, c. 691, s. 6; 1971, c. 363, s. 10; 1973, c. 47, s. 2; c. 148, s. 2.)

Editor's Note. — The above section was formerly numbered § 7A-104. It was renumbered § 7A-105 by Session Laws 1971, c. 363, s. 10. Former § 7A-105 was renumbered § 7A-107 by the same 1971 act.

§ 7A-106. Custody of records and property of office.

(a) It is the duty of the clerk of superior court, upon going out of office for any reason, to deliver to his successor, or such person as the senior regular resident superior court judge may designate, all records, books, papers, moneys, and property belonging to his office, and obtain receipts therefor.

(b) Any clerk going out of office or such other person having custody of the records, books, papers, moneys, and property of the office who fails to transfer and deliver them as directed shall forfeit and pay the State one thousand dollars ($1,000), which shall be sued for by the district attorney. (R. C., c. 19, s. 14; C. C. P., s. 142; Code, ss. 81, 124; Rev., ss. 906, 907; C. S., s. 943; 1971, c. 363, s. 5; 1973, c. 47, s. 2.)

Cross References. — As to failure to deliver as a misdemeanor, see § 14-231.

Editor's Note. — This section was formerly § 2-22. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 5.

CASE NOTES

Necessity of Order and Demand on Predecessor. — A person, duly elected clerk of the superior court by the people, needs no order from any person or authority to demand from his predecessor the property of all kinds belonging to the office, nor is it necessary for a retiring superior court clerk to be ordered to pay over to his successor, whether elected or appointed, the funds, etc., of the officer. Peebles v. Boone, 116 N.C. 57, 21 S.E. 187 (1895).

But where the judge places some person temporarily in charge of the office until the regular appointment is made, it is then necessary for the new clerk to have an order from the judge, directing the person temporarily in charge, to deliver the possession of his office to such clerk. Peebles v. Boone, 116 N.C. 57, 21 S.E. 187 (1895).

Ground for Right of Action. — The right of clerk of a superior court to bring an action against his predecessor on the latter's official bond to recover the records, money, etc., in his hands, does not rest on any injury done to the plaintiff, but on the ground that the law requires that each successive clerk shall receive from his predecessor all the records, money and property of his office. Peebles v. Boone, 116 N.C. 57, 21 S.E. 187 (1895).

Successor's Remedy. — When an outgoing clerk fails to deliver the property of his office, as herein provided, the successor's remedy is by attachment and suit for the penalty. O'Leary v. Harrison, 51 N.C. 338 (1859).

Two Distinct Remedies Provided. — Our statutes provide two separate and distinct remedies — one in behalf of the injured individual for a specific fund to which he is entitled or on account of a particular wrong committed against him by the clerk, as provided for in § 109-34, and one in behalf of the clerk against his predecessor in office to recover possession of records, books, papers, and money in the hands of the outgoing clerk by virtue or under color of his office, as provided for in this section. State ex rel. Underwood v. Watson, 223 N.C. 437, 27 S.E.2d 144 (1943); State ex rel. Underwood v. Watson, 224 N.C. 502, 31 S.E.2d 465 (1944).

Where Clerk Sought to Be Removed Made Affirmative Allegations. — In an action by the clerk of the superior court against his predecessor in office, for possession of records, books and funds, under this section, where defendant denied the allegations of the complaint that plaintiff was duly appointed clerk to fill a vacancy caused by the removal of defendant and qualified as such, and also made further affirmative allegation to like effect, there was error in allowing a motion to strike such affirmative allegations. State ex rel. Underwood v. Watson, 223 N.C. 437, 27 S.E.2d 144 (1943).

When Liability Ceases. — When a former clerk delivers to his successors all the proceeds, etc., of his office, his official duties, powers, and liabilities cease. Gregory v. Morisey, 79 N.C. 559 (1878).

§ 7A-107. Bonds of clerks, assistant and deputy clerks, and employees of office.

The Administrative Officer of the Courts shall require, or purchase, in such amounts as he deems proper, individual or blanket bonds for any and all clerks of superior court, assistant clerks, deputy clerks, and other persons employed in the offices of the various clerks of superior court, or one blanket bond covering all such clerks and other persons, such bond or bonds to be conditioned upon faithful performance of duty, and made payable to the State. The premiums shall be paid by the State. (1965, c. 310, s. 1; 1967, c. 691, s. 7; 1971, c. 363, ss. 10, 11.1; c. 518, s. 2.)

Editor's Note. — The above section was formerly numbered § 7A-105. It was renumbered § 7A-107 by Session Laws 1971, c. 363, s. 10.

§ 7A-108. Accounting for fees and other receipts; annual audit.

The Administrative Office of the Courts, subject to the approval of the State Auditor, shall establish procedures for the receipt, deposit, protection, investment, and disbursement of all funds coming into the hands of the clerk of superior court. The fees to be remitted to counties and municipalities shall be paid to them monthly by the clerk of superior court.

The State Auditor shall conduct an annual post audit of the receipts, disbursements, and fiscal transactions of each clerk of superior court, and furnish a copy to the Administrative Office of the Courts. (1965, c. 310, s. 1; 1969, c. 1190, s. 9; 1971, c. 363, s. 10.)

Editor's Note. — The above section was formerly numbered § 7A-103. It was renumbered § 7A-108 by Session Laws 1971, c. 363, s. 10.

§ 7A-109. Record-keeping procedures.

(a) Each clerk shall maintain such records, files, dockets and indexes as are prescribed by rules of the Director of the Administrative Office of the Courts. Except as prohibited by law, these records shall be open to the inspection of the public during regular office hours, and shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court, judgments, liens, lis pendens, and all other records required by law to be

maintained. The rules prescribed by the Director shall be designed to accomplish the following purposes:

(1) To provide an accurate record of every determinative legal action, proceeding, or event which may affect the person or property of any individual, firm, corporation, or association;

(2) To provide a record during the pendency of a case that allows for the efficient handling of the matter by the court from its initiation to conclusion and also affords information as to the progress of the case;

(3) To provide security against the loss or destruction of original documents during their useful life and a permanent record for historical uses;

(4) To provide a system of indexing that will afford adequate access to all records maintained by the clerk;

(5) To provide, to the extent possible, for the maintenance of records affecting the same action or proceeding in one rather than several units; and

(6) To provide a reservoir of information useful to those interested in measuring the effectiveness of the laws and the efficiency of the courts in administering them.

(b) The rules shall provide for indexing according to the minimum criteria set out below:

(1) Civil actions — the names of all parties;

(2) Special proceedings — the names of all parties;

(3) Administration of estates — the name of the estate and in the case of testacy the name of each devisee;

(4) Criminal actions — the names of all defendants;

(5) Juvenile actions — the names of all juveniles;

(6) Judgments, liens, lis pendens, etc. — the names of all parties against whom a lien has been created by the docketing of a judgment, notice of lien, transcript, certificate, or similar document and the names of all parties in those cases in which a notice of lis pendens has been filed with the clerk and abstracted on the judgment docket.

(c) The rules shall require that all documents received for docketing shall be immediately indexed either on a permanent or temporary index. The rules may prescribe any technological process deemed appropriate for the economical and efficient indexing, storage and retrieval of information. (Code, ss. 83, 95, 96, 97, 112, 1789; 1887, c. 178, s. 2; 1889, c. 181, s. 4; 1893, c. 52; 1899, c. 1, s. 17; cc. 82, 110; 1901, c. 2, s. 9; c. 89, s. 13; c. 550, s. 3; 1903, c. 51; c. 359, s. 6; 1905, c. 360, s. 2; Rev., s. 915; 1919, c. 78, s. 7; c. 152; c. 197, s. 4; c. 314; C. S., s. 952; 1937, c. 93; 1953, c. 259; c. 973, s. 3; 1959, c. 1073, s. 3; c. 1163, s. 3; 1961, c. 341, ss. 3, 4; c. 960; 1965, c. 489; 1967, c. 691, s. 39; c. 823, s. 2; 1971, c. 192; c. 363, s. 6.)

Local Modification. — Caldwell: Pub. Loc. 1927, c. 43; Durham: 1929, c. 88; Forsyth: 1949, c. 963, s. 4.

Cross References. — As to the duty of the clerk of superior court to maintain a record of juvenile cases, see § 7A-675.

Editor's Note. — This section was formerly § 2-42. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 6.

Records of Weapons Permits in Certain Counties. — Subdivision (35) of § 2-42 was repealed by Session Laws 1959, c. 1073, s. 3. The subdivision provided:

"(35) Record of permits to purchase weapons, which shall contain the name, date, place of residence, age, former place of residence, etc., of each person, firm or corporation to whom or which a permit is issued to purchase deadly weapons."

Session Laws 1959, c. 1073, s. 4, as amended from time to time, excepts the following counties from the repeal of subdivision (35): Ashe, Bertie, Duplin, Lincoln, Madison, Mitchell, Pender, Perquimans, Polk, Tyrrell, Warren, Watauga and Yancey.

Avery was deleted from the list of counties by Session Laws 1977, c. 35; Bladen was deleted from the list by Session Laws 1977, c. 35;

Caswell has been deleted from the list pursuant to Session Laws 1977, c. 347; Cherokee was deleted from the list by Session Laws 1977, c. 35; Clay was added to the list by Session Laws 1969, c. 276, and deleted from the list by Session Laws 1979, c. 134; Currituck was deleted from the list by Session Laws 1981, c. 196; Davie was deleted from the list by Session Laws 1977, c. 72; Franklin was deleted from the list by Session Laws 1975, cc. 139, 173; Greene has been deleted from the list pursuant to Session Laws 1977, c. 223; Halifax was deleted from the list by Session Laws 1975, cc. 173, 374; Harnett was deleted from the list by Session Laws 1967, c. 470 and Session Laws 1969, c. 658; Haywood was deleted from the list by Session Laws 1969, c. 6; Hertford was deleted from the list by Session Laws 1967, c. 903; Iredell was deleted from the list by Session Laws 1971, c. 410; Jackson was deleted from the list by Session Laws 1975, c. 173; Johnston was deleted from the list by Session Laws 1967, c. 122; Jones was deleted from the list by Session Laws 1969, c. 109; Lee was deleted from the list by Session Laws 1967, c. 470 and Session Laws 1969, c. 658; Macon was deleted from the list by Session Laws 1975, c. 173; Mecklenburg was deleted from the list by Session Laws 1969, c. 1305; Moore has been deleted from the list pursuant to Session Laws 1977, c. 235; Pamlico was deleted from the list by Session Laws 1967, c. 6; Person was deleted from the list by Session Laws 1975, c. 134; Rockingham was deleted from the list by Session Laws 1979, c. 323; Sampson was deleted from the list by Session Laws 1977, c. 347; Stokes was deleted from the list by Session Laws 1975, c. 173; Union was deleted from the list by Session Laws 1973, c. 421; Vance was deleted from the list by Session Laws 1969, c. 396; Washington was deleted from the list by Session Laws 1971, c. 192; Wilson was deleted from the list by Session Laws 1963, c. 537.

CASE NOTES

Editor's Note. — Most of the cases cited in the following annotation were decided under former § 2-42.

Purpose of Recordkeeping. — The clerk's proceedings are summary in their nature, and should always be put in such shape as to present all that he does in the course of a proceeding, including his orders and judgments, intelligently, and so that the same may be distinctly seen and understood. To this end, he is required to keep certain permanent records of proceedings before him. Edwards v. Cobb, 95 N.C. 4 (1886).

Judgment Docket Serves as Notice. — The law prescribes what shall be recorded on the judgment docket, and everybody has notice that he may find there whatever ought to be there recorded, if indeed it exists. He is not required to look elsewhere for such matters. But he is required and bound to take notice in proper connections of what is there. The law charges him with such notice. Holman v. Miller, 103 N.C. 118, 9 S.E. 429 (1889); Dewey v. Sugg, 109 N.C. 328, 13 S.E. 923 (1891).

Civil Issue Docket. — Not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court are to be put upon the civil issue docket. Brown v. Rhinehart, 112 N.C. 772, 16 S.E. 840 (1893). See Brittain v. Mull, 91 N.C. 498 (1884); Walton v. McKesson, 101 N.C. 428, 7 S.E. 566 (1888).

Minute Docket. — The minute docket is intended to and should contain a record of all the proceedings of the court, and such other entries as the judge may direct to be therein made. Walton v. McKesson, 101 N.C. 428, 7 S.E. 566 (1888); Guilford v. Board of Comm'rs, 120 N.C. 23, 27 S.E. 94 (1897).

When Minute Docket Prevails. — While in the absence of entries on the minute docket those made on the civil issue docket should not be disregarded, yet where there is a conflict between them, nothing else appearing, those on the former must prevail. Walton v. McKesson, 101 N.C. 428, 7 S.E. 566 (1888).

Record of Fiats. — Clerks are required to record in general order books copies of all fiats made by them. Perry v. Bragg, 111 N.C. 159, 16 S.E. 10 (1892).

Record of Appointments. — The record of appointments is admissible as evidence to show a guardian's appointment. Topping v. Windley, 99 N.C. 4, 5 S.E. 14 (1888).

Sufficient Notice of Lien. — A notice of a lien filed on the lien docket should go into details sufficiently so as to give reasonable notice to all persons of the character of the claim and the property upon which the lien is attached. Fulp & Linville v. Kernersville Light & Power Co., 157 N.C. 157, 72 S.E. 867 (1911). See Cook v. Cobb, 101 N.C. 68, 7 S.E. 700 (1888); Cameron v. Consolidated Lumber Co., 118 N.C. 266, 24 S.E. 7 (1896).

Former § 2-42 did not require cross-indexing of liens filed in the clerk's office and was not to be confused with the requirements for registering liens, deeds, etc., in the office of the register of deeds as provided by § 161-22, which does require cross-indexing. Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

A lien for material and labor was properly filed where the clerk after delivery attached it in its original form to specified page in a book labeled "Lien Docket" where the book without question was the book intended as the lien docket contemplated by former § 2-42, though

the book was also used for the filing of liens for old age assistance, since former § 108-30.1 (now repealed) provided that such liens should be filed in the regular lien docket. Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

The failure of the clerk to comply with the statute by neglecting to record all or a part of the proceeding does not render the proceeding void. Any interested party may, by motion, require the proceeding to be recorded and when a part of the papers has been lost without being recorded, the proceeding does not, because of that fact, lose its vitality or cease to give the protection which the complete record would afford. State Trust Co. v. Toms, 244 N.C. 645, 94 S.E.2d 806 (1956).

Treasurer's Report as Evidence. — The record of county treasurer's report is competent evidence against the sureties upon the official bond of such officer, and is prima facie evidence of the correctness of statements therein made. Davenport v. McKee, 98 N.C. 500, 4 S.E. 545 (1887).

Recording of Verified Report Purports Verity. — Plaintiff, purchaser of the real property at execution sale of a judgment against the devisee, offered in evidence, as proof of payment and that title had vested in the devisee, a special report, duly verified, filed by the executrix stating that the devisee had paid the estate the amount stipulated by the will. This special, verified report of the executrix was a document authorized and required to be recorded, was relevant to the issue, and was competent in evidence, its recording purporting verity and objection to its admission on the ground of hearsay in that it contained a declaration of a person not a party to the action is untenable, the recorded, verified report being more than a mere declaration by the executrix. Braddy v. Pfaff, 210 N.C. 248, 186 S.E. 340 (1936).

Stated in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

Cited in State ex rel. Unemployment Compensation Comm'n v. Willis Barber & Beauty Shop, 219 N.C. 709, 15 S.E.2d 4 (1941); Shaver v. Shaver, 248 N.C. 113, 102 S.E.2d 791 (1958); Wolfe v. Hewes, 41 N.C. App. 88, 254 S.E.2d 204 (1979).

§ 7A-109.1. List of prisoners furnished to judges.

(a) The clerk of superior court must furnish to each judge presiding over a criminal court a report listing the name, reason for confinement, period of confinement, and, when appropriate, charge or charges, amount of bail and conditions of release, and next scheduled court appearance of each person listed on the most recent report filed under the provisions of G.S. 153A-229.

(b) The clerk must file the report with superior court judges presiding over mixed or criminal sessions at the beginning of each session and must file the report with district court judges at each session or weekly, whichever is the less frequent. (1973, c. 1286, s. 5; 1975, c. 166, s. 22.)

§ 7A-110. List of attorneys furnished to Secretary of Revenue.

On or before the first of May each year the clerk of superior court shall certify to the Secretary of Revenue the names and addresses of all attorneys-at-law located within the clerk's county who are engaged in the practice of law. (1931, c. 290; 1971, c. 363, s. 7; 1973, c. 476, s. 193.)

Editor's Note. — This section was formerly § 2-45. It was revised and transferred to its present position by Session Laws 1971, c. 363, s. 7.

§ 7A-111. Receipt and disbursement of insurance and other moneys for minors and incapacitated adults.

(a) When a minor under 18 years of age, or an adult who is mentally incapable on account of sickness, old age, disease or other infirmity to manage his property and affairs, is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor or during the incapacity of such adult, and the proceeds of each individual policy do not exceed two thousand dollars ($2,000) such proceeds may be paid to and, if paid, shall be

received by the public guardian or clerk of the superior court of the county wherein the beneficiary is domiciled. A certificate of mental incapacity, signed by a physician or reputable person who has had an opportunity to observe the mental condition of an adult beneficiary, filed with the clerk, is prima facie evidence of the mental incapacity of such adult, and authorizes the clerk to receive and administer funds under this section. The receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies to the extent of the amount paid to such public guardian or clerk.

(b) Any person, firm, corporation or association having in its possession two thousand dollars ($2,000) or less for any minor child or incapacitated adult, as described in (a), for whom there is no guardian, may pay such moneys into the office of the public guardian, if any, or the office of the clerk of superior court of the county of the recipient's domicile. The clerk of the superior court is hereby authorized to receive and administer funds under this section. The clerk's receipt shall constitute a valid release of the payor's obligation to the extent of the sum delivered to the clerk.

(c) The moneys paid into the office of clerk of superior court pursuant to this section shall be disbursed only upon the order of the clerk or assistant clerk, and in the following manner:

(1) Minors. — The clerk is authorized to disburse the moneys held in such sum or sums and at such time or times as in his judgment is in the best interest of the child, except that the clerk must first determine that the parents or other persons responsible for the child's support and maintenance are financially unable to provide the necessities for such child, and also that the child is in need of maintenance and support or other necessities, including, when appropriate, education.

(2) Incapacitated Adults. — The clerk, upon finding of fact that it is in the best interest of the incapacitated adult, is authorized to disburse funds directly to a creditor or to some discreet and solvent neighbor or friend of a person mentally incapable of handling his property and affairs.

The clerk may require receipts or paid vouchers showing that the moneys disbursed under this section were used for the exclusive use and benefit of the child or incapacitated adult.

(d) The determination of incapacity authorized in subsection (a) of this section is separate and distinct from the procedure for the determination of incompetency provided in Chapter 35. (1899, c. 82; Rev., s. 924; 1911, c. 29, s. 1; 1919, c. 91; C. S., s. 962; Ex. Sess., 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1937, c. 201; 1945, c. 160, ss. 1, 2; 1949, c. 188; 1953, c. 101; 1959, c. 794, ss. 1, 2; 1961, c. 377; 1971, c. 363, s. 8; c. 1231, s. 1.)

Local Modification. — Cumberland: 1957, c. 1143; Wake: 1961, c. 613.

Editor's Note. — This section combines former §§ 2-52 and 2-53. The former sections were revised, combined and transferred to their present position by Session Laws 1971, c. 363, s. 8.

CASE NOTES

Satisfaction of Judgment in Favor of Infant. — Under the statutes of this State, only the clerk or the legal guardian of an infant has authority to receive payment and satisfy a judgment rendered in favor of an infant, and the defendant pays the judgment to the clerk of the superior court, who holds the funds until the minor becomes twenty-one (now 18) or until a general guardian is appointed for him, unless the sum is $1,000 or less, when he may disburse it himself under the terms of this section. Teele v. Kerr, 261 N.C. 148, 134 S.E.2d 126 (1964).

Stated in McMillan v. Robeson County, 262 N.C. 413, 137 S.E.2d 105 (1964).

§ 7A-112. Investment of funds in clerk's hands.

(a) The clerk of the superior court may in his discretion invest moneys secured by virtue or color of his office or as receiver in any of the following securities:

(1) Obligations of the United States or obligations fully guaranteed both as to principal and interest by the United States;

(2) Obligations of the State of North Carolina;

(3) Obligations of North Carolina cities or counties approved by the Local Government Commission; and

(4) Shares of any building and loan association organized under the laws of this State, or of any federal savings and loan association having its principal office in this State, and certificates of deposit for time deposits or savings accounts in any bank or trust company authorized to do business in North Carolina, to the extent in each instance that such shares or deposits are insured by the State or federal government or any agency thereof or by any mutual deposit guaranty association authorized by the Administrator of the Savings and Loan Division of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes. If the clerk desires to deposit in a bank, saving and loan, or trust company funds entrusted to him by virtue or color of his office, beyond the extent that such deposits are insured by the State or federal government or an agency thereof or by any mutual deposit guaranty association authorized by the Administrator of the Savings and Loan Division of North Carolina to do business in North Carolina pursuant to Article 7A of Chapter 54 of the General Statutes, the clerk shall require such depository to furnish a corporate surety bond or bonds of the United States government or of the State of North Carolina, or of counties and municipalities of North Carolina whose bonds have been approved by the Local Government Commission.

(b) When money in a single account in excess of two thousand dollars ($2,000) is received by the clerk by virtue or color of his office and it can reasonably be expected that the money will remain on deposit with the clerk in excess of six months from date of receipt, the money exceeding two thousand dollars ($2,000) shall be invested by the clerk within 60 days of receipt in investments authorized by this section. The first two thousand dollars ($2,000) of these accounts and money in a single account totaling less than two thousand dollars ($2,000), received by the clerk by virtue or color of his office, shall be invested, or administered, or invested and administered, by the clerk in accordance with regulations promulgated by the Administrative Officer of the Courts. This subsection shall not apply to cash bonds or to money received by the clerk to be disbursed to governmental units.

(c) The State Auditor is hereby authorized and empowered to inspect the records of the clerk to insure compliance with this section, and he shall report noncompliance with the provisions of this section to the Administrative Officer of the Courts.

(d) It shall be unlawful for the clerk of the superior court of any county receiving any money by virtue or color of his office to apply or invest any of it except as authorized under this section. Any clerk violating the provisions of this section shall be guilty of a misdemeanor. (1931, c. 281, ss. 1-3, 5; 1937, c. 188; 1939, cc. 86, 110; 1943, c. 543; 1971, c. 363, s. 9; c. 956, s. 1; 1973, c. 1446, s. 4; 1975, c. 496, ss. 1, 2.)

Local Modification. — Cleveland: 1933, c. 110; Forsyth: 1945, c. 876, s. 4.

Cross References. — As to investment of funds in different types of investments, see

§ 36A-2. As to investments in bonds issued or guaranteed by the United States government, see § 53-44.

Editor's Note. — This section combines former §§ 2-54, 2-55, 2-56 and 2-60. The provisions of the former sections were rewritten, combined and transferred to their present position by Session Laws 1971, c. 363, s. 9.

Legal Periodicals. — In the investment of funds of infants or persons non compos mentis used in the management or cultivation of lands held for them by the clerk as receiver or trustee, he is unlimited by the items mentioned in this section. 9 N.C.L. Rev. 399.

CASE NOTES

Cited in State ex rel. Page v. Sawyer, 223 N.C. 102, 25 S.E.2d 443 (1943); In re Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968); In re Castillian Apts., Inc., 281 N.C. 709, 190 S.E.2d 161 (1972).

§§ 7A-113 to 7A-129: Reserved for future codification purposes.

SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

ARTICLE 13.

Creation and Organization of the District Court Division.

§ 7A-130. Creation of district court division and district court districts; seats of court.

The district court division of the General Court of Justice is hereby created. It consists of various district courts organized in territorial districts. The numbers and boundaries of the districts are identical to those of the superior court judicial districts. The district court shall sit in the county seat of each county, and at such additional places in each county as the General Assembly may authorize, except that sessions of court are not required at an additional seat of court unless the chief district judge and the Administrative Officer of the Courts concur in a finding that the facilities are adequate. (1965, c. 310, s. 1.)

CASE NOTES

Stated in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

§ 7A-131. Establishment of district courts.

District courts are established, within districts, in accordance with the following schedule:

(1) On the first Monday in December, 1966, the first, the twelfth, the fourteenth, the sixteenth, the twenty-fifth, and the thirtieth districts;
(2) On the first Monday in December, 1968, the second, the third, the fourth, the fifth, the sixth, the seventh, the eighth, the ninth, the tenth, the eleventh, the thirteenth, the fifteenth, the eighteenth, the twentieth, the twenty-first, the twenty-fourth, the twenty-sixth, the twenty-seventh, and the twenty-ninth districts;

(3) On the first Monday in December, 1970, the seventeenth, the nineteenth, the twenty-second, the twenty-third, and the twenty-eighth districts. (1965, c. 310, s. 1.)

Legal Periodicals. — For article "Some Aspects of the Criminal Court Process in North Carolina," see 49 N.C.L. Rev. 469 (1971).

CASE NOTES

Issuance of Warrants. — Only officials authorized to issue warrants by statutes in force on November 6, 1962, may continue to issue warrants until district courts are established in the district. State v. Matthews, 270 N.C. 35, 153 S.E.2d 791 (1967).

Stated in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969); Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Cited in In re Holt, 1 N.C. App. 108, 160 S.E.2d 90 (1968); Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969); State v. Stilley, 4 N.C. App. 638, 167 S.E.2d 529 (1969); Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); State v. Barker, 8 N.C. App. 311, 174 S.E.2d 88 (1970); Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971); State v. Stafford, 11 N.C. App. 520, 181 S.E.2d 741 (1971); In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972); In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

§ 7A-132. Judges, district attorneys, full-time assistant district attorneys and magistrates for district court districts.

Each district court district shall have one or more judges and one district attorney. Each county within each district shall have at least one magistrate.

For each district the General Assembly shall prescribe the numbers of district judges, and the numbers of full-time assistant district attorneys. For each county within each district the General Assembly shall prescribe a minimum and a maximum number of magistrates. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1973, c. 47, s. 2.)

§ 7A-133. Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
1	3	Camden	1	2	
		Chowan	2	3	
		Currituck	1	2	
		Dare	2	4	
		Gates	2	3	
		Pasquotank	3	4	

District	Judges	County	Magistrates Min.-Max.		Additional Seats of Court
		Perquimans	2	3	
2	2	Martin	5	8	
		Beaufort	4	5	
		Tyrrell	1	2	
		Hyde	2	3	
		Washington	3	4	
3	6	Craven	7	10	
		Pitt	10	12	Farmville, Ayden
		Pamlico	2	3	
		Carteret	5	8	
4	5	Sampson	6	8	
		Duplin	9	11	
		Jones	2	3	
		Onslow	8	11	
5	4	New Hanover	6	10	
		Pender	4	6	
6	3	Northampton	5	6	
		Halifax	9	14	Roanoke Rapids, Scotland Neck
		Bertie	4	5	
		Hertford	5	6	
7	4	Nash	7	10	Rocky Mount
		Edgecombe	4	6	Rocky Mount
		Wilson	4	6	
8	5	Wayne	5	8	Mount Olive
		Greene	2	4	
		Lenoir	4	7	La Grange
9	4	Person	3	4	
		Granville	3	7	
		Vance	3	5	
		Warren	3	4	
		Franklin	3	6	
10	8	Wake	12	16	Apex Wendell Fuquay-Varina Wake Forest
11	4	Harnett	7	11	Dunn
		Johnston	10	12	Benson and Selma
		Lee	4	6	
12	5	Cumberland	10	17	
		Hoke	4	5	
13	4	Bladen	4	6	
		Brunswick	4	7	
		Columbus	6	8	Tabor City
14	4	Durham	8	11	
15A	3	Alamance	7	9	Burlington

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
15B	3	Orange	4	8	Chapel Hill
		Chatham	3	6	Siler City
16	4	Robeson	8	16	Fairmont Maxton Pembroke Red Springs Rowland St. Pauls
		Scotland	2	4	
17A	2	Caswell	2	5	
		Rockingham	4	9	Reidsville Eden Madison
17B	2	Stokes	2	4	
		Surry	5	8	Mt. Airy
18	8	Guilford	20	26	High Point
19A	4	Cabarrus	5	9	Kannapolis
		Rowan	5	10	
19B	2	Montgomery	2	4	
		Randolph	5	8	Liberty
20	5	Stanly	5	6	
		Union	4	6	
		Anson	4	5	
		Richmond	5	6	Hamlet
		Moore	5	8	Southern Pines
21	5	Forsyth	3	15	Kernersville
22	4	Alexander	2	3	
		Davidson	7	10	Thomasville
		Davie	2	3	
		Iredell	4	8	Mooresville
23	3	Alleghany	1	2	
		Ashe	3	4	
		Wilkes	4	6	
		Yadkin	2	3	
24	3	Avery	3	4	
		Madison	4	5	
		Mitchell	3	4	
		Watauga	4	6	
		Yancey	2	4	
25	5	Burke	4	7	
		Caldwell	4	7	
		Catawba	6	9	Hickory
26	10	Mecklenburg	15	26	
27A	4	Gaston	11	20	
27B	3	Cleveland	5	8	
		Lincoln	4	6	
28	4	Buncombe	6	13	
29	4	Henderson	4	6	
		McDowell	3	4	
		Polk	3	4	

District	Judges	County	Magistrates Min.	Magistrates Max.	Additional Seats of Court
		Rutherford	6	8	
		Transylvania	2	4	
30	3	Cherokee	3	4	
		Clay	1	2	
		Graham	2	3	
		Haywood	5	7	Canton
		Jackson	3	4	
		Macon	3	4	
		Swain	2	3	

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4.)

Editor's Note. — Session Laws 1979, c. 1072, s. 3, provides, in part: "The additional district court judges authorized by this section for District 1 shall be appointed by the Governor to serve until the first Monday in December, 1982. The appointees' successors shall be chosen in the general election of November, 1982, to serve a four-year term beginning the first Monday in December, 1982.

"The additional district court judges authorized by this section for Districts 3, 4, 5, 13, 27B and 29 shall be appointed by the Governor to serve until the first Monday in December, 1980. The appointees' successors shall be chosen in the general election of November, 1980, to serve a four-year term beginning the first Monday in December, 1980."

Session Laws 1979, c. 1072, s. 4, provides: "Senate Bill 124, c. 838 when and if ratified, is amended by adding a new section immediately preceding the section establishing that bill's effective date to be numbered appropriately and to read as follows:

'The additional district court judge authorized by this act for District 14 shall be appointed by the Governor to serve until the first Monday in December, 1982. The appointee's successor shall be chosen in the general election of November, 1982, to serve a four-year term beginning the first Monday in December, 1982.

'The additional district court judge authorized by this act for District 26 shall be appointed by the Governor to serve until the first Monday in December, 1980. The appointee's successor shall be chosen in the general election of November, 1980, to serve a four-year term beginning the first Monday in December, 1980.' "

Session Laws 1979, 2nd Sess., s. 2(b), provides: "The additional magistrate position for Mecklenburg County established in subsection (a) of this section shall be filled by a graduate from a four-year accredited college."

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased the maximum number of magistrates in Mecklenburg County from 25 to 26 and the maximum number of magistrates in Stokes County from three to four.

The 1981 amendment increased by two the number of district court judges in the tenth district, increased by one the number of district court judges in the fifteenth-B, twentieth, twenty-fourth and twenty-sixth districts, increased by two the maximum number of magistrates in Cumberland and Robeson Counties, and increased by one the maximum number of magistrates in Dare, Martin, Craven, Duplin, Halifax, Vance, Franklin, Granville, Harnett, Durham, Caswell, Guilford, Montgomery, Moore, Yancey, and Transylvania Counties. The amendment also, effective September 1, 1981, substituted the listings for the seventeenth-A and seventeenth-B districts for the listing for the seventeenth district.

Session Laws 1981, c. 964, s. 4(b), provides: "The four current district court judges allocated to the seventeenth judicial district are to serve in both judicial districts 17A and 17B until the first Monday in December, 1982. As of the first Monday in December, 1982, two of these four current district court judges or their successors are assigned to judicial district 17A and two of the four current district court judges or their successors are assigned to judicial district 17B."

Session Laws 1981, c. 964, s. 4(c), provides:

"The vacancies in the judgeships authorized by this section shall be filled by appointments by the Governor. The appointees shall serve until the first Monday in December, 1982. The appointees' successors shall be chosen in the general election of November 1982, to serve a four-year term beginning the first Monday in December, 1982."

§ 7A-134: Repealed by Session Laws 1973, c. 1339, s. 2.

Cross References. — For present provisions as to juvenile services, see §§ 7A-289.1 through 7A-289.6.

§ 7A-135. Transfer of pending cases when present inferior courts replaced by district courts.

On the date that the district court is established in any county, cases pending in the inferior court or courts of that county shall be transferred to the appropriate division of the General Court of Justice, and all records of these courts shall be transferred to the office of clerk of superior court in that county pursuant to rule of Supreme Court. (1965, c. 310, s. 1.)

CASE NOTES

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

Cited in In re Bowen, 7 N.C. App. 236, 172 S.E.2d 62 (1970); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

§§ 7A-136 to 7A-139: Reserved for future codification purposes.

ARTICLE 14.

District Judges.

§ 7A-140. (Effective until certification of approval of constitutional amendments) Number; election; term; qualification; oath.

There shall be at least one district judge for each district. Each district judge shall be elected by the qualified voters of the district court district in which he is to serve at the time of the election for members of the General Assembly. The number of judges for each district shall be determined by the General Assembly. Each judge shall be a resident of the district for which elected, and shall serve a term of four years, beginning on the first Monday in December following his election.

Each district judge shall devote his full time to the duties of his office. He shall not practice law during his term, nor shall he during such term be the partner or associate of any person engaged in the practice of law.

Before entering upon his duties, each district judge, in addition to other oaths prescribed by law, shall take the oath of office prescribed for a judge of the General Court of Justice. (1965, c. 310, s. 1; 1969, c. 1190, s. 11.)

Cross References. — For this section as amended effective upon certification of approval of the constitutional amendments proposed by Session Laws 1981, c. 504, ss. 1 through 3, see the following section, also numbered 7A-140.

§ 7A-140. (Effective on certification of approval of constitutional amendments) Number; election; term; qualification; oath.

There shall be at least one district judge for each district. Each district judge

shall be elected by the qualified voters of the district court district in which he is to serve, at the time specified in Chapter 163. The number of judges for each district shall be determined by the General Assembly. Each judge shall be a resident of the district for which elected, and shall serve a term of four years, beginning on the first Monday in December following his election.

Each district judge shall devote his full time to the duties of his office. He shall not practice law during his term, nor shall he during such term be the partner or associate of any person engaged in the practice of law.

Before entering upon his duties, each district judge, in addition to other oaths prescribed by law, shall take the oath of office prescribed for a judge of the General Court of Justice. (1965, c. 310, s. 1; 1969, c. 1190, s. 11; 1981, c. 504, s. 6.)

Cross References. — For this section as in effect until certification of approval of the constitutional amendments proposed by Session Laws 1981, c. 504, ss. 1 through 3, see the preceding section, also numbered 7A-140.

Effect of Amendments. — The 1981 amendment substituted "at the time specified in Chapter 163" for "at the time of the elections for members of the General Assembly" at the end of the first sentence of the first paragraph.

Session Laws 1981, c. 504, s. 20 provides that the amendment to this and other sections shall take effect only upon the approval of the voters of the constitutional amendments proposed in ss. 1 through 3 of the act, and that if the constitutional amendments are approved, the amendment to this section shall become effective at the same time as the constitutional amendment. Session Laws 1981, c. 504, s. 4, provides for the constitutional amendments to be submitted to the qualified voters of the State at the next statewide primary election or statewide general election or at the next statewide election, whichever is earlier. The amendments will be submitted to the voters in May, 1982.

For the amendments proposed by Session Laws 1981, c. 504, ss. 1 through 3, see the notes to N.C. Const., Art. II, §§ 2, 4, 8; Art. III, §§ 2, 7; Art. IV, §§ 9, 18, 19.

§ 7A-141. Designation of chief judge; assignment of judge to another district for temporary or specialized duty.

When more than one judge is authorized in a district, the Chief Justice of the Supreme Court shall designate one of the judges as chief district judge to serve in such capacity at the pleasure of the Chief Justice. In a single judge district, the judge is the chief district judge.

The Chief Justice may transfer a district judge from one district to another for temporary or specialized duty. (1965, c. 310, s. 1.)

§ 7A-142. Vacancies in office.

A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor from nominations submitted by the bar of the judicial district. If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. If the district bar fails to submit nominations within thirty days from the date the vacancy occurs, the Governor may appoint to fill the vacancy without waiting for nominations. (1965, c. 310, s. 1; 1975, c. 441; 1981, c. 763, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the second sentence, and substituted "thirty days" for "four weeks" in the last sentence.

Session Laws 1981, c. 763, s. 15, provides that the act shall apply to vacancies occurring on or after July 1, 1981.

§ 7A-143: Repealed by Session Laws 1973, c. 148, s. 6.

§ 7A-144. Compensation.

Each judge shall receive the annual salary provided in the Budget Appropriations Act, and reimbursement on the same basis as State employees generally, for his necessary travel and subsistence expenses. (1965, c. 310, s. 1; 1967, c. 691, s. 10.)

§ 7A-145: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-146. Administrative authority and duties of chief district judge.

The chief district judge, subject to the general supervision of the Chief Justice of the Supreme Court, has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:

(1) Arranging schedules and assigning district judges for sessions of district courts;

(2) Arranging or supervising the calendaring of noncriminal matters for trial or hearing;

(3) Supervising the clerk of superior court in the discharge of the clerical functions of the district court;

(4) Assigning matters to magistrates, and consistent with the salaries set by the Administrative Officer of the Courts, prescribing times and places at which magistrates shall be available for the performance of their duties; however, the chief district judge may in writing delegate his authority to prescribe times and places at which magistrates in a particular county shall be available for the performance of their duties to an employee of the General Court of Justice within that particular county, and the person to whom such authority is delegated shall make monthly reports to the chief district judge of the times and places actually served by each magistrate; and

(5) Making arrangements with proper authorities for the drawing of civil court jury panels and determining which sessions of district court shall be jury sessions;

(6) Arranging for the reporting of civil cases by court reporters or other authorized means;

(7) Arranging sessions, to the extent practicable for the trial of specialized cases, including traffic, domestic relations, and other types of cases, and assigning district judges to preside over these sessions so as to permit maximum practicable specialization by individual judges;

(8) Promulgating a schedule of traffic offenses for which magistrates and clerks of court may accept written appearances, waivers of trial, and pleas of guilty, and establishing a schedule of fines therefor;

(9) Assigning magistrates during an emergency to temporary duty outside the county of their residence but within that district; and, upon the request of a chief district judge of an adjoining district and upon the approval of the Administrative Officer of the Courts, to temporary duty in the district of the requesting chief district judge; and

(10) Designating another district judge of his district as acting chief district judge, to act during the absence or disability of the chief district judge. (1965, c. 310, s. 1; 1971, ch. 377, s. 8; 1977, c. 945, s. 1.)

CASE NOTES

Purpose of Section. — Legislative anticipation of the procedural quagmires and "judge shopping" that could result from multi-judge districts was a factor prompting the enactment of this section. Johnson v. Johnson, 7 N.C. App. 310, 172 S.E.2d 264 (1970).

Authority of Judge Other Than Chief District Judge to Hear Motions and Enter Interlocutory Orders. — Under the provisions of the first portion of § 7A-192, before a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of subdivision (1) of this section to preside at such session. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

In order to have authority to act on any motion, a district judge, other than the chief district judge, must be properly authorized under the provisions of this section and § 7A-192 to hold a session of court at which the matter is properly before him or under § 7A-192 to hear the matter in chambers. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Judgment Entered by Unauthorized Judge Void. — The judgment entered by a district court judge in favor of plaintiff which directed among other things, that defendant immediately pay to plaintiff's attorney a certain sum for legal services rendered was interlocutory and was void since the district court judge who entered the order had not been assigned by the chief district judge to preside over a session of court in the county where the judgment was entered, nor was he authorized by order or rule entered by the chief judge to hear motions and enter interlocutory orders on that date. Stroupe v. Stroupe, 301 N.C. 656, 273 S.E.2d 434 (1981).

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977); Dishman v. Dishman, 37 N.C. App. 543, 246 S.E.2d 819 (1978); Laroque v. Laroque, 46 N.C. App. 578, 265 S.E.2d 444 (1980).

OPINIONS OF ATTORNEY GENERAL

Time When Trial Session of the District Court Ends. — See opinion of Attorney General to Honorable John C. Clifford, Judge of the District Court, 21st Judicial District, 40 N.C.A.G. 117 (1969).

§ 7A-147. Specialized judgeships.

(a) Prior to January 1 of each year in which elections for district court judges are to be held, the Administrative Officer of the Courts may, with the approval of the chief district judge, designate one or more judgeships in districts having three or more judgeships, as specialized judgeships, naming in each case the specialty. Designations shall become effective when filed with the State Board of Elections. Nominees for the position or positions of specialist judge shall be made in the ensuing primary and the position or positions shall be filled at the general election thereafter. The State Board of Elections shall prepare primary and general election ballots to effectuate the purposes of this section.

(b) The designation of a specialized judgeship shall in no way impair the right of the chief district judge to arrange sessions for the trial of specialized cases and to assign any district judge to preside over these sessions. A judge elected to a specialized judgeship has the same powers as a regular district judge.

(c) The policy of the State is to encourage specialization in juvenile cases by district court judges who are qualified by training and temperament to be effective in relating to youth and in the use of appropriate community resources to meet their needs. The Administrative Office of the Courts is therefore authorized to encourage judges who hear juvenile cases to secure appropriate training whether or not they were elected to a specialized judgeship as provided herein. Such training shall be provided within the funds available to the Administrative Office of the Courts for such training, and

judges attending such training shall be reimbursed for travel and subsistence expenses at the same rate as is applicable to other State employees.

The Administrative Office of the Courts shall develop a plan whereby a district court judge may be better qualified to hear juvenile cases by reason of training, experience, and demonstrated ability. Any district court judge who completes the training under this plan shall receive a certificate to this effect from the Administrative Office of the Courts. In districts where there is a district court judge who has completed this training as herein provided, the chief district judge shall give due consideration in the assignment of such cases where practical and feasible. (1965, c. 310, s. 1; 1975, c. 823; 1979, c. 622, s. 1.)

§ 7A-148. Annual conference of chief district judges.

(a) The chief district judges of the various district court districts shall meet at least once a year upon call of the Chief Justice of the Supreme Court to discuss mutual problems affecting the courts and the improvement of court operations, to prepare and adopt a uniform schedule of traffic offenses for which magistrates and clerks of court may accept written appearances, waivers of trial and pleas of guilty, and establish a schedule of fines therefor, and to take such further action as may be found practicable and desirable to promote the uniform administration of justice.

(b) The chief district judges shall prescribe a multicopy uniform traffic ticket and complaint for exclusive use in each county of the State not later than December 31, 1970. (1965, c. 310, s. 1; 1967, c. 691, s. 11.)

CASE NOTES

Cited in In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

§§ 7A-149 to 7A-159: Reserved for future codification purposes.

Article 15.

District Prosecutors.

§§ 7A-160 to 7A-165: Repealed by Session Laws 1967, c. 1049, s. 6.

§§ 7A-166 to 7A-169: Reserved for future codification purposes.

Article 16.

Magistrates.

§ 7A-170. Nature of office and oath.

A magistrate is an officer of the district court. Before entering upon the duties of his office, a magistrate shall take the oath of office prescribed for a magistrate of the General Court of Justice. A magistrate possesses all the powers of his office at all times during his term. (1965, c. 310, s. 1; 1969, c. 1190, s. 13; 1977, c. 945, s. 2.)

CASE NOTES

A magistrate is an officer of the district court, and in issuing a warrant a magistrate performs a judicial act. Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230, cert. denied, 285 N.C. 589, 205 S.E.2d 722 (1974).

And Is Not Subject to Civil Action for Errors in Discharge of His Duties. — A judge of a court of this State is not subject to civil action for errors committed in the discharge of his official duties. This immunity applies even when the judge is accused of acting maliciously and corruptly, and is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. Thus a plaintiff failed to state a claim for false imprisonment against a magistrate by reason of any act of the magistrate in issuing warrants for plaintiff's arrest. Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230, cert. denied, 285 N.C. 589, 205 S.E.2d 722 (1974).

Applied in State v. Flowers, 12 N.C. App. 487, 183 S.E.2d 820 (1971).

Stated in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

Cited in Sutton v. Figgatt, 280 N.C. 89, 185 S.E.2d 97 (1971).

§ 7A-171. Numbers; appointment and terms; vacancies.

(a) The General Assembly shall establish a minimum and a maximum quota of magistrates for each county. In no county shall the minimum quota be less than one.

(b) Not earlier than the Tuesday after the first Monday nor later than the third Monday in December of each even-numbered year, the clerk of the superior court shall submit to the senior regular resident superior court judge of his district the names of two (or more, if requested by the judge) nominees for each magisterial office in the minimum quota established for the county. Not later than the fourth Monday in December, the senior regular resident superior court judge shall, from the nominations submitted by the clerk of the superior court, appoint magistrates to fill the minimum quota established for each county of his district. The term of a magistrate so appointed shall be two years, commencing on the first day in January of the calendar year next ensuing the calendar year of appointment.

(c) After the biennial appointment of the minimum quota of magistrates, additional magistrates in a number not to exceed, in total, the maximum quota established for each county may be appointed in the following manner. The chief district judge, with the approval of the Administrative Officer of the Courts, may certify to the clerk of superior court that the minimum quota is insufficient for the efficient administration of justice and that a specified additional number, not to exceed the maximum quota established for the county, is required. Within 15 days after the receipt of this certification the clerk of superior court shall submit to the senior regular resident superior court judge of his district the names of two (or more, if requested by the judge) nominees for each additional magisterial office. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall from the nominations submitted appoint magistrates in the number specified in the certification. A magistrate so appointed shall serve a term commencing immediately and expiring on the same day as the terms of office of magistrates appointed to fill the minimum quota for the county.

(d) Within 30 days after a vacancy in the office of magistrate occurs the clerk of superior court shall submit to the senior regular resident superior court judge the names of two (or more, if so requested by the judge) nominees for the office vacated. Within 15 days after receipt of the nominations the senior regular resident superior court judge shall appoint from the nominations received a magistrate who shall take office immediately and shall serve for the remainder of the unexpired term. (1965, c. 310, s. 1; 1967, c. 691, s. 15; 1971, c. 84, s. 1; 1973, c. 503, s. 2; 1977, c. 945, ss. 3, 4.)

OPINIONS OF ATTORNEY GENERAL

Judge Has Duty to Appoint Magistrates Which May Be Enforced by a Writ of Mandamus. — See opinion of Attorney General to Honorable Ralph A. Allison, Clerk of Superior Court, 40 N.C.A.G. 137 (1970).

§ 7A-171.1. Duty hours and salary.

The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

(1) A full-time magistrate, so designated by the Administrative Officer of the Courts, shall be paid the annual salary indicated in the table below according to the number of years he has served as a magistrate. The salary steps shall take effect on the anniversary of the date the magistrate was originally appointed:

Table of Salaries of Full-Time Magistrates

Number of prior years of service	*Annual salary*
Less than 1	$ 9,456
1 or more but less than 3	10,284
3 or more but less than 5	11,232
5 or more but less than 7	12,252
7 or more but less than 9	13,380
9 or more	14,640

A "Full-time magistrate" is a magistrate who is assigned to work an average of not less than 40 hours a week during his term of office.

Notwithstanding any other provision of this subdivision, a full-time magistrate, who was serving as a magistrate on December 31, 1978, and who was receiving an annual salary in excess of that which would ordinarily be allowed under the provisions of this subdivision, shall not have the salary, which he was receiving reduced during any subsequent term as a full-time magistrate. That magistrate's salary shall be fixed at the salary level from the table above which is nearest and higher than the latest annual salary he was receiving on December 31, 1978, and, thereafter, shall advance in accordance with the schedule in the table above.

(2) A part-time magistrate, so designated by the Administrative Officer of the Courts, shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during his term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

A "part-time magistrate" is a magistrate who is assigned to work an average of less than 40 hours of work a week during his term. No magistrate may be assigned an average of less than 10 hours of work a week during his term.

Notwithstanding any other provision of this subdivision, upon reappointment as a magistrate and being assigned to work the same or greater number of hours as he worked as a magistrate for a term of office ending on December 31, 1978, a person who received an

annual salary in excess of that to which he would be entitled under the formula contained in this subdivision shall receive an annual salary equal to that received during the prior term. That magistrate's salary shall increase in accordance with the salary formula contained in this subdivision.

(3) Notwithstanding any other provision of this section, a beginning full-time magistrate with a two-year Associate in Applied Science degree in criminal justice or paralegal training from a North Carolina community college or technical institute or the equivalent degree from a private educational institution in North Carolina, may be initially employed at the annual salary provided in the table above for a magistrate with "3 or more but less than 5" years of service; a beginning full-time magistrate with a four-year degree from an accredited senior institution of higher education may be initially employed at the annual salary provided in the table above for a magistrate with "5 or more but less than 7" years of service; a beginning full-time magistrate who holds a law degree from an accredited law school may be employed at the annual salary provided in the table for a magistrate with "7 or more but less than 9" years of service; and a beginning full-time magistrate who is licensed to practice law in North Carolina may be initially employed at the annual salary provided in the table for a magistrate with "9 or more" years of service. Seniority increments for a magistrate with a two or four-year degree or a law degree described herein accrue thereafter at two-year intervals, as provided in the table.

Magistrates with a two or four-year degree or a law degree described herein who became magistrates before July 1, 1979 are entitled to an increase of three, five and seven years, respectively, in their seniority, for pay purposes only. Full-time magistrates licensed to practice law in North Carolina who became magistrates before July 1, 1979 are entitled to the pay of a magistrate with 9 or more years of service, and part-time magistrates holding a law degree or a license to practice law as described above who became magistrates before July 1, 1979 are entitled to a proportionate adjustment in their pay. Pay increases authorized by this subdivision are not retroactive. (1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, increased all salaries in subdivision (1).

Session Laws 1979, 2nd Sess., c. 1137, s. 77, contains a severability clause.

The 1981 amendment, effective July 1, 1981, deleted "prior to the beginning of that term" from the end of the first sentence of the introductory paragraph of subdivision (1), and added the second sentence of the introductory paragraph of subdivision (1).

Session Laws 1981, c. 914, s. 2, provides that the act shall apply to magistrates reaching their anniversary date of service on or after July 1, 1981.

§ 7A-171.2. Qualifications for nomination or renomination.

(a) In order to be eligible for nomination or for renomination as a magistrate an individual must be a resident of the county for which he is appointed.

(b) To be eligible for nomination as a magistrate, an individual must have successfully completed a high school education, or have qualified for a certificate of high school equivalency, or have successfully completed the course of basic training prescribed by G.S. 7A-177.

(c) In order to be eligible for renomination as a magistrate an individual must have successfully completed the course of basic training for magistrates prescribed by G.S. 7A-177.

(d) Notwithstanding any other provision of this subsection, an individual who holds the office of magistrate on July 1, 1977, shall not be required to have successfully completed the course of basic training for magistrates prescribed by G.S. 7A-177 in order to be eligible for renomination as a magistrate. (1977, c. 945, s. 6.)

§ 7A-172: Repealed by Session Laws 1977, c. 945, s. 5.

Editor's Note. — This section was repealed by Session Laws 1977, c. 945, s. 5, ratified July 1, 1977, and amended by Session Laws 1977, 2nd Sess., c. 1136, s. 12, ratified June 14, 1978.

§ 7A-173. Suspension; removal; reinstatement.

(a) A magistrate may be suspended from performing the duties of his office by the chief district judge, or removal from office by the senior regular resident superior court judge or any regular superior court judge holding court in the district. Grounds for suspension or removal are the same as for a judge of the General Court of Justice.

(b) Suspension from performing the duties of the office may be ordered upon filing of sworn written charges in the office of clerk of superior court for the county in which the magistrate resides. If the chief district judge, upon examination of the sworn charges, finds that the charges, if true, constitute grounds for removal, he may enter an order suspending the magistrate from performing the duties of his office until a final determination of the charges on the merits. During suspension the salary of the magistrate continues.

(c) If a hearing, with or without suspension, is ordered, the magistrate against whom the charges have been made shall be given immediate written notice of the proceedings and a true copy of the charges, and the matter shall be set by the chief district judge for hearing before the senior regular resident superior court judge or a regular superior court judge holding court in the district. The hearing shall be held within the district not less than 10 days nor more than 30 days after the magistrate has received a copy of the charges. The hearing shall be open to the public. All testimony offered shall be recorded. At the hearing the superior court judge shall receive evidence, and make findings of fact and conclusions of law. If he finds that grounds for removal exist, he shall enter an order permanently removing the magistrate from office, and terminating his salary. If he finds that no such grounds exist, he shall terminate the suspension, if any.

(d) A magistrate may appeal from an order of removal to the Court of Appeals on the basis of error of law by the superior court judge. Pending decision of the case on appeal, the magistrate shall not perform any of the duties of his office. If, upon final determination, he is ordered reinstated, either by the appellate division or by the superior court on remand, his salary shall be restored from the date of the original order of removal. (1965, c. 310, s. 1; 1967, c. 108, s. 4; 1973, c. 148, ss. 3, 4.)

§ 7A-174. Bonds.

Prior to taking office, magistrates shall be bonded, individually or collectively, in such amount or amounts as the Administrative Officer of the Courts shall determine. The bond or bonds shall be conditioned upon the faithful performance of the duties of the office of magistrate. The Administrative Officer shall procure such bond or bonds from any indemnity or guaranty company authorized to do business in North Carolina, and the premium or premiums shall be paid by the State. (1965, c. 310, s. 1.)

§ 7A-175. Records to be kept.

A magistrate shall keep such dockets, accounts, and other records, under the general supervision of the clerk of superior court, as may be prescribed by the Administrative Office of the Courts. (1965, c. 310, s. 1.)

§ 7A-176. Office of justice of the peace abolished.

The office of justice of the peace is abolished in each county upon the establishment of a district court therein. (1965, c. 310, s. 1.)

§ 7A-177. Training course in duties of magistrate.

Within six months of taking the oath of office as a magistrate for the first time, a magistrate is required to attend and satisfactorily complete a course of basic training of at least 40 hours in the civil and criminal duties of a magistrate. The Administrative Office of the Courts is authorized to contract with the Institute of Government or with any other qualified educational organization to conduct this training, and to reimburse magistrates for travel and subsistence expenses incurred in taking such training. (1975, c. 956, s. 11.)

§§ 7A-178, 7A-179: Reserved for future codification purposes.

Article 17.

Clerical Functions in the District Court.

§ 7A-180. Functions of clerk of superior court in district court matters.

The clerk of superior court:

(1) Has and exercises all of the judicial powers and duties in respect of actions and proceedings pending from time to time in the district court of his county which are now or hereafter conferred or imposed upon him by law in respect of actions and proceedings pending in the superior court of his county;

(2) Performs all of the clerical, administrative and fiscal functions required in the operation of the district court of his county in the same manner as he is required to perform such functions in the operation of the superior court of his county;

(3) Maintains, under the supervision of the Administrative Office of the Courts, an office of uniform consolidated records of all judicial proceedings in the superior court division and the district court division of the General Court of Justice in his county. Those records shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court and all other records required by law to be maintained. The form and procedure for filing, docketing, indexing, and recording shall be as prescribed by the Administrative Officer of the Courts notwithstanding any contrary statutory provision as to the title and form of the record or as a method of indexing;

(4) Has the power to accept written appearances, waivers of trial and pleas of guilty to certain traffic offenses in accordance with a schedule of offenses and fines promulgated by the chief district judge, and, in such cases, to enter judgment and collect the fines and costs;

(5) Has the power to issue warrants of arrest valid throughout the State, and search warrants valid throughout the county of the issuing clerk;

(6) Has the power to conduct an initial appearance in accordance with Chapter 15A, Article 24, Initial Appearance, and to fix conditions of release in accordance with Chapter 15A, Article 26, Bail; and
(7) Continues to exercise all powers, duties and authority theretofore vested in or imposed upon clerks of superior court by general law, with the exception of jurisdiction in juvenile matters;
(8) Has the power to accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-107 when restitution is made, the amount of the check is four hundred dollars ($400.00) or less, and the warrant does not charge a fourth or subsequent violation of this statute, and, in such cases, to enter such judgments as the chief district judge shall direct and, forward the amounts collected as restitution to the appropriate prosecuting witnesses and to collect the costs. (1965, c. 310, s. 1; 1967, c. 691, s. 16; 1969, c. 1190, s. 14; 1973, c. 503, ss. 3, 4; c. 1286, s. 6; 1975, c. 166, s. 23; c. 626, s. 2; 1981, c. 142.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "four hundred dollars ($400.00)" for "three hundred dollars ($300.00)" near the beginning of subdivision (8).

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

CASE NOTES

Stated in State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

§ 7A-181. Functions of assistant and deputy clerks of superior court in district court matters.

Assistant and deputy clerks of superior court:
(1) Have the same powers and duties with respect to matters in the district court division as they have in the superior court division;
(2) Have the same powers as the clerk of superior court with respect to the issuance of warrants and acceptance of written appearances, waivers of trial and pleas of guilty; and
(3) Have the same power as the clerk of superior court to fix conditions of release in accordance with Chapter 15A, Article 26, Bail, and the same power as the clerk of superior court to conduct an initial appearance in accordance with Chapter 15A, Article 24, Initial Appearance. (1965, c. 310, s. 1; 1967, c. 691, s. 17; 1973, c. 503, s. 5; 1975, c. 166, s. 24; c. 626, s. 3.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 7A-182. Clerical functions at additional seats of court.

(a) In any county in which the General Assembly has authorized the district court to hold sessions at a place or places in addition to the county seat, the clerk of superior court shall furnish assistant and deputy clerks to the extent necessary to process efficiently the judicial business at such additional seat or seats of court. Only such records as are necessary for the expeditious processing of current judicial business shall be kept at the additional seat or seats of court. The office of the clerk of superior court at the county seat shall remain the permanent depository of official records.

(b) If an additional seat of a district court is designated for any municipality located in more than one county of a district, the clerical functions for that seat of court shall be provided by the clerks of superior court of the contiguous counties, in accordance with standing rules issued by the chief district judge, after consultation with the clerks concerned and a committee of the district bar appointed for this purpose. An assistant or deputy clerk assigned to a seat of district court described in this subsection shall have the same powers and authority as if he were acting in his own county. (1965, c. 310, s. 1; 1967, c. 691, s. 18; 1969, c. 1190, s. 15.)

§§ 7A-183 to 7A-189: Reserved for future codification purposes.

Article 18.

District Court Practice and Procedure Generally.

§ 7A-190. District courts always open.

The district courts shall be deemed always open for the disposition of matters properly cognizable by them. But all trials on the merits shall be conducted at trial sessions regularly scheduled as provided in this Chapter. (1965, c. 310, s. 1.)

CASE NOTES

This section and § 7A-191 are both subject to the provisions of § 7A-192. Bowen v. Hodge Motor Co., 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

Quoted in Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968); Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

OPINIONS OF ATTORNEY GENERAL

When Session Ends. — See opinion of Attorney General to Honorable John C. Clifford, Judge of the Twenty-first Judicial District Court, 40 N.C.A.G. 117 (1969).

§ 7A-191. Trials; hearings and orders in chambers.

All trials on the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other proceedings, hearings, and acts may be done or conducted by a judge in chambers in the absence of the clerk or other court officials and at any place within the district; but no hearing may be held, nor order entered, in any cause outside the district in which it is pending without the consent of all parties affected thereby. (1965, c. 310, s. 1.)

CASE NOTES

Cross References. — See note to § 7A-192.

Section 7A-190 and this section are both subject to the provisions of § 7A-192. Bowen v. Hodge Motor Co., 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

This section and § 7A-192 make a distinction between the jurisdiction of the district courts and the power and authority of a district judge other than the chief district judge to act. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

And Recognize Distinction between Trial on Merits and Hearing of Motion. — This section and § 7A-192 recognize a fundamental procedural distinction between a trial on the merits and the hearing of a motion in the cause. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

A hearing on motions in a cause comes within the purview of "all other proceedings, hearings and acts" referred to in this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

§ 7A-192. By whom power of district court to enter interlocutory orders exercised.

Any district judge may hear motions and enter interlocutory orders in causes regularly calendared for trial or for the disposition of motions, at any session to which the district judge has been assigned to preside. The chief district judge and any district judge designated by written order or rule of the chief district judge, may in chambers hear motions and enter interlocutory orders in all causes pending in the district courts of the district, including causes transferred from the superior court to the district court under the provisions of this Chapter. The designation is effective from the time filed in the office of the clerk of superior court of each county of the district until revoked or amended by written order of the chief district judge. (1965, c. 310, s. 1; 1969, c. 1190, s. 16.)

CASE NOTES

Sections 7A-190 and 7A-191 are both subject to the provisions of this section. Bowen v. Hodge Motor Co., 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

This section and § 7A-191 make a distinction between the jurisdiction of the district courts and the power and authority of a district judge other than the chief district judge to act. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

And recognize a fundamental procedural distinction between a trial on the merits and the hearing of a motion in the cause. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Limitations on Authority of Judge Other Than Chief Judge to Hear Motions and Enter Interlocutory Orders. — The authority of a district judge (other than the chief district judge) to hear motions and enter interlocutory orders in cases properly pending in the district court is a special authority which is limited by this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Under the provisions of the first portion of this section, before a district court judge, other than the chief district judge, may hear motions and enter interlocutory orders at any session of district court in cases calendared for trial or hearing at such session, he must be first assigned by the chief district judge under the provisions of subdivision (1) of § 7A-146 to preside at such session. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

In order to have authority to act on any motion, a district judge, other than the chief district judge, must be properly authorized under the provisions of § 7A-146 and this section to hold a session of court at which the matter is properly before him, or under this section to hear the matter in chambers. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Authority of Such Judge Must Affirmatively Appear on Record. — There is no presumption that a district judge (other than the chief district judge) has authority in chambers to hear motions and enter interlocutory orders in all cases pending in the district courts of the district; it must affirmatively appear in the record that the district judge was authorized pursuant to this section. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Written Authorization for Hearing Motions in Chambers. — A district judge other than the chief district judge may hear motions and enter interlocutory orders during any session over which he has been assigned to preside, whether the assignment be oral or written, but he may not hear motions in chambers without written authorization. Jim Walter Homes, Inc. v. Peartree, 28 N.C. App. 709, 222 S.E.2d 706 (1976).

Chambers matters may be heard by the chief district judge at any time and place within the district, but other district judges have no

authority to hear chambers matters out of session except upon written order or rule of the chief district judge. Bowen v. Hodge Motor Co., 29 N.C. App. 463, 224 S.E.2d 699 (1976), rev'd on other grounds, 292 N.C. 633, 234 S.E.2d 748 (1977).

Restraining Order in Action Pending in Another County in District. — A chief judge of the district court has jurisdiction to enter, in chambers in one county, a temporary restraining order in an action pending in the district court of another county in the judicial district, to return the order for hearing before him, and to enter an order continuing the restraining order in effect in the district court of the other county until the trial of the case on its merits. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Temporary Restraining Order Is Interlocutory Order. — A temporary restraining order, made permanent pending trial of the cause on its merits, is an interlocutory order. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Judgment Entered By Unauthorized Judge is Void. — The judgment entered by a district court judge in favor of plaintiff which directed among other things, that defendant immediately pay to plaintiff's attorney a certain sum for legal services rendered was interlocutory and was void since the district court judge who entered the order had not been assigned by the chief district judge to preside over a session of court in the county where the judgment was entered, nor was he authorized by order or rule entered by the chief judge to hear motions and enter interlocutory orders on that date. Stroupe v. Stroupe, 301 N.C. 656, 273 S.E.2d 434 (1981).

§ 7A-193. Civil procedure generally.

Except as otherwise provided in this Chapter, the civil procedure provided in Chapters 1 and 1A of the General Statutes applies in the district court division of the General Court of Justice. Where there is reference in Chapters 1 and 1A of the General Statutes to the superior court, it shall be deemed to refer also to the district court in respect of causes in the district court division. (1965, c. 310, s. 1; 1969, c. 1190, s. 17.)

Legal Periodicals. — For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

For survey of 1979 law on civil procedure, see 58 N.C.L. Rev. 1261 (1980).

CASE NOTES

Making Calendar for Trial of Civil Cases Discretionary. — In the superior court, making a calendar for the trial of civil cases appears to be discretionary rather than mandatory; this section makes the same rule apply to the district court. Laws v. Laws, 1 N.C. App. 243, 161 S.E.2d 40 (1968).

Separate Findings and Conclusions Required. — The rule that upon trial of an issue of fact by the court, its decision shall be in writing and shall contain a statement of the facts found and the conclusions of law separately, applies in the district court division of the General Court of Justice as well as in the superior court. Public Serv. Co. v. Beal, 5 N.C. App. 659, 169 S.E.2d 41 (1969).

This Chapter does not change the effect of § 1A-1, Rule 52(a)(1), and therefore it is necessary for the district judge who is authorized to hear a case involving the custody and support of minor children to find the facts specially and state separately his conclusions of law before entering an appropriate judgment. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

Applied in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Little v. Little, 12 N.C. App. 353, 183 S.E.2d 278 (1971).

Quoted in Alexiou v. O.R.I.P., Ltd., 36 N.C. App. 246, 243 S.E.2d 412 (1978).

Cited in Roberson v. Roberson, 40 N.C. App. 193, 252 S.E.2d 237 (1979).

§ 7A-194: Repealed by Session Laws 1977, c. 711, s. 33.

Editor's Note. — Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 35, provides: "None of the provisions of this act providing for the repeal of certain sections of the General Statutes shall constitute a reenactment of the common law."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

§ 7A-195: Repealed by Session Laws 1969, c. 911, s. 5.

§ 7A-196. Jury trials.

(a) In civil cases in the district court there shall be a right to trial by a jury of 12 in conformity with Rules 38 and 39 of the Rules of Civil Procedure.

(b) In criminal cases there shall be no jury trials in the district court. Upon appeal to superior court trial shall be de novo, with jury trial as provided by law. (1965, c. 310, s. 1; 1967, c. 954, s. 3.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

Right to Jury Trial Preserved — Civil Cases. — The right to trial by jury in civil cases in the district court is preserved by this section provided timely demand is made in one of the ways authorized by statute. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Same — Criminal Cases. — The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

When Demand Timely. — The demand for trial by jury in a civil case is timely if made in writing not later than 10 days after the filing of the last pleading directed to the issues. Holcomb v. Holcomb, 7 N.C. App. 329, 172 S.E.2d 212 (1970); Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

One authorized method of making the demand is by endorsement on the pleading of the party. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Error to Deny Jury Trial Timely Demanded. — Defendants having made timely demand in a manner authorized by statute, it was error for the district judge to deny them a jury trial. Ford Motor Credit Co. v. Hayes, 10 N.C. App. 527, 179 S.E.2d 181 (1971).

Waiver. — The failure of a party to make a demand for jury trial within the 10-day limitation period is a waiver of the right to a jury trial. Holcomb v. Holcomb, 7 N.C. App. 329, 172 S.E.2d 212 (1970).

Transfer of Case without Notice Denied Defendant's Right to Jury Trial. — Defendant was denied its constitutional right to a jury trial where the action was transferred from the superior court division to the district court division without notice to defendant, so that defendant made no demand for jury trial in the district court within the 10-day time period formerly allowed by this section (see now § 1A-1, Rule 38), and the district court subsequently denied defendant's demand for a jury trial. Thermo-Industries v. Talton Constr. Co., 9 N.C. App. 55, 175 S.E.2d 370 (1970).

Applied in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970); Williams v. Williams, 13 N.C. App. 468, 186 S.E.2d 210 (1972).

Quoted in Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

Stated in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973).

§ 7A-197. Petit jurors.

Unless otherwise provided in this Chapter, the provisions of Chapter 9 of the General Statutes with respect to petit jurors for the trial of civil actions in the superior court are applicable to the trial of civil actions in the district court. (1965, c. 310, s. 1.)

§ 7A-198. Reporting of civil trials.

(a) Court-reporting personnel shall be utilized, if available, for the reporting of civil trials in the district court. If court reporters are not available in any county, electronic or other mechanical devices shall be provided by the Administrative Office of the Courts upon request of the chief district judge.

(b) The Administrative Office of the Courts shall from time to time investigate the state of the art and techniques of recording testimony, and shall provide such electronic or mechanical devices as are found to be most efficient for this purpose.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some other person designated by him to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, and transcribe the record as required. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs, or other records are the property of the State, and the clerk shall keep them in his custody.

(d) Reporting of any trial may be waived by consent of the parties.

(e) Reporting will not be provided in trials before magistrates.

(f) Appointment of a reporter or reporters for district court proceedings in each district shall be made by the chief district judge. The compensation and allowances of reporters in each district shall be fixed by the chief district judge, within limits determined by the Administrative Officer of the Courts, and paid by the State. (1965, c. 310, s. 1; 1969, c. 1190, s. 18.)

CASE NOTES

A hearing on a motion for alimony pendente lite is not a civil trial within the meaning of this section. Howell v. Howell, 19 N.C. App. 260, 198 S.E.2d 462 (1973).

When Motion for Services of Reporter May Be Refused. — If the case is one in which a court reporter's services can be dispensed with without prejudice, and no reporter can be found, it is not error to refuse a motion for the services of a reporter. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (1972).

It is not error for the trial judge to fail to appoint a stenographer where no stenographer is available and where the defendant made no motion that any other means be employed when his motion for a court reporter was denied. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (1972).

The absence of stenographic notes is not always fatal, even when oral testimony is introduced, if no prejudice is shown to result. McAlister v. McAlister, 14 N.C. App. 159, 187 S.E.2d 449, cert. denied, 281 N.C. 315, 188 S.E.2d 898 (1972).

Stated in North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

Cited in Sauls v. Sauls, 288 N.C. 387, 218 S.E.2d 338 (1975).

§ 7A-199. Special venue rule when district court sits without jury in seat of court lying in more than one county; where judgments recorded.

(a) In any nonjury civil action or juvenile matter properly pending in the district court division, regularly assigned for a hearing or trial before a district judge at a seat of the district court in a municipality the corporate limits of which extend into two or more contiguous counties, venue is properly laid for such trial or hearing if by statute or common law it is properly laid in any of the contiguous counties.

(b) In any jury civil action regularly assigned for a hearing or trial before a district judge at a seat of the district court in a municipality the corporate limits of which extend into two or more contiguous counties, venue is properly laid for such jury trial if by statute or common law it is properly laid in any of the contiguous counties; provided, however, any such action shall be instituted in the county of proper venue, and the jurors summoned shall be from the county where such action was instituted. Notwithstanding the fact that the place of trial within such municipality is in a different county from the county where such action was commenced, the sheriff of the county where such action was commenced is authorized to summon the jurors to appear at such place of trial. Such jurors shall be subject to the same challenge as other jurors, except challenges for nonresidence in the county of trial.

(c) A district court judge sitting at a seat of court described in this section may, in criminal cases, conduct preliminary hearings and try misdemeanors arising within the corporate limits of the municipality plus the territory embraced within a distance of one mile in all directions therefrom.

(d) The judgment or order rendered in any civil action or juvenile matter heard or tried under the authority of this section shall be recorded in the county where the action was commenced. The judgment or finding of probable cause or other determination in any criminal action heard or tried under the authority of this section shall be recorded in the county where the offense was committed. (1967, c. 691, s. 19.)

§§ 7A-200 to 7A-209: Reserved for future codification purposes.

Article 19.

Small Claim Actions in District Court.

§ 7A-210. Small claim action defined.

For purposes of this Article a small claim action is a civil action wherein:

(1) The amount in controversy, computed in accordance with G.S. 7A-243, does not exceed one thousand dollars ($1,000); and

(2) The only principal relief prayed is monetary, or the recovery of specific personal property, or summary ejectment, or any combination of the foregoing in properly joined claims; and

(3) The plaintiff has requested assignment to a magistrate in the manner provided in this Article.

The seeking of the ancillary remedy of claim and delivery does not prevent an action otherwise qualifying as a small claim action under this Article from so qualifying. (1965, c. 310, s. 1; 1973, c. 1267, s. 1; 1979, c. 144, s. 1; 1981, c. 555, s. 1.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "one thousand dollars ($1,000)" for "eight hundred dollars ($800.00)" in subdivision (1).

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Remedy of summary ejectment may be obtained in a small action heard by a magistrate. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

§ 7A-211. Small claim actions assignable to magistrates.

In the interest of speedy and convenient determination, the chief district judge may, in his discretion, by specific order or general rule, assign to any magistrate of his district any small claim action pending in his district if the defendant is a resident of the county in which the magistrate resides. If there is more than one defendant, at least one of them must be a bona fide resident of the county in which the magistrate resides. (1965, c. 310, s. 1, 1967, c. 1165.)

CASE NOTES

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-211.1. Actions to enforce motor vehicle mechanic and storage liens.

Notwithstanding the provisions of G.S. 7A-210(2) and 7A-211, the chief district judge may in his discretion, by specific order or general rule, assign to any magistrate of his district actions to enforce motor vehicle mechanic and storage liens arising under G.S. 44A-2(d) or 20-77(d) when the claim arose in the county in which the magistrate resides. The defendant may be subjected to the jurisdiction of the court over his person by the methods provided in G.S. 7A-217 or 1A-1, Rule 4(j), Rules of Civil Procedure. (1977, c. 86, s. 1; 1979, c. 602, s. 1.)

§ 7A-212. Judgment of magistrate in civil action improperly assigned or not assigned.

No judgment of the district court rendered by a magistrate in a civil action assigned to him by the chief district judge is void, voidable, or irregular for the reason that the action is not one properly assignable to the magistrate under this article. The sole remedy for improper assignment is appeal for trial de novo before a district judge in the manner provided in this article. No judgment rendered by a magistrate in a civil action is valid when the action was not assigned to him by the chief district judge. (1965, c. 310, s. 1.)

CASE NOTES

Judgment of magistrate in civil action assigned to him by chief district judge is judgment of the district court. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-213. Procedure for commencement of action; request for and notice of assignment.

The plaintiff files his complaint in a small claim action in the office of the clerk of superior court of the county wherein the defendant, or one of the defendants resides. The designation "Small Claim" on the face of the complaint is a request for assignment. If, pursuant to order or rule, the action is assigned to a magistrate, the clerk issues a magistrate summons substantially in the form prescribed in this Article as soon as practicable after the assignment is made. The issuance of a magistrate summons commences the action. After service of the magistrate summons on the defendant, the clerk gives written notice of the assignment to the plaintiff. The notice of assignment identifies the action, designates the magistrate to whom assignment is made, and specifies the time, date and place of trial. By any convenient means the clerk notifies the magistrate of the assignment and the setting. (1965, c. 310, s. 1; 1969, c. 1190, s. 19; 1971, c. 377, s. 9.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-214. Time within which trial is set.

The time for trial of a small claim action is set not later than 30 days after the action is commenced. By consent of all parties the time for trial may be changed from the time set. For good cause shown, the magistrate to whom the action is assigned may grant continuances from time to time. (1965, c. 310, s. 1.)

§ 7A-215. Procedure upon nonassignment of small claim action.

Failure of the chief district judge to assign a claim within five days after filing of a complaint requesting its assignment constitutes nonassignment. The chief district judge may sooner order nonassignment. Upon nonassignment, the clerk immediately issues summons in the manner and form provided for commencement of civil actions generally, whereupon process is served, return made, and pleadings are required to be filed in the manner provided for civil actions generally. Upon issuing civil summons, the clerk gives written notice of nonassignment to the plaintiff. The plaintiff within five days after notice of nonassignment, and the defendant before or with the filing of his answer, may request a jury trial. Failure within the times so limited to request a jury trial constitutes a waiver of the right thereto. Upon the joining of issue, the clerk places the action upon the civil issue docket for trial in the district court division. (1965, c. 310, s. 1.)

§ 7A-216. Form of complaint.

The complaint in a small claim action shall be in writing, signed by the party or his attorney, except the complaint in an action for summary ejectment may be signed by an agent for the plaintiff. It need be in no particular form, but is sufficient if in a form which enables a person of common understanding to know what is meant. In any event, the forms prescribed in this Article are sufficient under this requirement, and are intended to indicate the simplicity and brevity of statement contemplated. Demurrers and motions to challenge the legal and formal sufficiency of a complaint in an assigned small claim action shall not be used. But at any time after its filing, the clerk, the chief district judge, or the magistrate to whom such an action is assigned may, on oral or written ex parte motion of the defendant, or on his own motion, order the plaintiff to perfect the statement of his claim before proceeding to its determination, and shall grant extensions of time to plead and continuances of trial pending any perfecting of statement ordered. (1965, c. 310, s. 1; 1971, c. 377, s. 10.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 7A-217. Methods of subjecting person of defendant to jurisdiction.

When by order or rule a small claim action is assigned to a magistrate, the defendant may be subjected to the jurisdiction of the court over his person by the following methods:

(1) By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. When the defendant is under any legal disability, he may be subject to personal jurisdiction only by personal service of process in the manner provided by law.

(2) When the defendant is not under any legal disability and when request is made therefor by the plaintiff, service of process may be made upon the defendant by mail, as herein provided. The plaintiff requests service upon defendant by mail by endorsement in writing upon his complaint, which request shall include the address to be used in mailing. The clerk mails to the defendant at the address given in the endorsement a copy of the complaint and a magistrate summons substantially in the form provided in this Article. Service of process by mail is made by certified mail, return receipt requested, and is complete upon return to the office of the clerk of the receipt signed by the defendant. Service by mail is proved prima facie by the signature of defendant upon the return receipt. The plaintiff bears the cost of service of process by mail.

(3) When the defendant is under no legal disability, he may be subjected to the jurisdiction of the court over his person by his written acceptance of service, or by his voluntary appearance.

(4) In summary ejectment cases only, service as provided in G.S. 42-29 is also authorized. (1965, c. 310, s. 1; 1969, c. 1190, s. 20; 1973, c. 90.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 7A-218. Answer of defendant.

At any time prior to the time set for trial, the defendant may file a written answer admitting or denying all or any of the allegations in the complaint, or pleading new matter in avoidance. No particular form is required, but it is sufficient if in a form to enable a person of common understanding to know the nature of the defense intended. A general denial of all the allegations of the complaint is permissible.

Failure of defendant to file a written answer after being subjected to the jurisdiction of the court over his person constitutes a general denial. (1965, c. 310, s. 1; 1967, c. 691, s. 20.)

§ 7A-219. Certain counterclaims; cross claims; third-party claims not permissible.

No counterclaim, cross claim or third-party claim which would make the amount in controversy exceed one thousand dollars ($1,000) is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action. (1965, c. 310, s. 1; 1973, c. 1267, s. 2; 1979, c. 144, s. 2; 1981, c. 555, s. 2.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "one thousand dollars ($1,000)" for "eight hundred dollars ($800.00)" in the first sentence.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Applied in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975); Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975).

§ 7A-220. No pleadings other than complaint and answer.

There are no pleadings in assigned small claim actions other than the complaint and answer. Any new matter pleaded in avoidance in the answer is deemed denied or avoided. But on appeal from judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims, cross claims, third-party claims, replies, and answers to cross claims. (1965, c. 310, s. 1.)

§ 7A-221. Objections to venue and jurisdiction over person.

By motion prior to filing answer, or in the answer, the defendant may object that the venue is improper, or move for change of venue, or object to the jurisdiction of the court over his person. These motions or objections are heard on notice by the chief district judge or a district judge designated by order or rule of the chief district judge. Assignment to the magistrate is suspended pending determination of the objection, and the clerk gives notice of the suspension by any convenient means to the magistrate to whom the action has been assigned. All these objections are waived if not made prior to the date set for trial. If venue is determined to be improper, or is ordered changed, the action is transferred to the district court of the new venue, and is not thereafter assigned to a magistrate, but proceeds as in the case of civil actions generally. (1965, c. 310, s. 1.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 7A-222. General trial practice and procedure.

Trial of a small claim action before a magistrate is without a jury. The rules of evidence applicable in the trial of civil actions generally are observed. At the conclusion of plaintiff's evidence the magistrate may render judgment of dismissal if plaintiff has failed to establish a prima facie case. If a judgment of dismissal is not rendered the defendant may introduce evidence. At the conclusion of all the evidence the magistrate may render judgment or may in his discretion reserve judgment for a period not in excess of 10 days. (1965, c. 310, s. 1; 1971, c. 377, s. 11.)

CASE NOTES

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-223. Practice and procedure in small claim actions for summary ejectment.

In any small claim action demanding summary ejectment or past due rent, or both, the complaint may be signed by an agent acting for the plaintiff who has actual knowledge of the facts alleged in the complaint. If a small claim action demanding summary ejectment is assigned to a magistrate, the practice and procedure prescribed for commencement, form and service of process, assignment, pleadings, and trial in small claim actions generally are observed, except that if the defendant by written answer denies the title of the plaintiff, the action is placed on the civil issue docket of the district court division for trial before a district judge. In such event, the clerk withdraws assignment of the action from the magistrate and immediately gives written notice of withdrawal, by any convenient means, to the plaintiff and the magistrate to whom the action has been assigned. The plaintiff, within five days after receipt of the notice, and the defendant, in his answer, may request trial by jury. Failure to request jury trial within the time limited is a waiver of the right to trial by jury. (1965, c. 310, s. 1; 1967, c. 691, s. 21; 1971, c. 377, s. 12.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Cited in Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

§ 7A-224. Rendition and entry of judgment.

Judgment in a small claim action is rendered in writing and signed by the magistrate. The judgment so rendered is a judgment of the district court, and is recorded and indexed as are judgments of the district and superior court generally. Entry is made as soon as practicable after rendition. (1965, c. 310, s. 1; 1969, c. 1190, s. 21.)

§ 7A-225. Lien and execution of judgment.

From the time of docketing, the judgment rendered by a magistrate in a small claim action constitutes a lien and is subject to execution in the manner provided in Chapter 1, Article 28, of the General Statutes. (1965, c. 310, s. 1.)

§ 7A-226. Priority of judgment when appeal taken.

When appeal is taken from a judgment in a small claim action, the lien acquired by docketing merges into any judgment rendered after trial de novo on appeal, continues as a lien from the first docketing, and has priority over any judgment docketed subsequent to the first docketing. (1965, c. 310, s. 1.)

§ 7A-227. Stay of execution on appeal.

Appeal from judgment of a magistrate does not stay execution if the judgment is for recovery of specific property. Such execution may be stayed by order of the clerk of superior court upon petition by the appellant accompanied by undertaking in writing, executed by one or more sufficient sureties approved by the clerk, to the effect that if judgment be rendered against appellant the sureties will pay the amount thereof with costs awarded against the appellant. Appeal from judgment of a magistrate does stay execution if the judgment is for money damages. This section shall not require any undertaking of appellants in summary ejectment actions other than those imposed by Chapter 42 of the General Statutes. (1965, c. 310, s. 1; 1967, c. 24, s. 1; 1977, c. 844; 1979, c. 820, s. 9.)

CASE NOTES

Quoted in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

§ 7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal.

(a) With the consent of the chief district court judge, a magistrate may set aside an order or judgment for mistake or excusable neglect pursuant to G.S. 1A-1, Rule 60(b) (1) and order a new trial before a magistrate. After final disposition before the magistrate, the sole remedy for an aggrieved party is appeal for trial de novo before a district court judge. Notice of appeal may be given orally in open court upon announcement of or rendition of the judgment. If not announced in open court, notice of the appeal must be given in writing to the magistrate. The appeal must be perfected within 10 days after rendition of the judgment in the manner set out in subsection (b). Upon the announcement of the appeal in open court or upon receipt of the written notice of appeal, the magistrate shall note the appeal upon the judgment.

(b) The appeal shall be perfected by payment of the costs of the appeal and by serving a written notice of the appeal stating that the cost of the appeal has been paid on all other parties and the clerk of superior court. Failure to demand a jury is a waiver of the right thereto.

(c) Whenever such appeal is docketed and is regularly set for trial, and the appellant fails to appear and prosecute his appeal, the presiding judge may have the appellant called and the appeal dismissed; and in such case the judgment of the magistrate shall be affirmed. (1965, c. 310, s. 1; 1969, c. 1190, s. 22; 1979, 2nd Sess., c. 1328, s. 3; 1981, c. 599, s. 3.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, added present subsection (c).

The 1981 amendment, effective Oct. 1, 1981, rewrote this section.

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

Legal Periodicals. — For comment on the present and future use of the writ of recordari in North Carolina, see 2 Wake Forest Intra. L. Rev. 77 (1966).

As to form for writ of recordari, see 2 Wake Forest Intra. L. Rev. 88 (1966).

CASE NOTES

Applied in Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975); Ball Photo Supply Co. v. McClain, 30 N.C. App. 132, 226 S.E.2d 178 (1976).

Quoted in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-229. Trial de novo on appeal.

Upon appeal noted, the clerk of superior court places the action upon the civil issue docket of the district court division. The district judge before whom the action is tried may order repleading or further pleading by some or all of the parties; may try the action on stipulation as to the issue; or may try it on the pleadings as filed. (1965, c. 310, s. 1.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Cited in Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968); Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-230. Jury trial on appeal.

The appellant in his written notice of appeal may demand a jury on the trial de novo. Within 10 days after receipt of the notice of appeal stating that the costs of the appeal have been paid, any appellee by written notice served on all parties and on the clerk of superior court may demand a jury on the trial de novo. (1965, c. 310, s. 1; 1981, c. 599, s. 3.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, rewrote this section.

Session Laws 1981, c. 599, s. 21, provides that the act shall not affect pending litigation.

CASE NOTES

Cited in Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

§ 7A-231. Provisional and incidental remedies.

The provisional and incidental remedies of claim and delivery, subpoena duces tecum, and production of documents are obtainable in small claim actions. The practice and procedure provided therefor in respect of civil actions generally is observed, conformed as may be required. No other provisional or

incidental remedies are obtainable while the action is pending before the magistrate. (1965, c. 310, s. 1.)

§ 7A-232. Forms.

The following forms are sufficient for the purposes indicated under this article. Substantial conformity is sufficient.

FORM 1.

MAGISTRATE SUMMONS

NORTH CAROLINA
. . . . . COUNTY

General Court of Justice
District Court Division
Before the Magistrate

A. B., Plaintiff
v.
C. D., Defendant

SUMMONS

To the above-named Defendant:

You are hereby summoned to appear before His Honor . . . . . ., Magistrate of the District Court, at . . . . . (time) . . . . . ., on . . . . (date) . . . ., at the . . . . . (address) . . . . . in the . . . . . (city) . . . . . ., then and there to defend against proof of the claim stated in the complaint filed in this action, copy of which is served herewith. You may file written answer making defense to the claim in the office of the Clerk of Superior Court . . . . . County in . . . . . ., N. C., not later than the time set for trial. If you do not file answer, plaintiff must nevertheless prove his claim before the Magistrate. But if you fail to appear and defend against the proof offered, judgment for the relief demanded in the complaint may be rendered against you.

This . . . . . day of . . . . . (month) . . . . . ., 19 . . . ..

. . . . . .
Clerk of Superior Court
. . . . . County

FORM 2.

NOTICE OF NON-ASSIGNMENT OF ACTION

NORTH CAROLINA
. . . . . County

General Court of Justice
District Court Division

A. B., Plaintiff
v.
C. D., Defendant

NOTICE OF NON-ASSIGNMENT OF ACTION

To the above-named Plaintiff:

Take notice that the civil action styled as above which you requested be assigned for trial before a Magistrate will not be assigned. Thirty-day summons to answer is being issued for service upon defendant, and upon the joining of issue this action will be placed on the civil issue docket for trial before a district judge.

This . . . . . day of . . . . . ., 19 . . . ..

. . . . . .
Clerk of Superior Court
. . . . . County

FORM 3.

NOTICE OF ASSIGNMENT OF ACTION

NORTH CAROLINA — General Court of Justice
District Court Division
. . . . . County — Before the Magistrate

A. B., Plaintiff
v.
C. D., Defendant
NOTICE OF ASSIGNMENT OF ACTION

To the above-named Plaintiff:

Take notice that the civil action styled as above, commenced by you as plaintiff, has been assigned for trial before His Honor . . . . . ., Magistrate of the District Court, at . . . . . (time) . . . . . on . . . . (date) . . . ., at . . . . . (address) . . . . . in . . . . . (city) . . . . . ., N.C.

. . . . . .
Clerk of Superior Court
. . . . . County

FORM 4.

COMPLAINT ON A PROMISSORY NOTE

NORTH CAROLINA — General Court of Justice
District Court Division
. . . . . COUNTY — SMALL CLAIM

A. B., Plaintiff
v.
C. D., Defendant
COMPLAINT

1. Plaintiff is a resident of . . . . . County; defendant is a resident of . . . . . County.

2. Defendant on or about January 1, 1964, executed and delivered to plaintiff a promissory note (in the following words and figures: (here set out the note verbatim)); (a copy of which is annexed as Exhibit . . . . .); (whereby defendant promised to pay to plaintiff or order on June 1, 1964, the sum of two hundred and fifty dollars ($250.00) with interest thereon at the rate of six percent (6%) per annum).

3. Defendant owes the plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of two hundred and fifty dollars ($250.00), interest and costs.

This . . . . . day of . . . . . ., 19 . . . ..

. . . . . .
(signed) A. B., Plaintiff
(or E. F., Attorney for Plaintiff)

Service by mail is, is not, requested.

. . . . . .
(signed) A. B., Plaintiff
(or E. F., Attorney for Plaintiff)

FORM 5.

COMPLAINT ON AN ACCOUNT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) according to the account annexed as Exhibit A.

Wherefore (etc., as in form 4).

FORM 6.

COMPLAINT FOR GOODS SOLD AND DELIVERED

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) for goods sold and delivered to defendant between June 1, 1965, and December 1, 1965.

Wherefore (etc., as in form 4).

FORM 7.

COMPLAINT FOR MONEY LENT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant owes plaintiff two hundred and fifty dollars ($250.00) for money lent by plaintiff to defendant on or about June 1, 1965.

Wherefore (etc., as in form 4.)

FORM 8.

COMPLAINT FOR CONVERSION

(Caption as in form 4)

1. (Allegation of residence of parties)

2. On or about June 1, 1965, defendant converted to his own use a set of plumbing tools of the value of two hundred and fifty dollars ($250.00), the property of plaintiff.

Wherefore (etc., as in form 4).

FORM 9.

COMPLAINT FOR INJURY TO PERSON OR PROPERTY

(Caption as in form 4)

1. (Allegation of residence of parties)

2. On or about June 1, 1965, at the intersection of Main and Church Streets in the Town of Ashley, N. C., defendant (intentionally struck plaintiff a blow in the face) (negligently drove a bicycle into plaintiff) (intentionally tore plaintiff's clothing) (negligently drove a motorcycle into the side of plaintiff's automobile).

3. As a result (plaintiff suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one hundred and fifty dollars ($150.00) (plaintiff suffered damage to his property above described in the sum of two hundred and fifty dollars ($250.00).

Wherefore (etc., as in form 4).

FORM 10.

COMPLAINT TO RECOVER POSSESSION OF CHATTEL

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant has in his possession a set of plumber's tools of the value of two hundred dollars ($200.00), the property of plaintiff. Plaintiff is entitled to immediate possession of the same but defendant refuses on demand to deliver the same to plaintiff.

3. Defendant has unlawfully kept possession of the property above described since on or about June 1, 1965, and has thereby deprived plaintiff of its use, to his damage in the sum of fifty dollars ($50.00).

Wherefore plaintiff demands judgment against defendant for the recovery of possession of the property above described and for the sum of fifty dollars ($50.00), interest and costs. (etc., as in form 4).

FORM 11.

COMPLAINT IN SUMMARY EJECTMENT

(Caption as in form 4)

1. (Allegation of residence of parties)

2. Defendant entered into possession of a tract of land (briefly described) as a lessee of plaintiff (or as lessee of E. F. who, after making the lease, assigned his estate to the plaintiff); the term of defendant expired on the 1st day of June, 1965 (or his term has ceased by nonpayment of rent, or otherwise, as the fact may be); the plaintiff has demanded possession of the premises of the defendant, who refused to surrender it, but holds over; the estate of plaintiff is still subsisting, and the plaintiff is entitled to immediate possession.

3. Defendant owes plaintiff the sum of fifty dollars ($50.00) for rent of the premises from the 1st of May, 1965, to the 1st day of June, 1965, and one hundred dollars ($100.00) for the occupation of the premises since the 1st day of June, 1965 to the present.

Wherefore, plaintiff demands judgment against defendant that he be put in immediate possession of the premises, and that he recover the sum of one hundred and fifty dollars ($150.00), interest and costs. (etc., as in form 4).

(1965, c. 310, s. 1; 1971, c. 1181, s. 2.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§§ 7A-233 to 7A-239: Reserved for future codification purposes.

SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

ARTICLE 20.

Original Civil Jurisdiction of the Trial Divisions.

§ 7A-240. Original civil jurisdiction generally.

Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

CASE NOTES

Judicial Immunity. — Judges of courts of general jurisdiction are fully clothed by both logic and precedent with the shield of judicial immunity. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

Jurisdiction Over Member of Eastern Band of Cherokee in Tort Claim. — The courts of this State have jurisdiction over a member of the Eastern Band of Cherokee Indians in a tort claim by a non-Indian arising from an occurrence on land within the Qualla Boundary. Sasser v. Beck, 40 N.C. App. 668, 253 S.E.2d 577, cert. denied, 298 N.C. 300, 259 S.E.2d 915 (1979).

Concurrent Jurisdiction to Hear Application for Restraining Order Pending Trial on the Merits. — An application for a restraining order pending trial on the merits is a justiciable matter of a civil nature which is cognizable in the General Court of Justice, and the original general jurisdiction to hear the application and issue such order is vested concurrently in the superior court division and the district court division. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Superior Court Jurisdiction In Personal Injury Actions. — The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Disposition of Case in Superior Court After Transfer to District Court. — After a judge entered his order transferring a case from the superior court division of the General Court of Justice to the district court division, and the latter was the proper division in which to try the case, nothing else appearing, disposition of the case thereafter in the superior court is irregular and contrary to the course and practice in the General Court of Justice. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

Applied in Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 40 N.C. App. 675, 253 S.E.2d 621 (1979).

Quoted in Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Stated in Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975); Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Cited in Grissom v. North Carolina Dep't of Revenue, 34 N.C. App. 381, 238 S.E.2d 311 (1977); North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

§ 7A-241. Original jurisdiction in probate and administration of decedents' estates.

Exclusive original jurisdiction for the probate of wills and the administration of decedents' estates is vested in the superior court division, and is exercised by the superior courts and by the clerks of superior court as ex officio judges of probate according to the practice and procedure provided by law. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

For survey of 1976 case law on wills, trusts and estates, see 55 N.C.L. Rev. 1109 (1977).

CASE NOTES

This section reemphasizes the fact that the district courts have no jurisdiction of probate matters, and except in those instances where the clerk is disqualified to act, it vests probate jurisdiction in the superior courts to be exercised originally by the clerks as ex officio judges of probate in the manner specified in the applicable statutes, that is, "according to the practice and procedure provided by law." In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Allocation of Jurisdiction Between Clerk and Judge. — This section does not say that concurrent jurisdiction in probate matters is vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested

in the superior court division to be exercised by the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, has allocated the jurisdiction between the clerk and the judge. By § 28A-2-1 the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act under § 28A-2-3. When the clerk is disqualified to exercise his jurisdiction the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate court pursuant to § 7A-251. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Judge Deals with Probate and Nonprobate Issues. — The judge of superior court in the exercise of his inherent powers upon appeal from clerk's finding had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the decedent's estate, which is not a probate matter. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

The clerk is a part of the superior court. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Under this section, the clerk of superior court, "as ex officio judge of probate," continues to exercise probate jurisdiction "according to the practice and procedure provided by law"; and in doing so, he continues to act as "a judicial officer of the superior court division, and not as a separate court" pursuant to § 7A-40. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Section Supports § 28A-2-1 Assignment of Authority to Clerk. — The assignment of original authority of probate matters to the clerk in § 28A-2-1 is supported by, and not contravened by, this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Reference to "Practice and Procedure Provided by Law". — When this section was enacted in 1965 its reference to "the practice and procedure provided by law" was a reference to Chapter 28, which remained applicable to the estates of all decedents dying on or before October 1, 1975. After that date the reference in this section was to Chapter 28A. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Strict Construction of Appeal Procedure from Clerk Conflicts with Section. — Under a strict construction of §§ 1-272 and 1-273 as they affect § 7A-251, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of this section. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

An administratrix' petition for allowance of commissions and attorneys' fees is initially properly brought before the clerk of superior court. In re Green, 9 N.C. App. 326, 176 S.E.2d 19 (1970).

Quoted in Kimrey v. Dorsett, 10 B.R. 466 (M.D.N.C. 1981).

Stated in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Cited in In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970); Turner v. Lea, 25 N.C. App. 113, 212 S.E.2d 391 (1975); Beck v. Beck, 36 N.C. App. 774, 245 S.E.2d 199 (1978).

§ 7A-242. Concurrently held original jurisdiction allocated between trial divisions.

For the efficient administration of justice in respect of civil matters as to which the trial divisions have concurrent original jurisdiction, the respective divisions are constituted proper or improper for the trial and determination of specific actions and proceedings in accordance with the allocations provided in this Article. But no judgment rendered by any court of the trial divisions in any civil action or proceeding as to which the trial divisions have concurrent original jurisdiction is void or voidable for the sole reason that it was rendered by the court of a trial division which by such allocation is improper for the trial and determination of the civil action or proceeding. (1965, c. 310, s. 1.)

Legal Periodicals. — For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

CASE NOTES

Administrative allocations of case loads between the divisions are not jurisdictional since a judgment is not void or voidable for the reason that it was rendered by a court of the trial division which by the statutory allocation was the improper division for hearing and determining the matter. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

The superior court division or the district court division, or both, are designated as "proper" divisions in which to bring a given civil action and no order of the district court may be overturned merely because it was not the proper division to enter the order. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Superior Court Jurisdiction of Personal Injury Actions. — The superior court is a court of general jurisdiction and has jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute. Morse v. Curtis, 276 N.C. 371, 172 S.E.2d 495 (1970).

Enforcement of Judgment for Alimony Entered in Superior Court before Establishment of District Court. — A district court judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Quoted in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Cited in Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

§ 7A-243. Proper division for trial of civil actions generally determined by amount in controversy.

Except as otherwise provided in this Article, the district court division is the proper division for the trial of all civil actions in which the amount in controversy is five thousand dollars ($5,000.00) or less; and the superior court division is the proper division for the trial of all civil actions in which the amount in controversy exceeds five thousand dollars ($5,000.00).

For purposes of determining the amount in controversy, the following rules apply whether the relief prayed is monetary or nonmonetary, or both, and with respect to claims asserted by complaint, counterclaim, cross-complaint or third-party complaint:

(1) The amount in controversy is computed without regard to interest and costs.

(2) Where monetary relief is prayed, the amount prayed for is in controversy unless the pleading in question shows to a legal certainty that the amount claimed cannot be recovered under the applicable measure of damages. The value of any property seized in attachment, claim and delivery, or other ancillary proceeding, is not in controversy and is not considered in determining the amount in controversy.

(3) Where no monetary relief is sought, but the relief sought would establish, enforce, or avoid an obligation, right or title, the value of the obligation, right, or title is in controversy. The judge may require by rule or order that parties make a good faith estimate of the value of any nonmonetary relief sought.

(4) a. Except as provided in subparagraph c of this subdivision, where a single party asserts two or more properly joined claims, the claims are aggregated in computing the amount in controversy.

b. Except as provided in subparagraph c, where there are two or more parties properly joined in an action and their interests are aligned, their claims are aggregated in computing the amount in controversy.

c. No claims are aggregated which are mutually exclusive and in the alternative, or which are successive, in the sense that satisfaction of one claim will bar recovery upon the other.

d. Where there are two or more claims not subject to aggregation the highest claim is the amount in controversy.

(5) Where the value of the relief to a claimant differs from the cost thereof to an opposing party, the higher amount is used in determining the amount in controversy. (1965, c. 310, s. 1.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Disposition of Case in Superior Court after Transfer to District Court. — After a judge entered his order transferring a case from the superior court division of the General Court of Justice to the district court division, and the latter was the proper division in which to try the case, nothing else appearing, disposition of the case thereafter in the superior court is irregular and contrary to the course and practice in the General Court of Justice. Brady v. Town of Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

Applied in Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 40 N.C. App. 675, 253 S.E.2d 621 (1979).

Stated in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

Cited in Kinney v. Goley, 4 N.C. App. 325, 167 S.E.2d 97 (1969); North Brook Farm Lines v. McBrayer, 35 N.C. App. 34, 241 S.E.2d 74 (1978).

§ 7A-244. Domestic relations.

The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, and child custody. (1965, c. 310, s. 1; 1981, c. 815, s. 5.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, inserted "equitable distribution of property" near the end of the section.

Session Laws 1981, c. 815, s. 7, provides that the act shall apply only when the action for an absolute divorce is filed on or after Oct. 1, 1981.

CASE NOTES

Jurisdiction Generally. — The district court is, under the provisions of this section, a court of general jurisdiction for the trial of civil actions and proceedings for annulment, divorce, alimony, child support, and child custody. Austin v. Austin, 12 N.C. App. 286, 183 S.E.2d 420 (1971).

This section is merely an administrative allocation of annulment, divorce, alimony, child support and child custody actions to the district court division. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Transfer of Action for Absolute Divorce Which Has Ended in Mistrial. — The superior court has authority under § 7A-259 to transfer to the district court an action for absolute divorce which has twice ended in mistrial in the superior court and this section gives the district court jurisdiction to try the action. Pence v. Pence, 8 N.C. App. 484, 174 S.E.2d 860 (1970).

Alimony Jurisdiction. — The district court has jurisdiction over alimony proceedings and, indeed, the legislature has decreed that it is the

only "proper" division for such a proceeding. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Same — Enforcement of Judgments. — It is manifest that the court which has been given the duty to supervise domestic relations matters — including alimony judgments and orders pursuant thereto — must have the authority to enforce those judgments and orders. This is true whether the judgment was entered in the superior court or the district court. It would be anomalous to assume that when the legislature changed the statutory framework to make the district court division the proper agency in which to bring actions for alimony or actions to enforce alimony judgments, it meant to leave supervision of prior alimony judgments to the superior court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Same — Judgment Entered in Superior Court before Establishment of District Court. — The district court has the power to enforce by a civil contempt proceeding a confession of judgment entered in the superior court before the establishment of the district court allowing alimony to an appellee. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Same — Order Not Final Judgment. — An order for the payment of alimony is not a final judgment, since it may be modified upon application of either party; thus, an action for alimony would continue to be "pending" in the court of proper jurisdiction, which is now the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Applied in Bonavia v. Torreso, 7 N.C. App. 21, 171 S.E.2d 108 (1969); Russ v. Russ, 43 N.C. App. 74, 257 S.E.2d 676 (1979).

Quoted in Francis v. Durham County Dep't. of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Cited in In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); In re Greer, 26 N.C. App. 106, 215 S.E.2d 404 (1975).

§ 7A-245. Injunctive and declaratory relief to enforce or invalidate statutes; constitutional rights.

(a) The superior court division is the proper division without regard to the amount in controversy, for the trial of civil actions where the principal relief prayed is

(1) Injunctive relief against the enforcement of any statute, ordinance, or regulation;

(2) Injunctive relief to compel enforcement of any statute, ordinance, or regulation;

(3) Declaratory relief to establish or disestablish the validity of any statute, ordinance, or regulation; or

(4) The enforcement or declaration of any claim of constitutional right.

(b) When a case is otherwise properly in the district court division, a prayer for injunctive or declaratory relief by any party not a plaintiff on grounds stated in this section is not ground for transfer. (1965, c. 310, s. 1.)

Legal Periodicals. — For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Jurisdiction of injunctive relief generally is vested concurrently in the superior court division and the district court division, because even the four types of injunctive relief which the legislature suggested should be heard in the superior court division are not confined jurisdictionally to that division; the statute merely specifies that the superior court division is the proper division for the trial of such actions. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Under subsection (b) of this section a prayer for injunctive relief of any of the types enumerated in subsection (a) is not even grounds for transfer to the superior court division unless such injunctive relief is prayed for by a party plaintiff. So it is abundantly clear that the district court division has jurisdiction to grant injunctive relief in cases docketed in that division. Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

§ 7A-246. Special proceedings; exception; guardianship and trust administration.

The superior court division is the proper division, without regard to the amount in controversy, for the hearing and trial of all special proceedings except proceedings under the Protection of the Abused or Neglected Elderly Act (Chapter 108, Article 4, of the General Statutes), except proceedings for involuntary commitment to treatment facilities (Chapter 122, Article 5A, of the General Statutes) and of all proceedings involving the appointment of guardians and the administration by legal guardians and trustees of express trusts of the estates of their wards and beneficiaries, according to the practice and procedure provided by law for the particular proceeding. (1965, c. 310, s. 1; 1973, c. 726, s. 5; c. 1378, s. 3; 1981, c. 682, s. 1.)

Editor's Note. — Chapter 122, Article 5, referred to in this section, was repealed by Session Laws 1973, c. 726, s. 2. For present provisions as to involuntary commitment to mental hospitals, see Chapter 122, Article 5A, § 122-58.1 et seq. chapter 108 of the General Statutes was repealed by Session Laws 1981, c. 275. See now chapter 108A.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Article 5A" for "Article 5" near the middle of the section.

CASE NOTES

Applied in In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818 (1979).

§ 7A-247. Quo warranto.

The superior court division is the proper division, without regard to the amount in controversy, for the trial of all civil actions seeking as principal relief the remedy of quo warranto, according to the practice and procedure provided for obtaining that remedy. (1965, c. 310, s. 1; 1971, c. 377, s. 13.)

Legal Periodicals. — For survey of 1978 law on criminal procedure, see 57 N.C.L. Rev. 1007 (1979).

For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

§ 7A-248. Condemnation actions and proceedings.

The superior court division is the proper division, without regard to the amount in controversy, for the trial of all actions and proceedings wherein property is being taken by condemnation in exercise of the power of eminent domain, according to the practice and procedure provided by law for the particular action or proceeding. Nothing in this section is in derogation of the validity of such administrative or quasi-judicial procedures for value appraisal as may be provided for the particular action or proceeding prior to the raising of justiciable issues of fact or law requiring determination in the superior court. (1965, c. 310, s. 1.)

§ 7A-249. Corporate receiverships.

The superior court division is the proper division, without regard to the amount in controversy, for actions for corporate receiverships under Chapter 1, Article 38, of the General Statutes, and proceedings under Chapters 55 (Business Corporation Act) and 55A (Nonprofit Corporation Act) of the General Statutes. (1965, c. 310, s. 1; 1973, c. 503, s. 6.)

§ 7A-250. Review of decisions of administrative agencies.

(a) Except as otherwise provided in subsections (b) and (c) of this section, the superior court division is the proper division, without regard to the amount in controversy, for review by original action or proceeding, or by appeal, of the decisions of administrative agencies, according to the practice and procedure provided for the particular action, proceeding, or appeal.

(b) The Court of Appeals shall have jurisdiction to review final orders or decisions of the North Carolina Utilities Commission and the North Carolina Industrial Commission, as provided in Article 5 of this Chapter, and any order or decision of the Commissioner of Insurance described in G.S. 58-9.4.

(c) Appeals from rulings of county game commissions shall be heard in the district court division. The appeal shall be heard *de novo* before a district court judge sitting in the county in which the game commission whose ruling is being appealed is located. (1965, c. 310, s. 1; 1967, c. 108, s. 6; 1973, c. 503, s. 7; 1981, c. 444.)

Cross References. — As to jurisdiction of the Court of Appeals to review orders or decisions of the Commissioner of Insurance under this section, see § 58-9.4.

Effect of Amendments. — The 1981 amendment rewrote this section.

Legal Periodicals. — For an article entitled, "A Powerless Judiciary? The North Carolina Courts' Perceptions of Review of Administrative Action," see 12 N.C. Cent. L.J. 21 (1980).

CASE NOTES

Stated in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

§ 7A-251. Appeal from clerk to judge.

In all matters properly cognizable in the superior court division which are heard originally before the clerk of superior court, appeals lie to the judge of superior court having jurisdiction from all orders and judgments of the clerk for review in all matters of law or legal inference, in accordance with the procedure provided in Chapter 1 of the General Statutes. (1965, c. 310, s. 1.)

Cross References. — As to manner of taking appeals from clerk to judge, see §§ 1-272, 1-273.

CASE NOTES

Strict Construction of Appeal Procedure from Clerk Conflicts with § 7A-241. — Under a strict construction of §§ 1-272 and 1-273 as they affect this section, in probate matters originally heard by the clerk, an appeal would lie directly to the judge of superior court in matters of law and legal inference; but in the hearing before the clerk if issues of fact, or both law and fact, were raised, the appeal would lie directly to the superior court for jury trial on

the issues of fact. But this strict construction would ignore the "according to the practice and procedure provided by law" mandate of § 7A-241. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Allocation of Jurisdiction between Clerk and Judge. — Section 7A-241 does not say that concurrent jurisdiction in probate matters is vested in the clerk and the judge of the superior court. It says that probate jurisdiction is vested in the superior court division to be exercised by the superior court and the clerk according to the practice and procedure provided by law. The law, that is, the statutes specifying this practice and procedure, has allocated the jurisdiction between the clerk and the judge. By § 28A-2-1 the clerk is given exclusive original jurisdiction of "the administration, settlement and distribution of estates of decedents" except in cases where the clerk is disqualified to act under § 28A-2-3. When the clerk is disqualified to exercise his jurisdiction the judge has equal authority to perform the clerk's probate duties and, in that sense, he exercises concurrent jurisdiction of probate matters. In all other instances, however, the judge's probate jurisdiction is, in effect, that of an appellate court pursuant to this section. In re Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976).

Judge Deals with Probate and Nonprobate Issues. — The judge of superior court in the exercise of his inherent powers upon appeal from clerk's finding had the right to submit to the jury the one issue that would resolve both the right to qualify as administratrix, a probate matter, and the right to share in the decedent's estate, which is not a probate matter. In re Estate of Adamee, 28 N.C. App. 229, 221 S.E.2d 370, rev'd on other grounds, 291 N.C. 386, 230 S.E.2d 541 (1976).

Stated in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

Cited in In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

§ 7A-252: Repealed by Session Laws 1971, c. 377, s. 32.

§§ 7A-253, 7A-254: Reserved for future codification purposes.

Article 21.

Institution, Docketing, and Transferring Civil Causes in the Trial Divisions.

§ 7A-255. Clerk of superior court processes all actions and proceedings.

All civil actions and proceedings in the General Court of Justice are instituted in, and the original records thereof are maintained in, the office of the clerk of superior court, without regard to the trial divisions in which the cause is pending from time to time. When the commencement of an action or proceeding requires issuance of summons, the clerk of superior court issues the summons, and such summons runs and is valid as general process of the State without regard to the trial division in which the action or proceeding may be pending from time to time. (1965, c. 310, s. 1; 1967, c. 691, s. 22.)

§ 7A-256. Causes docketed and retained in originally designated trial division until transferred.

Upon the institution of any action or proceeding in the General Court of Justice the party instituting it designates upon the face of the originating pleading or other originating paper when filed, which trial division of the General Court of Justice he deems proper for disposition of the cause. The clerk dockets the cause for the trial division so designated and the cause is retained for complete disposition in that division unless thereafter transferred in accordance with the provisions of this Article. If no designation is made the clerk dockets the cause for the superior court division, and the cause is retained for

complete disposition in that division unless thereafter transferred in accordance with the provisions of this Article. (1965, c. 310, s. 1.)

§ 7A-257. Waiver of proper division.

Any party may move for transfer between the trial divisions as provided in this Article. Failure of a party to move for transfer within the time prescribed is a waiver of any objection to the division, except that there shall be no waiver of the jurisdiction of the superior court division in probate of wills and administration of decedents' estates. Where more than one party is aligned in interest, any party may move for transfer of the entire case, notwithstanding waiver by other parties or coparties. A waiver of objection to the division does not prevent the judge from ordering a transfer on his own motion as provided in this Article. (1965, c. 310, s. 1.)

CASE NOTES

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Failure to Make Timely Objection. — An appellant's attack on the authority of the district court to enter an order holding him in contempt for failure to comply with an alimony consent order entered in the superior court must fail where there is no showing in the record that he entered a timely objection to the jurisdiction or venue of the district court. Peoples v. Peoples, 8 N.C. App. 136, 174 S.E.2d 2 (1970).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

§ 7A-258. Motion to transfer.

(a) Any party, including the plaintiff, may move on notice to all parties to transfer the civil action or special proceeding to the proper division when the division in which the case is pending is improper under the rules stated in this Subchapter. A motion to transfer to another division may also be made if all parties to the action or proceeding consent thereto, and if the judge deems the transfer will facilitate the efficient administration of justice.

(b) A motion to transfer is filed in the action or proceeding sought to be transferred, but it is heard and determined by a judge of the superior court division whether the case is pending in that division or not. A regular resident superior court judge of the district in which the action or proceeding is pending, any special superior court judge residing in the district, or any superior court judge presiding over any courts of the district may hear and determine such motion. The motion is heard and determined within the district, except by consent of the parties.

(c) A motion to transfer by any party other than the plaintiff must be filed within 30 days after the moving party is served with a copy of the pleading which justifies transfer. A motion to transfer by the plaintiff, if based upon the pleading of any other party, must be filed within 20 days after the pleading has been filed. A motion to transfer by any party, based upon an amendment to his own pleading must be made not later than 10 days after such amendment is filed. In no event is a motion to transfer made or determined after the case has been called for trial. Failure to move for transfer within the required time is a waiver of any objection to the division in which the case is pending, except in matters of probate of wills or administration of decedents' estates.

(d) A motion to transfer is in writing and contains:

(1) A short and direct statement of the grounds for transfer with specific reference to the provision of this Chapter which determines the proper division; and

(2) A statement by an attorney for the moving party, or if the party is not represented by counsel, a statement by the party that the motion is made in the good faith belief that it may be properly granted and that he intends no amendment which would affect propriety of transfer.

(e) A motion to transfer is made on notice to all parties.

(f) Objection to the jurisdiction of the court over person or property is waived when a motion to transfer is filed unless such objection is raised at the time of filing or before. In no other case does the filing of a motion to transfer waive any rights under other motions or pleadings, nor does it prevent the filing of other motions or pleadings, except as provided in Rule 12 of the Rules of Civil Procedure. The filing of a motion to transfer does not stay further proceedings in the case except that:

(1) Involuntary dismissal is not ordered while a motion to transfer is pending;

(2) Assignment to a magistrate is not ordered while a motion to transfer is pending; and

(3) A change of venue is not ordered while a motion to transfer is pending, except by consent.

When a change of venue is ordered by consent while a motion to transfer is pending, the motion to transfer is determined in the new venue. The filing of a motion to transfer does not enlarge the time for filing responsive pleadings, nor does the filing of any other motion or pleading waive any rights under the motion to transfer.

(g) The motion for transfer provided herein is the sole method for seeking a transfer, and no transfer is effected by the use of mandamus, injunction, prohibition, certiorari, or other extraordinary writs; provided, however, that transfer may be sought in a responsive pleading when permitted by Rules 7(b) and 12(b) of the Rules of Civil Procedure.

(h) Transfer is effected when an order of transfer is filed. When transfer is ordered, the clerk makes appropriate entries on the dockets of each division and transfers the file of the case to the new division. No further proceedings are taken in the division from which the case is transferred. Papers filed after a transfer are properly filed notwithstanding any erroneous reference to the division from which the case is transferred. All orders made prior to transfer including restraining orders, remain effective after transfer, as if no transfer had been made, until modified or set aside in the division to which the case is transferred.

(i) A claim of new or different relief asserted after transfer has been effected does not authorize a second transfer. (1965, c. 310, s. 1; 1967, c. 954, s. 3; 1969, c. 1190, s. 22½; 1971, c. 377, s. 14.)

Editor's Note. — The Rules of Civil Procedure are found in § 1A-1.

CASE NOTES

Party May Move for Transfer of Case as Matter of Right. — Although the case allocations of this Chapter are merely administrative directives, a party may move, as a matter of right, for transfer of a case in accordance with the proper statutory allocation. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Except Where Case Has Reached Trial Stage. — The General Assembly did not intend that cases called for trial or cases already tried and reduced to judgment be transferred under this section as a matter of right. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Because this section clearly applies only to cases in the pleading stage. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

And Failure to Move Prior to Trial Waives Right. — Where an action was improperly brought in the district court, the parties could have moved pursuant to this section to transfer the case to the proper division while the case was pending in the improper division; however the parties waived this right after the case had been called for trial, and the defect is not jurisdictional. Parslow v. Parslow, 47 N.C. App. 84, 266 S.E.2d 746 (1980).

Action Instituted in Superior Court prior to Establishment of District Court. — Where an action was instituted in the superior court prior to the establishment of the district court in the county and where no order was ever entered transferring the action from the superior court to the district court, a district court judge is without jurisdiction to enter an order in the action. Hodge v. Hodge, 9 N.C. App. 601, 176 S.E.2d 795 (1970).

The district court had no authority to modify a child-custody order entered in the superior court where the cause was pending in the superior court when district courts were established in the county, and no order had been entered in the superior court transferring the cause to the district court pursuant to § 7A-259, nor had a motion to transfer been made pursuant to this section. In re Hopper, 9 N.C. App. 730, 177 S.E.2d 326 (1970).

Applied in In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971); Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975).

§ 7A-259. Transfer on judge's own motion.

(a) If no party has moved for transfer within the time allowed to parties, any superior court judge who may hear and determine motions to transfer may order a transfer upon his own motion for the purpose of efficient administration of the trial divisions at any time before the case is calendared for trial. Transfer is not made on the judge's own motion unless the pleadings clearly show that the case is pending in an improper division. No hearing is held on such trasnfers, but the parties are given prompt notice when transfer is effected. Nothing in this section affects the power of the clerk to transfer matters and proceedings pending before him when an issue of fact is raised.

(b) When a district court is established in a district, any superior court judge authorized to hear and determine motions to transfer may, on his own motion, subject to the requirements of subsection (a), transfer to the district court cases pending in the superior court. (1965, c. 310, s. 1; 1967, c. 691, s. 23.)

CASE NOTES

Causes Pending in Superior Court at Time of Establishment of District Court. — All causes pending in the superior court at the time of the establishment of the district court remained pending in the superior court unless and until transferred to the district court by proper order. In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228, cert. denied, 279 N.C. 726, 184 S.E.2d 884 (1971).

See also notes to § 7A-258.

Compliance with Subsection (a) Assumed. — Absent objection and exception to an order of transfer, it is assumed that the provisions of subsection (a) of this section were complied with. Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

This section includes giving prompt notice to the parties when the transfer is effected. Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

When Judge Not Authorized to Order Transfer. — A judge, on his own motion, is not authorized to order a transfer once the case has reached the trial stage and has been calendared. Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

Transfer of Action for Absolute Divorce Which Has Ended in Mistrial. — The superior court has authority under this section to transfer to the district court an action for absolute divorce which has twice ended in mistrial in the superior court and § 7A-244 gives the district court jurisdiction to try the action. Pence v. Pence, 8 N.C. App. 484, 174 S.E.2d 860 (1970).

Applied in H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973); Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974).

Quoted in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

Stated in Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970).

Cited in Boston v. Freeman, 6 N.C. App. 736, 171 S.E.2d 206 (1969); Radford v. Radford, 7 N.C. App. 569, 172 S.E.2d 897 (1970).

§ 7A-260. Review of transfer matters.

Orders transferring or refusing to transfer are not immediately appealable, even for abuse of discretion. Such orders are reviewable only by the appellate division on appeal from a final judgment. If on review, such an order is found erroneous, reversal or remand is not granted unless prejudice is shown. If, on review, a new trial or partial new trial is ordered for other reasons, the appellate division may specify the proper division for new trial and order a transfer thereto. (1965, c. 310, s. 1; 1967, c. 108, s. 7.)

CASE NOTES

Applied in Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); In re Hopper, 11 N.C. App. 611, 182 S.E.2d 228 (1971).

Cited in Stanback v. Stanback, 287 N.C. 448, 215 S.E.2d 30 (1975).

§ 7A-261: Repealed by Session Laws 1971, c. 377, s. 32.

§§ 7A-262 to 7A-269: Reserved for future codification purposes.

Article 22.

Jurisdiction of the Trial Divisions in Criminal Actions.

§ 7A-270. Generally.

General jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice. (1965, c. 310, s. 1.)

CASE NOTES

Jurisdiction of District Court. — Under this section and § 7A-271, the district court has original jurisdiction for the trial of all criminal actions below the grade of felony, that is, of all prosecutions for misdemeanors; and the district court has exclusive original jurisdiction of all misdemeanors except in the four specific instances defined in subdivisions (a)(1), (a)(2), (a)(3) and (a)(4) of § 7A-271. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the courts in this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

§ 7A-271. Jurisdiction of superior court.

(a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:

(1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or

(2) When the charge is initiated by presentment; or

(3) Which may be properly consolidated for trial with a felony under G.S. 15A-926;

(4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or

(5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser included or related charge.

(b) Appeals by the State or the defendant from the district court are to the superior court. The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial de novo is the same as the district court had in the first instance, and when that conviction resulted from a plea arrangement between the defendant and the State pursuant to which misdemeanor charges were dismissed, reduced, or modified, to try those charges in the form and to the extent that they subsisted in the district court immediately prior to entry of the defendant and the State of the plea arrangement.

(c) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsection (a), and which is not pending in the superior court on appeal from a lower court. (1965, c. 310, s. 1; 1967, c. 691, s. 24; 1969, c. 1190, ss. 23, 24; 1971, c. 377, s. 15; 1977, c. 711, s. 6; 1979, 2nd Sess., c. 1328, s. 2.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, added to subsection (b) the language beginning "and when that conviction."

CASE NOTES

I. General Consideration.
II. Jurisdiction over Misdemeanors.
A. In General.
B. Charge Initiated by Presentment.
C. Consolidation with Felony.
D. Guilty Plea to Lesser Included or Related Charge.
E. Particular Misdemeanors.

I. GENERAL CONSIDERATION.

Appeals in Civil Causes Distinguished from Appeals in Criminal Causes. — The constitutional and statutory structure of the General Court of Justice provides that, generally, appeals from the district court in civil causes go to the Court of Appeals, while appeals in criminal causes must first go to the superior court. State v. Killian, 25 N.C. App. 224, 212 S.E.2d 419 (1975).

Jurisdiction of District Court. — See note to § 7A-270.

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the courts in this State in a criminal case is not an independent, distinct, substantive matter of exemption,

immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Presumption of Regular Procedure. — On appeal to the superior court from a conviction in the district court a presumption of regular procedure in the district court can be inferred. State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

The entire record may be considered on appeal to the superior court from a conviction in the district court in searching for evidence that proper procedure was followed. State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

The imposition of a greater sentence after a conviction by a jury in the superior court, upon appeal from a district court, does not violate a defendant's constitutional rights. State v. Martin, 16 N.C. App. 609, 192 S.E.2d 596 (1972).

Applied in State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. Rowland, 13 N.C. App. 253, 185 S.E.3d 296 (1971); State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Weiderman, 19 N.C. App. 753, 200 S.E.2d 202 (1973); State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978); State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Stated in State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971); State v. White, 22 N.C. App. 123, 205 S.E.2d 757 (1974); State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980).

Cited in State v. Cash, 30 N.C. App. 677, 228 S.E.2d 85 (1976); State v. Morrow, 31 N.C. App. 592, 230 S.E.2d 182 (1976); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979).

II. JURISDICTION OVER MISDEMEANORS.

A. In General.

Appeal from Conviction in District Court. — The superior court may try a misdemeanor when the conviction is appealed from the district court to the superior court for trial de novo but has no jurisdiction to try a defendant upon warrants charging misdemeanors where defendant has not first been tried upon the warrants in the district court and appealed to the superior court. State v. Taylor, 8 N.C. App. 544, 174 S.E.2d 872 (1970).

Where a prosecution was instituted under statutes which created misdemeanors, for which the district court has exclusive, original jurisdiction, until defendants were tried and convicted in the district court and appealed to the superior court for a trial de novo that court had no jurisdiction of the case. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

The superior court has no jurisdiction to try an accused for a specific misdemeanor on the warrant of an inferior court unless he is first tried and convicted for such misdemeanor in the inferior court and appeals to the superior court from the sentence pronounced against him by the inferior court on his conviction for such misdemeanor. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Same — Jurisdiction Derivative. — Jurisdiction of the superior court on appeal from a conviction in district court is derivative. State v. Joyner, 33 N.C. App. 361, 235 S.E.2d 107 (1977).

The jurisdiction of the superior court for the trial of a misdemeanor, unless a circumstance enumerated in subsection (a) of this section arises, is derivative and arises only upon appeal from a conviction of the misdemeanor in district court. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Same — The Court of Appeals did not abuse its discretion in denying defendant's motion to amend the record to show derivative jurisdiction of a misdemeanor in the superior court through appeal of a district court conviction and then dismissing defendant's appeal for failure of the record to show jurisdiction. State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

Where Court of Appeals orders that a new trial be held in a misdemeanor prosecution originally tried in a municipal court and then tried de novo in the superior court, the case on retrial maintains its status as a case pending in the superior court on appeal from a lower court, and defendant's motion to quash the indictment on the ground that the district court has jurisdiction of the case is properly denied. State v. Patton, 5 N.C. App. 164, 167 S.E.2d 821 (1969).

Effect of Issuing Second Warrant Charging Same Offense. — Where defendant was tried and convicted in district court, appealed to superior court, and subsequently moved to dismiss the charge pursuant to the Speedy Trial Act, §§ 15A-701 through 15A-704; the court allowed defendant's motion and ordered dismissal of the case without prejudice; on that same day the magistrate issued a

new warrant charging the same offense; and the trial judge, later during the same session, reopened the matter, heard additional evidence and arguments, and dismissed the case without prejudice to the State, the superior court was not divested of jurisdiction by the magistrate's issuing the second warrant, nor did the State, by securing the second warrant, waive whatever rights to appellate review it might have had. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

B. Charge Initiated by Presentment.

"Presentment" Defined. — In this jurisdiction, the accepted definition of the word "presentment" is as follows: "A presentment is an accusation of crime made by a grand jury on its own motion upon its own knowledge or observation, or upon information from others without any bill of indictment, but, since the enactment of former § 15-137 (see now § 15A-641), trials upon presentments have been abolished and a presentment amounts to nothing more than an instruction by the grand jury to the public prosecuting attorney to frame a bill of indictment." State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Language of Presentment and Indictment May Differ. — Where the language of the presentment and that contained in the bills of indictment, while not identical, dealt with the same subject matter and the charges contained in the bills were in fact initiated by the presentment, the superior court had original jurisdiction under this section. State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978).

Initiation Not Shown. — A prosecution for violation of former § 20-105 governing unauthorized use of a conveyance was not "initiated by presentment" within the meaning of subdivision (a)(2). Although the prerequisites to conviction for the felony charged in the warrant and the misdemeanor charged in the indictment were different, the prosecution for the alleged criminal conduct of defendant in respect of the alleged unlawful taking of a car was initiated by warrant issued by the district court. It was not initiated in the superior court by presentment or otherwise. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

C. Consolidation with Felony.

A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of subdivision (a)(3). State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

Jurisdiction after "Nol Pros" in District Court. — And therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of this section, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

D. Guilty Plea to Lesser Included or Related Charge.

Condition for Acceptance of Guilty Plea on Related Charge. — The acceptance of a plea of guilty by the superior court to a related charge in misdemeanor appeals from the district court is conditioned upon the requirement that the related charge be contained in a written information. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

No Jurisdiction to Accept Plea. — The superior court does not have jurisdiction to accept a plea of guilty to a charge of reckless driving when defendant is before the court on appeal from a conviction in the district court for operating a motor vehicle while under the influence of intoxicating liquor. State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974).

E. Particular Misdemeanors.

Violation of § 14-33 or § 14-34. — The superior court has no original jurisdiction of a trial for the misdemeanor violation of either § 14-33(b)(1) or § 14-34, for one of which defendant was charged and for one of which he was convicted. Its jurisdiction of these offenses is derivative and arises only upon appeal from a conviction in district court of the misdemeanor for which he stands charged in superior court or the misdemeanor with respect to which the jury returned a guilty verdict in superior court. State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

OPINIONS OF ATTORNEY GENERAL

Jurisdiction Over Misdemeanor Appeals. — See opinion of Attorney General to the Honorable Hubert E. May, Special Judge, Superior Court, 40 N.C.A.G. 145 (1969).

Violation of § 20-7. — Obviously, subdivisions (a)(1), (a)(2), and (a)(4) of this section do not apply to a criminal prosecution for operation of an automobile without an operator's license in violation of § 20-7(a). With reference to subdivision (a)(3), it is sufficient to say that defendant was not tried for or charged with any felony. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Violation of § 20-28. — A superior court has no original jurisdiction in a case involving a violation of § 20-28(b), a misdemeanor; the jurisdiction of the superior court in such cases is derivative, and where the record does not disclose that defendant was convicted and sentenced in district court for this offense, the superior court is without jurisdiction to try him, and the trial in the superior court for that charge upon the original warrant is a nullity. State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973).

Violation of Former § 20-105. — The warrant on which defendant was arrested and bound over to superior court charged a felony, to wit, the larceny of an automobile valued at more than $200.00, and the indictment charged a misdemeanor, to wit, a violation of former § 20-105, the "temporary larceny" statute. Since defendant, in the superior court, was not tried for or charged with any felony, subdivisions (a)(1), (a)(3), and (a)(4) of this section did not apply to the criminal prosecution for the violation of former § 20-105. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Error for Superior Court to Instruct on Specific Misdemeanor not Tried in District Court. — The trial judge, on trial de novo in the superior court, erred in instructing the jury on reckless driving under § 20-140(a) and should have instructed on § 20-140(c), where the defendant had been charged in the district court with drunken driving under § 20-138 but was convicted of the lesser included offense under § 20-140(c). State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

§ 7A-272. Jurisdiction of district court.

(a) Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

(b) The district court has jurisdiction to conduct preliminary examinations and to bind the accused over for trial upon waiver of preliminary examination or upon a finding of probable cause, making appropriate orders as to bail or commitment. (1965, c. 310, s. 1.)

Legal Periodicals. — For an article on the North Carolina Speedy Trial Act, see 17 Wake Forest L. Rev. 173 (1981).

CASE NOTES

I. General Consideration.
II. Jurisdiction Over Misdemeanors.
III. Preliminary Examinations.

I. GENERAL CONSIDERATION.

State Has Burden to Show Jurisdiction. — The question of jurisdiction of the courts in this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Applied in State v. Harrell, 279 N.C. 464, 183 S.E.2d 638 (1971); State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972); State v. Martin, 16 N.C. App. 609, 192 S.E.2d 596 (1972); State v. Guffey, 283 N.C. 94, 194 S.E.2d 827 (1973); State v. Craig, 21 N.C. App. 51, 203 S.E.2d 401 (1974); State v. Cole, 294 N.C. 304, 240 S.E.2d 355 (1978).

Quoted in State v. Taylor, 8 N.C. App. 544, 174 S.E.2d 872 (1970).

Stated in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); State v. Felmet, 47 N.C. App. 201, 266 S.E.2d 701 (1980); State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980).

Cited in State v. Flynt, 8 N.C. App. 323, 174 S.E.2d 120 (1970); State v. Godwin, 13 N.C. App. 700, 187 S.E.2d 400 (1972); State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322

(1974); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); State v. Felmet, 302 N.C. 173, 273 S.E.2d 708 (1981).

II. JURISDICTION OVER MISDEMEANORS.

The district court has exclusive original jurisdiction of misdemeanors, including actions to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

Where a prosecution was instituted under statutes which created misdemeanors, for which the district court had exclusive, original jurisdiction, until defendants were tried and convicted in the district court and appealed to the superior court for a trial de novo that court had no jurisdiction of the case. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

It is fundamental that the district courts of this state have exclusive original jurisdiction of misdemeanors, and the jurisdiction of the superior court is derivative and arises only upon an appeal from a conviction of the misdemeanor in the district court. State v. McKoy, 44 N.C. App. 516, 261 S.E.2d 226 (1980).

But Court Is without Jurisdiction to Impose Sentence for Felony. — District courts are without jurisdiction to impose sentences in felony cases. State v. Jackson, 14 N.C. App. 75, 187 S.E.2d 470 (1972).

The constitutional right of a defendant charged with a misdemeanor to have a jury trial is not infringed by the fact that he has first to submit to trial without a jury in the district court and then appeal to superior court in order to obtain a jury trial. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

Demand for Jury Trial Not Ground for Removal. — Where, upon defendant's demand for a jury trial on a charge of driving without an operator's license, the district court ordered defendant to appear at the next session of superior court, the district judge apparently being of opinion that the defendant by moving for a jury trial could avoid trial in the district court and have his case transferred forthwith for trial in the superior court, the district court acted under a misapprehension of the law and erred by failing to proceed to trial of defendant for this criminal offense in accordance with the accusation contained in the warrant. State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Where Court of Appeals orders that a new trial be held in a misdemeanor prosecution originally tried in a municipal court and then tried de novo in the superior court, the case on retrial maintains its status as a case pending in the superior court on appeal from a lower court, and defendant's motion to quash the indictment on the ground that the district court has jurisdiction of the case is properly denied. State v. Patton, 5 N.C. App. 164, 167 S.E.2d 821 (1969).

Effect of Issuing Second Warrant Charging Same Offense. — Where defendant was tried and convicted in district court, appealed to superior court, and subsequently moved to dismiss the charge pursuant to the Speedy Trial Act, §§ 15A-701 through 15A-704; the court allowed defendant's motion and ordered dismissal of the case without prejudice; on that same day the magistrate issued a new warrant charging the same offense; and the trial judge, later during the same session, reopened the matter, heard additional evidence and arguments and dismissed the case without prejudice to the State, the superior court was not divested of jurisdiction by the magistrate's issuing the second warrant, nor did the State, by securing the second warrant, waive whatever rights to appellate review it might have had. State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400, cert. denied, 300 N.C. 201, 269 S.E.2d 615 (1980).

District Court Jurisdiction Lost after "Nol Pros". — A "driving under the influence" misdemeanor charge and a manslaughter felony charge were based on the same transaction within the meaning of § 7A-271(a)(3), and therefore the superior court had jurisdiction of both charges and had the right to proceed to the trial on the misdemeanor charge under the joinder exception of § 7A-271, the "original jurisdiction" of the district court having been lost after nolle prosequi was entered as to the misdemeanor in that court. State v. Karbas, 28 N.C. App. 372, 221 S.E.2d 98, cert. denied, 289 N.C. 618, 223 S.E.2d 394 (1976).

Violation of § 20-7(a). — The district court had jurisdiction to try defendant on the warrant charging operation of an automobile without an operator's license in violation of § 20-7(a). State v. Wall, 271 N.C. 675, 157 S.E.2d 363 (1967).

Proceeding Pursuant to Uniform Reciprocal Enforcement of Support Act. — The district court had exclusive original jurisdiction to entertain a proceeding pursuant to the Uniform Reciprocal Enforcement of Support Act. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

And to Determine Paternity Issue. — Since the district court has exclusive original jurisdiction to entertain a proceeding under the Uniform Reciprocal Enforcement of Support Act, it is clear that the district court has jurisdiction to determine the issue of paternity in such a case. Amaker v. Amaker, 28 N.C. App. 558, 221 S.E.2d 917 (1976).

III. PRELIMINARY EXAMINATIONS.

A preliminary hearing is not a trial but is simply an inquiry into whether the accused

should be discharged or whether, on the other hand, there is probable cause to submit the State's evidence to the grand jury and seek a bill of indictment to the end that the accused may be placed upon trial. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Preliminary Hearing Not Required. — A preliminary hearing is not a necessary step in the prosecution of a person accused of crime, and an accused person is not entitled to a preliminary hearing as a matter of substantive right. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

A preliminary hearing is not an essential prerequisite to the finding of a bill of indictment and it is proper to try the accused upon a bill of indictment without a preliminary hearing. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

When performing his duties under subsection (b) of this section the district judge sits only as an examining magistrate in all felony cases because the trial of felonies is beyond the jurisdiction of the district court. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Same — Duties As Examining Magistrate. — In his capacity as examining magistrate, the district judge is concerned only with determining (1) whether a felonious offense has been committed and (2) whether there is probable cause to charge the prisoner therewith. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

The district judge, in his capacity as committing magistrate, passes only on the narrow question of whether probable cause exists and, if so, the fixing of bail if the offense is bailable. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

District Judge Does Not Render a Verdict. — The district judge, when sitting as a committing magistrate as authorized by subsection (b) of this section, does not render a verdict; and a discharge of the accused is not an acquittal and does not bar a later indictment. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

Or Have Authority to Dismiss First-Degree Murder Charge. — A district judge sitting as a committing magistrate in a preliminary hearing has no authority to dismiss a first-degree murder charge. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

OPINIONS OF ATTORNEY GENERAL

Jurisdiction Over Offense of Failure to List Property for Taxation. — See Opinion of Attorney General to Mr. Amsey A. Boyd, Tax Supervisor of Richmond County, 40 N.C.A.G. 776 (1969).

§ 7A-273. Powers of magistrates in criminal actions.

In criminal actions, any magistrate has power:

(1) In misdemeanor cases, other than traffic offenses, in which the maximum punishment which can be adjudged cannot exceed imprisonment for 30 days, or a fine of fifty dollars ($50.00), exclusive of costs, to accept guilty pleas and enter judgment;

(2) In misdemeanor cases involving traffic offenses, to accept written appearances, waivers of trial and pleas of guilty, in accordance with a schedule of offenses and fines promulgated by the chief district judge, and, in such cases, to enter judgment and collect the fine and costs;

(3) To issue arrest warrants valid throughout the State;

(4) To issue search warrants valid throughout the county; and

(5) To grant bail before trial for any noncapital offense;

(6) Notwithstanding the provisions of subdivision (1) of this section, to hear and enter judgment as the chief district judge shall direct in all worthless check cases brought under G.S. 14-107, when the amount of the check is five hundred dollars ($500.00) or less. Provided, however, that under this section magistrates may not impose a prison sentence longer than 30 days;

(7) To conduct an initial appearance as provided in G.S. 15A-511;
(8) To accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-107 and enter such judgments as the chief district judge shall direct, when the amount of the check is five hundred dollars ($500.00) or less, restitution is made, and the warrant does not charge a fourth or subsequent violation of this statute. (1965, c. 310, s. 1; 1969, c. 876, s. 2; c. 1190, s. 25; 1973, c. 6; c. 503, s. 8; c. 1286, s. 7; 1975, c. 626, s. 4; 1977, c. 873, s. 1; 1979, c. 144, s. 3; 1981, c. 555, s. 3.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "five hundred dollars ($500.00)" for "four hundred dollars ($400.00)" in the first sentence of subdivision (6) and near the end of subdivision (8).

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

CASE NOTES

State Has Burden to Show Jurisdiction. — When jurisdiction is challenged, in a criminal case, the State must carry the burden and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused. Former cases holding that a challenge to the jurisdiction is an affirmative defense with the burden of persuasion on the accused are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

The question of jurisdiction of the court in this State in a criminal case is not an independent, distinct, substantive matter of exemption, immunity or defense and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, when contested, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

§ 7A-274. Power of mayors, law-enforcement officers, etc., to issue warrants and set bail restricted.

The power of mayors, law-enforcement officers, and other persons not officers of the General Court of Justice to issue arrest, search, or peace warrants, or to set bail, is terminated in any district court district upon the establishment of a district court therein. (1965, c. 310, s. 1.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 7A-275: Repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-276: Reserved for future codification purposes.

Article 22A.

Prohibited Orders.

§ 7A-276.1. Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned.

No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following: any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or ciminal; and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law. If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order. (1977, c. 711, s. 3.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32 provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Session Laws 1977, c. 711, s. 34, provides: "All statutes which refer to sections repealed or amended by the act shall be deemed, insofar as possible, to refer to those provisions of this act which accomplish the same or an equivalent purpose."

Session Laws 1977, c. 711, s. 36, contains a severability clause.

Legal Periodicals. — For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

Article 23.

Jurisdiction and Procedure Applicable to Children.

§§ 7A-277 to 7A-289: Repealed by Session Laws 1979, c. 815, s. 1, effective January 1, 1980.

Cross References. — For the North Carolina Juvenile Code, see §§ 7A-516 through 7A-732.

Editor's Note. — Section 7A-279 was amended by Session Laws 1979, c. 110, s. 4. Section 7A-286 was amended by Session Laws 1979, c. 110, s. 5; c. 358, s. 26.

ARTICLE 24.

Juvenile Services.

§ 7A-289.1. Purpose.

The purpose of this Article is to provide for a statewide and uniform system of juvenile probation and aftercare which provides adequate and appropriate services to certain children who are found to be within the juvenile jurisdiction of the district court and to authorize an intake process for diversion of selected juvenile offenders from the juvenile justice system. (1973, c. 1339, s. 1.)

§ 7A-289.2. Definitions.

The terms or phrases used in this Article shall be defined according to the definitions contained in G.S. 7A-517 and as follows, unless the context or subject matter otherwise requires:

(1) "Administrator" is the Administrator for Juvenile Services in the Administrative Office of the Courts who is responsible for planning, organizing and administering a statewide system of juvenile probation and aftercare services as authorized by this Article.

(2) "Aftercare" means the legal status of a child who has been committed by the court to the Department of Correction for placement by said agency in one or more of its institutions or programs and who is being granted conditional release to return to the community as authorized by G.S. 7A-655.

(3) "Chief court counselor" is the professional person responsible for administration and supervision of juvenile probation and aftercare in each judicial district under the supervision of the court and the Administrator for Juvenile Services.

(4) "Court counselor" is a professional person responsible for juvenile probation and aftercare services to children on probation or on conditional release from the Office of Youth Development, Department of Social Rehabilitation and Control under the supervision of the chief court counselor.

(5) "Director" is the Director of the Administrative Office of the Courts.

(6) "Division" is the Division of Juvenile Services to administer juvenile probation and aftercare services to juveniles as authorized by this Article.

(7) "Probation" means the legal status of a child who is delinquent or undisciplined and is placed on probation as authorized by G.S. 7A-649(8) under conditions of probation related to the needs of the child as authorized in that statute. (1973, c. 1262, s. 10; c. 1339, s. 1; 1981, c. 469, s. 21.)

Editor's Note. — Pursuant to Session Laws 1973, c. 1262, "Department of Correction" has been substituted for "Office of Youth Development, Department of Social Rehabilitation and Control" in this section as enacted by Session Laws 1973, c. 1339. Chapter 1262 did not expressly refer either to the Office of Youth Development or to the Department of Social Rehabilitation and Control, but their functions have devolved upon the Department of Correction.

Chapter 134 was rewritten by Session Laws 1975, c. 742, s. 1 and recodified as Chapter 134A. However, the provisions of Chapter 134A which were analogous to § 134-17, referred to in this section, were repealed by Session Laws 1979, c. 815, s. 3. For present provisions governing conditional release of juveniles, see §§ 7A-655 and 7A-656.

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "G.S. 7A-517" for "G.S. 7A-278" in the introductory paragraph, substituted "G.S. 7A-655" for "G.S. 134-17" at the end of subdivision (2), substituted "G.S. 7A-649(8)" for "G.S. 7A-286(4)" near the middle of subdivision (7), and substi-

tuted "in that statute" for "by G.S. 110-22" at the end of subdivision (7).

§ 7A-289.3. Division of Juvenile Services.

A Division of Juvenile Services is hereby created within the Administrative Office of the Courts to be responsible for administration of a statewide and uniform system of juvenile probation and aftercare services in all judicial districts of the State. The administrative head of the Division shall be the Administrator for Juvenile Services who shall be appointed by the Director. The Administrator shall be responsible for planning, organizing and administering juvenile probation and aftercare services on a statewide basis to the end that juvenile services will be uniform throughout the State and of sufficient quality to meet the needs of the children under supervision. (1973, c. 1339, s. 1.)

§ 7A-289.4. Duties and powers of Administrator.

The Administrator shall have the following powers and duties under the supervision of the Director:

(1) To plan for a statewide program of juvenile probation and aftercare services;

(2) To appoint such personnel within the Administrative Office of the Courts as may be necessary to administer a statewide and uniform system of juvenile probation and aftercare;

(3) To appoint the chief court counselor in each judicial district with the approval of the chief district judge and the Director;

(4) To study the various issues related to qualifications, salary ranges, appointment of personnel on a merit basis (including chief court counselors, court counselors, secretaries and other appropriate personnel) at the State and district levels in order to recommend appropriate policies and procedures governing personnel to the Director who may adopt such personnel policies as he finds to be in the best interest of the juvenile services program;

(5) To develop a statewide plan for staff development and training so that chief court counselors, court counselors and other personnel responsible for juvenile services may be appropriately trained and qualified; such plan may include attendance at appropriate professional meetings and opportunities for educational leave for academic study;

(6) To develop, promulgate and enforce such policies, procedures, rules and regulations as he may find necessary and appropriate to implement a statewide and uniform program of juvenile probation and aftercare services. (1973, c. 1339, s. 1.)

§ 7A-289.5. Duties and powers of chief court counselors.

The chief court counselor in each judicial district who is appointed as provided by this Article shall have the following powers and duties:

(1) To appoint such court counselors, secretaries and other personnel as may be authorized by the Administrative Office of the Courts with the approval of the Administrator in accordance with the personnel policies adopted by the Director.

(2) To supervise and direct the program of juvenile probation and aftercare services within the district under the supervision of the court and the Administrator according to the statewide practices and procedures promulgated by the Administrator.

(3) To provide in-service training for staff as required by the Administrator.
(4) To keep such records and make such reports as may be requested by the Administrator in order to provide statewide data and information about juvenile needs and services. (1973, c. 1339, s. 1.)

§ 7A-289.6. Duties and powers of court counselors.

The court counselors in each district shall have the duties and powers of juvenile probation officers as provided by G.S. 110-23 and as follows:
(1) To conduct a prehearing social study of any child alleged to be delinquent or undisciplined if so instructed by the court, provided that no social study shall be made prior to an adjudication that the child is within the juvenile jurisdiction of the court unless the child and his parent or attorney or guardian or custodian files a written statement with the court counselor declaring the child's intention to admit the allegations contained in the juvenile petition and giving consent to such prehearing social study; when such a prehearing social study has been completed, the court counselor shall prepare a written report for the court summarizing the findings which may be reviewed by the court prior to the juvenile hearing and which shall contain recommendations as to the type of care and/or treatment needed by the child and which shall be in the form developed by the Administrator for such reports.
(2) To assist the court in handling cases where a child alleged or adjudicated delinquent or undisciplined needs detention care prior to the juvenile hearing, or after a hearing to determine the need for detention, or pending admission of the child to an institution or other residential program.
(3) To bring any child on probation to the attention of the court for review and termination when the child's period of probation is ended as provided by G.S. 7A-658; the counselor may also recommend termination of probation prior to the end of the child's period of probation when such a recommendation is merited by the progress and adjustment of the child.
(4) To assist the court as requested in matters related to children within the juvenile jurisdiction of the court as undisciplined, dependent or neglected or within the Interstate Compact on Juveniles. This provision shall not be construed, however, to deprive the Department of Social Services of the functions assigned to it by law in the area of dependent or neglected children. (1973, c. 1339, s. 1; 1981, c. 469, s. 22.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, deleted "as authorized by G.S. 7A-286(3)" from the end of subdivision (2), and substituted "G.S. 7A-658" for "G.S. 110-22" near the middle of subdivision (3).

§ 7A-289.7: Repealed by Session Laws 1979, c. 815, s. 1, effective January 1, 1980.

Cross References. — For present provisions relating to intake services in juvenile cases, see § 7A-530. As to the North Carolina Juvenile Code, see §§ 7A-516 through 7A-732.

§§ 7A-289.8 to 7A-289.12: Reserved for future codification purposes.

ARTICLE 24A.

Delinquency Prevention and Youth Services.

§ 7A-289.13. Legislative intent.

The General Assembly hereby declares its intent to reduce the number of children committed by the courts for delinquency to institutions operated by the Division of Youth Development, Department of Human Resources or other State agencies. The primary intent of this Article is to provide a comprehensive plan for the development of community-based alternatives to training school commitment so that "status offenders" (defined by this Article to include "those juveniles guilty of offenses which would not be violations of the law if committed by an adult") may be eliminated from the youth development institutions of this State. Additionally it is the intent of this legislation to provide noninstitutional disposition options in any case before the juvenile court where such disposition is deemed to be in the best interest of the child and the community.

The policy and intent of the General Assembly in delinquency prevention and community-based services can be summarized as follows:

(1) Such programs should be planned and organized at the community level within the State, and such planning efforts should include appropriate representation from local government, local agencies serving families and children (both public and private), local business leaders, citizens with an interest in youth problems, youth representatives, and others as may be appropriate in a particular community. The role of the State should be to provide technical assistance, access to funding, program information, and to assist local leadership in appropriate planning.

(2) When a child is adjudicated to be within the juvenile jurisdiction of the district court such child should be carefully evaluated through the available community-level resources (including mental health, social services, public health and other available medical services, public schools, and others as appropriate) prior to the juvenile hearing dealing with disposition so that the disposition of the court may be made with an understanding of the needs of the child and after consideration of the resources available to meet these needs.

(3) It is contrary to the policy of the State for a court to separate a child from his own family or commit a child to an institution or training school without a careful evaluation of the needs of the child.

(4) The General Assembly finds that State and local government should be responsive to the need for community-based services which would provide a viable alternative to commitment to an institution or training school. The General Assembly intends that State government should be responsive to this need through the Department of Human Resources by helping public and private local groups to plan, develop and fund community-based programs, both residential and nonresidential. It is recognized that such efforts will require the cooperation of several major State departments in addition to Human Resources, such as Public Instruction, Administrative Office of the Courts, and the Governor's Crime Commission.

(5) It is the intent of the General Assembly that the Secretary of the Department of Human Resources develop a funding mechanism that will provide State support for programs that meet the standards as

developed under the provisions of this Article. (1975, c. 929; 1977, c. 627, ss. 18, 19.)

Cross References. — As to the Youth Services Advisory Committee, see §§ 143B-207, 143B-208. As to the codification of this Article, see Editor's Note under § 143B-207 in the 1978 Replacement Volume.

§ 7A-289.14. Duties of Secretary of Human Resources.

It shall be the duty of the Secretary of Human Resources to arrange for the appropriate unit or units of the Department of Human Resources to implement this Article as follows:

(1) To designate the appropriate unit of the Department of Human Resources to be responsible for coordination of state-level services in relation to delinquency prevention and youth services so that any citizen may go to one place in State government to receive services or access to services.

(2) Repealed by Session Laws 1977, c. 627, s. 20.

(3) To arrange appropriate coordination and planning within the child-serving agencies of the Department of Human Resources and promote interdepartmental coordination.

(4) To assist local governments and private service agencies in the development of community-based programs, and to provide information on the availability of potential funding sources and whatever assistance may be requested in making application for needed funding.

(5) To approve yearly program evaluations and to make recommendations to the General Assembly concerning continuation funding that might be supported by that evaluation.

(6) To approve program evaluation standards by which all programs developed under the provisions of this Article may be objectively evaluated.

Such standards as may be developed for the purpose of program evaluation shall be in addition to any current standards as may be applicable under the existing authority of the Social Services Commission and the Department of Human Resources.

Minimum operating standards as well as program evaluation standards as may be needed for new program models designed to fulfill the intent of this Article, may be developed at the discretion of the Secretary either by the Social Services Commission or the Secretary.

(7) To develop a formula for funding on a matching basis community-based services as provided for in this Article. This formula shall be based upon the county's or counties' relative ability to fund community-based programs for juveniles.

Local governments receiving State matching funds for programs under the provisions of this Article must maintain the same overall level of effort that existed at the time of the filing of the county assessment of youth needs with the Department of Human Resources as provided in G.S. 7A-289.16 of this Article. (1975, c. 929; 1977, c. 627, ss. 20-23; 1981, c. 50, s. 5.)

Effect of Amendments. — The 1981 amendment deleted "by regular interaction with the Youth Services Advisory Committee" from the end of subdivision (3).

§ 7A-289.15. Purchase of care or services from programs meeting State standards.

The Department of Human Resources and any other appropriate State or local agency are hereby authorized to purchase care or services from public or private agencies providing delinquency prevention programs or community-based services, provided the program meets the State standards as authorized by G.S. 7A-289.14. As institutional populations are reduced, the Department of Human Resources may divert State funds appropriated for institutional programs to purchase such services, pursuant to the provisions of the Executive Budget Act.

The Secretary of Human Resources shall prepare an annual report on the progress of the community-based programs of this State which shall include the most current institutional populations of children being served by the various departments of State government which shall include comparative costs of all child-serving agencies. Such report shall be submitted to the Governor, the General Assembly and the various State departments providing services to children. (1975, c. 929; 1977, c. 627, s. 24.)

§ 7A-289.16. County assessment of youth needs.

The board of county commissioners of each participating county shall conduct or arrange for a study of youth needs in the county, giving particular attention to the need for delinquency prevention programs and community-based services (residential or nonresidential) which would provide an alternative to commitment to training school. The board of county commissioners may delegate the responsibility to any appropriate board or department of county government, or it may contract with an appropriate private agency or group for the study. Adjoining counties may cooperate in conducting such study on a regional basis, utilizing appropriate public or private resources.

The board of county commissioners of any county may request technical assistance from the Secretary of Human Resources in conducting such study. Each participating county shall develop a study plan for submission to the Secretary of Human Resources by January 1, 1976. Each participating county shall file a report of preliminary findings from such study to the Secretary of Human Resources by January 1, 1977, and its full report by January 1, 1978. Each participating county shall plan for a continuing assessment of youth needs in the county or region with annual reports to the Secretary of Human Resources. (1975, c. 929.)

§§ 7A-289.17 to 7A-289.21: Reserved for future codification purposes.

ARTICLE 24B.

Termination of Parental Rights.

§ 7A-289.22. Legislative intent; construction of Article.

The General Assembly hereby declares as a matter of legislative policy with respect to termination of parental rights:

(1) The general purpose of this Article is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.

(2) It is the further purpose of this Article to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.
(3) Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict.
(4) This Article shall not be used to circumvent the provisions of Chapter 50A, the Uniform Child Custody Jurisdiction Act. (1977, c. 879, s. 8; 1979, c. 110, s. 6.)

Legal Periodicals. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

Right to Counsel. — It cannot be said that the Constitution requires the appointment of counsel in every parental termination proceeding; therefore the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings is to be answered in the first instance by the trial court, subject, of course, to appellate review. Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

§ 7A-289.23. Jurisdiction.

The district court shall have exclusive original jurisdiction to hear and determine any petition relating to termination of parental rights to any child who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition. The court shall have jurisdiction to terminate the parental rights of any parent irrespective of the age of the parent. The parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. The fees of appointed counsel shall be borne by the Administrative Office of the Courts. In addition to the right to appointed counsel set forth above, a guardian ad litem shall be appointed in accordance with the provisions of G.S. 1A-1, Rule 17, to represent a parent in the following cases:

(1) Where it is alleged that a parent's rights should be terminated pursuant to G.S. 7A-289.32(7); or
(2) Where the parent is under the age of 18 years.

The fees of the guardian ad litem shall be borne by the Administrative Office of the Courts when the court finds that the respondent is indigent. In other cases the fees of the court appointed guardian ad litem shall be a proper charge against the respondent, if the respondent does not secure private legal counsel. Provided that, before exercising jurisdiction under this Article the court shall find that it would have jurisdiction to make a child custody determination under the provisions of G.S. 50A-3. (1977, c. 879, s. 8; 1979, c. 110, s. 7; 1979, 2nd Sess., c. 1206, s. 1; 1981, c. 966, s. 1.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, ratified June 24, 1980, and effective 60 days after ratification, substituted the present third sentence for one which read "A guardian ad litem shall be appointed to represent such minor parent, under the age of 14 years," and added the fourth and fifth sentences.

Session Laws 1979, 2nd Sess., c. 1206, s. 6, provides that the act shall not apply to any action brought prior to its effective date.

The 1981 amendment substituted the third, fourth and fifth sentences for the former third sentence, which related to the appointment of an attorney as guardian ad litem for parents.

Session Laws 1981, c. 966, s. 5, provides: "This act shall become effective 30 days after ratification and shall only apply to cases brought on or after the effective date. The act was ratified July 10, 1981."

§ 7A-289.24. Who may petition.

A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

(1) Either parent seeking termination of the right of the other parent; or

(2) Any person who has been judicially appointed as the guardian of the person of the child; or

(3) Any county department of social services or licensed child-placing agency to whom custody of the child has been given by a court of competent jurisdiction; or

(4) Any county department of social services or licensed child-placing agency to which the child has been surrendered for adoption by one of the parents or by the guardian of the person of such child, pursuant to G.S. 48-9(a)(1); or

(5) Any person with whom the child has resided for a continuous period of two years or more next preceding the filing of the petition. (1977, c. 879, s. 8.)

CASE NOTES

Stated in Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

OPINIONS OF ATTORNEY GENERAL

Foster Parents Have Standing. — Irrespective of their status *vis a vis* the county department of social services, foster parents have standing pursuant to subdivision (5) of this section to petition for termination of parental rights. See opinion of Attorney General to James W. Swindell, Assistant County Attorney, Durham County, 50 N.C.A.G. 1 (1980).

§ 7A-289.25. Petition.

The petition shall be verified by the petitioner and shall be entitled "In re (Last name of child), a minor child"; and shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner shall so state:

(1) The name of the child as it appears on the child's birth certificate, the date and place of birth, and the county where the child is presently residing.

(2) The name and address of the petitioner and facts sufficient to identify the petitioner as one entitled to petition under G.S. 7A-289.24.

(3) The name and address of the parents of the child. If the name or address of one or both parents is unknown to the petitioner, the petitioner shall set forth with particularity the petitioner's efforts to ascertain the identity or whereabouts of the parent or parents. Such information may be contained in an affidavit attached to the petition and incorporated therein by reference.

(4) The name and address of any person appointed as guardian of the person of the child pursuant to the provisions of Article 1 of Chapter 33 of the General Statutes, or of G.S. 7A-585.

(5) The name and address of any person or agency to whom custody of the child has been given by a court of this or any other state; and a copy of such custody order shall be attached to the petition.

(6) Facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.

(7) That the petition has not been filed to circumvent the provisions of Chapter 50A, the Uniform Child Custody Jurisdiction Act. (1977, c. 879, s. 8; 1979, c. 110, s. 8; 1981, c. 469, s. 23.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "G.S. 7A-585" for "G.S. 71-286(7)" at the end of subdivision (4).

CASE NOTES

Stated in Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

§ 7A-289.26. Preliminary hearing; unknown parent.

(a) If either the name or identity of any parent whose parental rights the petitioner seeks to terminate is not known to the petitioner, the court shall within 10 days from the date of filing of the petition, or during the next term of court in the county where the petition is filed if there is no court in said county in that 10-day period, conduct a preliminary hearing to ascertain the name or identity of such parent.

(b) The court may, in its discretion, inquire of any known parent of the child concerning the identity of the unknown parent and may appoint a guardian ad litem for the unknown parent to conduct a diligent search for the parent. Should the court ascertain the name or identity of the parent, it shall enter a finding to that effect; and such parent shall be summoned to appear in accordance with G.S. 7A-289.27.

(c) Notice of the preliminary hearing need be given only to the petitioner who shall appear at the hearing; but the court may cause summons to be issued to any person directing him to appear and testify.

(d) If the court is unable to ascertain the name or identity of the unknown parent, the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the child to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and 1-598 and published in the counties directed by the court, once a week for three successive weeks. Provided, further, the notice shall:

(1) Designate the court in which the petition is pending;

(2) Be directed to "the father (mother) (father and mother) of a male (female) child born on or about . . . . . in . . . . . County, (date) . . . . . , ... , respondent"; (city) (State)

(3) Designate the docket number and title of the case (the court may direct the actual name of the title be eliminated and the words "In Re Doe" substituted therefor);

(4) State that a petition seeking to terminate the parental rights of the respondent has been filed;

(5) Direct the respondent to answer the petition within 30 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of first publication of notice, and be substantially in the form as set forth in G.S. 1A-1, Rule 4(j)(9)(c); and

(6) State that the respondent's parental rights to the child will be terminated upon failure to answer the petition within the time prescribed.

Upon completion of the service, an affidavit of the publisher shall be filed with the court.

(e) The court shall issue the order required by G.S. 7A-289.26(b) and (d) within 30 days from the date of the preliminary hearing unless the court shall determine that additional time for investigation is required.

(f) Upon the failure of the parent served by publication pursuant to G.S. 7A-289.26(d) to answer the petition within the time prescribed, the court shall issue an order terminating all parental rights of the unknown parent. (1977, c. 879, s. 8.)

§ 7A-289.27. Issuance of summons.

Except as provided in G.S. 7A-289.26, upon the filing of the petition, the court shall cause a summons to be issued, directed to the following persons or agency, not otherwise a party petitioner, who shall be named as respondents:

(1) The parents of the child;

(2) Any person who has been judicially appointed as guardian of the person of the child;

(3) The custodian of the child appointed by a court of competent jurisdiction;

(4) Any county department of social services or licensed child-placing agency to whom a child has been released by one parent pursuant to G.S. 48-9(a)(1); and

(5) The child, if he or she is 12 years of age or older at the time the petition is filed.

Provided, no summons need be directed to or served upon any parent who has previously surrendered the child to a county department of social services or licensed child-placing agency, nor to any parent who has consented to the adoption of the child by the petitioner. The summons shall notify the respondents to file written answer within 30 days after service of the summons and petition and that if the respondents fail to answer, the petitioner will apply to the court for the relief prayed for in the petition. The summons shall also notify the parents of the child that the parents are entitled to appointed counsel if they are indigent, provided they request counsel at or before the time of the hearing and that a parent is entitled to attend any hearing affecting his parental rights. Service of the summons shall be completed as provided under the procedures established by G.S. 1A-1, Rule 4(j); but the parent of the child shall not be deemed to be under disability even though such parent is a minor. (1977, c. 879, s. 8; 1981, c. 966, s. 2.)

Effect of Amendments. — The 1981 amendment added the third sentence of the second paragraph.

Session Laws 1981, c. 966, s. 5, provides: "This act shall become effective 30 days after ratification and shall only apply to cases brought on or after the effective date. The act was ratified July 10, 1981."

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Stated in Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

§ 7A-289.28. Failure of respondents to answer.

Upon the failure of the respondents to file written answer to the petition with the court within 30 days after service of the summons and petition, or within the time period established for a defendant's reply by G.S. 1A-1, Rule 4(j)(9)c if service is by publication, the court shall issue an order terminating all parental and custodial rights of the respondent or respondents with respect to the child; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition. (1977, c. 879, s. 8; 1979, c. 525, s. 3.)

CASE NOTES

Quoted in Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

§ 7A-289.29. Answer of respondents.

(a) Any respondent may file a written answer to the petition. The answer shall admit or deny the allegations of the petition and shall set forth the name and address of the answering respondent or his or her attorney.

(b) If an answer denies any material allegation of the petition, the court shall appoint a licensed attorney as guardian ad litem for the child to represent the best interests of the child. The court shall conduct a special hearing after notice of not less than 10 days nor more than 30 days to the petitioner, the answering respondent(s), and the guardian ad litem for the child, to determine the issues raised by the petition and answer(s). Notice of the hearing shall be deemed to have been given upon the depositing thereof in the United States mail, first-class postage prepaid, and addressed to the petitioner, respondent, and guardian ad litem or their counsel of record, at the addresses appearing in the petition and responsive pleading. (1977, c. 879, s. 8.)

CASE NOTES

Stated in Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

§ 7A-289.30. Adjudicatory hearing on termination.

(a) The hearing on the termination of parental rights shall be conducted by the district court sitting without a jury. Reporting of the hearing shall be as provided by G.S. 7A-198 for reporting civil trials.

(a1) The court shall inquire whether the child's parents are present at the hearing and, if so, whether they are represented by counsel. If the parents are not represented by counsel, the court shall inquire whether the parents desire counsel but are indigent. In the event that the parents desire counsel but are

indigent as defined in G.S. 7A-450(a) and are unable to obtain counsel to represent them, the court shall appoint counsel to represent them. The court shall grant the parents such an extension of time as is reasonable to permit their appointed counsel to prepare their defense to the termination petition. In the event that the parents do not desire counsel and are present at the hearing, the court shall examine each parent and make findings of fact sufficient to show that the waivers were knowing and voluntary. This examination shall be reported as provided in G.S. 7A-198.

(b) The court may, upon finding that reasonable cause exists, order the child to be examined by a psychiatrist, a licensed clinical psychologist, a physician, a public or private agency, or any other expert in order that the child's psychological or physical condition or needs may be ascertained or, in the case of a parent whose ability to care for the child is at issue, the court may order a similar examination of any parent of the child.

(c) The court may for good cause shown continue the hearing for such time as is required for receiving additional evidence, any reports or assessments which the court has requested, or any other information needed in the best interest of the child.

(d) The court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent.

(e) All findings of fact shall be based on clear, cogent, and convincing evidence. No husband-wife or physician-patient privilege shall be grounds for excluding any evidence regarding the existence or nonexistence of any circumstance authorizing the termination of parental rights. (1977, c. 879, s. 8; 1979, c. 669, s. 1; 1981, c. 966, s. 3.)

Effect of Amendments. — The 1981 amendment added subsection (a1).

Session Laws 1981, c. 966, s. 5, provides: "This act shall become effective 30 days after ratification and shall only apply to cases brought on or after the effective date."

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Quoted in Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

§ 7A-289.31. Disposition.

(a) Should the court determine that any one or more of the conditions authorizing a termination of the parental rights of a parent exist, the court shall issue an order terminating the parental rights of such parent with respect to the child unless the court shall further determine that the best interests of the child require that the parental rights of such parent not be terminated.

(b) Should the court conclude that irrespective of the existence of one or more circumstances authorizing termination of parental rights, the best interests of the child require that such rights should not be terminated, the court shall dismiss the petition, but only after setting forth the facts and conclusions upon which such dismissal is based.

(c) Should the court determine that circumstances authorizing termination of parental rights do not exist, the court shall dismiss the petition, making appropriate findings of fact and conclusions.

(d) The court may tax the cost of the proceeding to any party. (1977, c. 879, s. 8.)

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

§ 7A-289.32. Grounds for terminating parental rights.

The court may terminate the parental rights upon a finding of one or more of the following:

(1) Repealed by Session Laws 1979, c. 669, s. 2.

(2) The parent has abused or neglected the child. The child shall be deemed to be abused or neglected if the court finds the child to be an abused child within the meaning of G.S. 110-117(1)(a), (b), or (c), or a neglected child within the meaning of G.S. 7A-278(4).

(3) The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

(4) The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

(5) One parent has been awarded custody of the child by judicial decree, or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition willfully failed without justification to pay for the care, support, and education of the child, as required by said decree or custody agreement.

(6) The father of a child born out of wedlock has not prior to the filing of a petition to terminate his parental rights:

a. Establish(ed) paternity judicially or by affidavit which has been filed in a central registry maintained by the Department of Human Resources; provided, the court shall inquire of the Department of Human Resources as to whether such an affidavit has been so filed and shall incorporate into the case record the Department's certified reply; or

b. Legitimated the child pursuant to provisions of G.S. 49-10, or filed a petition for this specific purpose; or

c. Legitimated the child by marriage to the mother of the child; or

d. Provided substantial financial support or consistent care with respect to the child and mother.

(7) That the parent is incapable as a result of mental retardation, mental illness, organic brain syndrome, or any other degenerative mental condition of providing for the proper care and supervision of the child, such that the child is a dependent child within the meaning of G.S. 7A-517(13), and that there is a reasonable probability that such incapability will continue throughout the minority of the child. (1977, c. 879, s. 8; 1979, c. 669, s. 2; 1979, 2nd Sess., c. 1088, s. 2; c. 1206, s. 2.)

Editor's Note. — Sections 110-117 and 7A-278, referred to in this section, were repealed by Session Laws 1979, c. 815. See now § 7A-516.

Effect of Amendments. — The first 1979, 2nd Sess., amendment, ratified June 16, 1980 and effective 90 days after ratification, added in subdivision (6)a the language beginning "which has been filed" and ending "certified reply."

The second 1979, 2nd Sess., amendment, ratified June 24, 1980, and effective 60 days after ratification, added subdivision (7).

Session Laws 1979, 2nd Sess., c. 1206, s. 6, provides that the act shall not apply to any action brought prior to its effective date.

Legal Periodicals. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Editor's Note. — Many of the cases cited in the following annotation were decided under former § 7A-288.

Section Is Not Unconstitutional. — Statutes permitting the termination of parental rights if a child is neglected as defined by subdivision (2) of this section, or if the parents fail to pay a reasonable portion of a child's foster care costs for six months preceding the filing of the petition for termination of parental rights as defined by subdivision (4) of this section, are not unconstitutionally vague but are sufficiently definite to be applied in a uniform manner to protect both the State's substantial interest in the welfare of minor children and the parents' fundamental right to the integrity of their family unit. In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

This section, which permits the termination of parental rights for failure of the parent to pay a reasonable portion of a child's foster care costs for six months preceding the filing of the petition, does not violate the equal protection clause by discriminating among persons similarly situated since it applies to all parents equally and allows due consideration of their specific individual financial circumstances. In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

Proper Exercise of Police Power. — It certainly is not an unreasonable or arbitrary exercise of the police power for the State to intervene between parent and child where that child is helpless and defenseless and is endangered by parental neglect, inattention, or abuse. In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

The court is not required to terminate parental rights under any circumstances. Forsyth County Dep't of Social Servs. v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974); In re Godwin, 31 N.C. App. 137, 228 S.E.2d 521 (1976).

But Has Discretionary Authority to Do So. — The court has the authority to terminate parental rights in the exercise of its discretion. Forsyth County Dep't of Social Servs. v. Roberts, 22 N.C. App. 658, 207 S.E.2d 368 (1974); In re Godwin, 31 N.C. App. 137, 228 S.E.2d 521 (1976).

Rights Properly Terminated. — The trial court properly terminated respondent mother's parental rights in her two children where the evidence supported findings by the court that the children were neglected children within the meaning of former § 7A-278(4) and that respondent failed to pay any portion of their foster care costs for more than six months preceding the filing of the petition as called for under subdivision (4) of this section. In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

Cited in In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

§ 7A-289.33. Effects of termination order.

An order terminating the parental rights completely and permanently terminates all rights and obligations of the parent to the child and of the child to the parent, arising from the parental relationship, except that the child's right of inheritance from his or her parent shall not terminate until such time as a final order of adoption is issued. Such parent is not thereafter entitled to notice of proceedings to adopt the child and may not object thereto or otherwise participate therein.

(1) If the child had been placed in the custody of or released for adoption by one parent to, a county department of social services or licensed child-placing agency and is in the custody of such agency at the time of such filing of the petition, that agency shall, upon entry of the order terminating parental rights, acquire all of the rights for placement of

said child as such agency would have acquired had the parent whose rights are terminated released the child to that agency pursuant to the provisions of G.S. 48-9(a)(1), including the right to consent to the adoption of such child.

(2) Except as provided in subdivision (1) above, upon entering an order terminating the parental rights of one or both parents, the court may place the child in the custody of the petitioner, or some other suitable person, or in the custody of the Department of Social Services or licensed child-placing agency, as may appear to be in the best interest of the child. (1977, c. 879, s. 8.)

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Rights of Foster Parents. — Foster parents had no standing to bring an action for permanent custody of a child temporarily placed with them by the county department of social services where the rights of the child's natural parents had been surrendered to the department of social services, and the department had legal custody of the child and the right to place the child for adoption. Oxendine v. Catawba County Dep't of Social Servs., 49 N.C. App. 570, 272 S.E.2d 417 (1980), cert. granted, — N.C. —, 274 S.E.2d 230 (1981).

§ 7A-289.34. Appeals; modification of order after affirmation.

Any child, parent, guardian, custodian or agency who is a party to a proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after the hearing. Pending disposition of an appeal, the court may enter such temporary order affecting the custody or placement of the child as the court finds to be in the best interest of the child or the best interest of the State. Upon the affirmation of the order of adjudication or disposition of the district court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of such an appeal, the district court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interest of the child to reflect any adjustment made by the child or change in circumstances during the period of time the case on appeal was pending, provided that if such modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if any there be, within 10 days thereafter, as to why said modifying order should be vacated or altered. (1977, c. 879, s. 8.)

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Stated in Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

ARTICLE 25.

Jurisdiction and Procedure in Criminal Appeals from Districts Courts.

§ 7A-290. Appeals from district court in criminal cases; notice; appeal bond.

Any defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge. Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo. Notice of appeal may be given orally in open court, or to the clerk in writing within 10 days of entry of judgment. Upon expiration of the 10-day period in which an appeal may be entered, if an appeal has been entered and not withdrawn, the clerk shall transfer the case to the district or superior court docket. The original bail shall stand pending appeal, unless the judge orders bail denied, increased, or reduced. (1965, c. 310, s. 1; 1967, c. 601, s. 1; 1969, c. 876, s. 3; c. 911, s. 5; c. 1190, s. 26; 1971, c. 377, s. 16.)

Editor's Note. — This section was formerly numbered § 7A-288. It was renumbered § 7A-290 by Session Laws 1969, c. 911, s. 5.

CASE NOTES

I. General Consideration.
II. Appeal to Superior Court.

I. GENERAL CONSIDERATION.

This section and § 49-7, when properly construed together, are not inconsistent. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Hence, the proviso in § 49-7 was not repealed either expressly or by implication by enactment of this section. State v. Coffey, 3 N.C. App. 133, 164 S.E.2d 39 (1968).

Purpose of State's de novo procedure is to provide all criminal defendants charged with misdemeanor violations the right to a "speedy trial" in the district court and to offer them an opportunity to learn about the State's case without revealing their own. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Validity of Trial without Jury in Inferior Court. — The fact that a right of appeal was given where the defendant was convicted in the lower court without the intervention of a jury has generally been regarded as a sufficient reason, in support of the validity of such trials without a jury in the inferior tribunal, as by appealing the defendant secures his right to a jury trial in the superior court, and therefore cannot justly complain that he has been deprived of his constitutional right. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

Applied in State v. Golden, 40 N.C. App. 37, 251 S.E.2d 875 (1979).

Stated in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968).

Cited in State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); Perry v. Blackledge, 453 F.2d 856 (4th Cir. 1971).

II. APPEAL TO SUPERIOR COURT.

Trial de novo in the superior court is a new trial from beginning to end, on both law and facts, disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970);

State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

And Lower Court Judgment is Annulled. — When an appeal of right is taken to the superior court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

And May Be Ignored Even Where Defendant Was Denied Constitutional Rights. — The superior court division, as the trial court upon appeal and trial de novo, is generally justified in disregarding completely the plea, trial, verdict and judgment below, even in those situations in which the inferior court has not granted the defendant his constitutional rights. State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649, cert. denied, 297 N.C. 699, 259 S.E.2d 297 (1979).

Defendants are entitled to a trial de novo in the superior court even though their trials in the inferior court were free from error. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

Even After Guilty Plea. — An appeal from a conviction in an inferior court entitles the defendant to a trial de novo in the superior court as a matter of right; and this is true even when an accused pleads guilty in the inferior court. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

An accused in a criminal case is entitled to a trial de novo as a matter of right on appeal to the superior court from an inferior court, even when the accused entered a guilty plea in the inferior court. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

But State Not Bound by Plea Bargain after Defendant Appeals. — Where a defendant originally charged with felonies entered guilty pleas to misdemeanors in the district court pursuant to a plea bargain with the State, but then appealed to the superior court for a trial de novo, the State was not bound by the agreement and could try the defendant upon the felony charges or any lesser included offenses. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Waiver of Right of Appeal. — By acquiescing in the terms of the judgment of the district court by paying a fine and costs, defendant waived his statutory right of appeal to the superior court. State v. Vestal, 34 N.C. App. 610, 239 S.E.2d 275 (1977).

Transcript of District Court Proceedings Not Required. — State's de novo procedure has no requirement that a defendant purchase and provide the superior court with a transcript of the district court proceedings in order to secure full appellate review. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

There is no merit in the argument that a transcript of the district court proceedings is needed for an effective appeal for trial de novo in superior court. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Nor Is Indigent Entitled to Free Transcript. — There are no constitutional infirmities in the denial of a free transcript of the district court proceedings to an indigent defendant. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Sentence in Superior Court May Be Lighter or Heavier than That Imposed by District Court. — Inasmuch as the trial in the superior court is without regard to the proceedings in the district court, the judge of the superior court is necessarily required to enter his own independent judgment. His sentence may be lighter or heavier than that imposed by the inferior court, provided, of course, it does not exceed the maximum punishment which the inferior court could have imposed. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

In the sound discretion of the superior court judge, the defendant's sentence may be lighter or heavier than that imposed in the district court provided that it does not exceed the statutory maximum. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

And Heavier Sentence Is No Violation of Constitutional or Statutory Rights. — The fact that a defendant received a greater sentence in the superior court than he received in a recorder's court is no violation of his constitutional or statutory rights. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970); State v. Coats, 17 N.C. App. 407, 194 S.E.2d 366 (1973).

The fact that defendants received a greater sentence in the superior court than they received in the district court is no violation of their constitutional rights. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970).

But Reasons for Imposing Heavier Sentence Must Affirmatively Appear. — Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be

fully reviewed on appeal. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Remand to District Court. — Where the appeal has been docketed in the superior court, the judge presiding, at term, has the authority, upon satisfactory cause shown and with the consent of the defendant, to remand the case to the inferior court for clarifying judgment or other proceedings. This would reinstate the case and revest the inferior court with jurisdiction. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

Same — Cause or Consent of Defendant Required. — Where a defendant has appealed for trial de novo in superior court, a judge of that court has no authority, absent satisfactory cause shown or without the consent of the defendant, to dismiss the appeal and remand the case for compliance with the judgment of the district court. State v. Fox, 34 N.C. App. 576, 239 S.E.2d 471 (1977).

Same — Failure to Appear in Court or Consent to Dismissal. — Where the defendant neither appears in court when his case is called nor consents to dismissal of his appeal, the trial judge is without authority to dismiss the appeal and remand the case to the district court for compliance with the judgment of that court. The defendant is entitled to a trial as if the case originated in the superior court. State v. Bryant, 11 N.C. App. 423, 181 S.E.2d 211 (1971).

OPINIONS OF ATTORNEY GENERAL

Withdrawal of Appeal to Superior Court Not Allowed. — See opinion of Attorney General to Mr. Carroll R. Holmes, Attorney at Law, 40 N.C.A.G. 96 (1969).

Duty of Clerk in Event of Appeal in a Criminal Case. — See opinion of Attorney General to Mrs. Lena M. Leary, Clerk, Chowan County Superior Court, 40 N.C.A.G. 101 (1969).

ARTICLE 26.

Additional Powers of District Court Judges and Magistrates.

§ 7A-291. Additional powers of district court judges.

In addition to the jurisdiction and powers assigned in this Chapter, a district court judge has the following powers:

(1) To administer oaths;
(2) To punish for contempt;
(3) To compel the attendance of witnesses and the production of evidence;
(4) To set bail;
(5) To issue arrest warrants valid throughout the State, and search warrants valid throughout the district of issue; and
(6) To issue all process and orders necessary or proper in the exercise of his powers and authority, and to effectuate his lawful judgments and decrees. (1965, c. 310, s. 1; 1969, c. 1190, s. 27; 1973, c. 1286, s. 11.)

Legal Periodicals. — For comment on bail in North Carolina, see 5 Wake Forest Intra. L. Rev. 300 (1969).

§ 7A-292. Additional powers of magistrates.

In addition to the jurisdiction and powers assigned in this Chapter to the magistrate in civil and criminal actions, each magistrate has the following additional powers:

(1) To administer oaths;
(2) To punish for direct criminal contempt subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina;
(3) When authorized by the chief district judge, to take depositions and examinations before trial;

(4) To issue subpoenas and capiases valid throughout the county;
(5) To take affidavits for the verification of pleadings;
(6) To issue writs of habeas corpus ad testificandum, as provided in G.S. 17-41;
(7) To assign a year's allowance to the surviving spouse and a child's allowance to the children as provided in Chapter 30, Article 4, of the General Statutes;
(8) To take acknowledgments of instruments, as provided in G.S. 47-1;
(9) To perform the marriage ceremony, as provided in G.S. 51-1;
(10) To take acknowledgment of a written contract or separation agreement between husband and wife;
(11) Repealed by Session Laws 1973, c. 503, s. 9.
(12) To assess contribution for damages or for work done on a dam, canal, or ditch, as provided in G.S. 156-15; and
(13) Repealed by Session Laws 1973, c. 503, s. 9.

(1965, c. 310, s. 1; 1967, c. 691, s. 25; 1971, c. 377, s. 17; 1973, c. 503, s. 9; 1977, c. 375, s. 4; 1979, 2nd Sess., c. 1080, s. 6.)

Effect of Amendments. — The 1979, 2nd Sess., amendment rewrote subdivision (2), which formerly read "To punish for contempt."

§ 7A-293. Special authority of a magistrate assigned to a municipality located in more than one county of a district court district.

A magistrate assigned to an incorporated municipality, the boundaries of which lie in more than one county of a district court district, may, in criminal matters, exercise the powers granted by G.S. 7A-273 as if the corporate limits plus the territory embraced within a distance of one mile in all directions therefrom were located wholly within the magistrate's county of residence. Appeals from a magistrate exercising the authority granted by this section shall be taken in the district court in the county in which the offense was committed. A magistrate exercising the special authority granted by this section shall transmit all records, reports, and monies collected to the clerk of the superior court of the county in which the offense was committed. (1967, c. 691, s. 26.)

§§ 7A-294 to 7A-299: Reserved for future codification purposes.

SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

ARTICLE 27.

Expenses of the Judicial Department.

§ 7A-300. Expenses paid from State funds.

(a) The operating expenses of the Judicial Department shall be paid from State funds, out of appropriations for this purpose made by the General Assembly. The Administrative Office of the Courts shall prepare budget estimates to cover these expenses, including therein the following items and such other items as are deemed necessary for the proper functioning of the Judicial Department:

(1) Salaries, departmental expense, printing and other costs of the appellate division;
(2) Salaries and expenses of superior court judges, district attorneys, assistant district attorneys, public defenders, and assistant public defenders, and fees and expenses of counsel assigned to represent indigents under the provisions of Subchapter IX of this Chapter;
(3) Salaries, travel expenses, departmental expense, printing and other costs of the Administrative Office of the Courts;
(4) Salaries and travel expenses of district judges, magistrates, and family court counselors;
(5) Salaries and travel expenses of clerks of superior court, their assistants, deputies, and other employees, and the expenses of their offices, including supplies and materials, postage, telephone and telegraph, bonds and insurance, equipment, and other necessary items;
(6) Fees and travel expenses of jurors, and of witnesses required to be paid by the State;
(7) Compensation and allowances of court reporters;
(8) Briefs for counsel and transcripts and other records for adequate appellate review when an appeal is taken by an indigent person;
(9) Transcripts of preliminary hearings in indigency cases and, in cases in which the defendant pays for a transcript of the preliminary hearing, a copy for the district attorney;
(10) Transcript of the evidence and trial court charge furnished the district attorney when a criminal action is appealed to the appellate division;
(11) All other expenses arising out of the operations of the Judicial Department which by law are made the responsibility of the State; and
(12) Operating expenses of the Judicial Council and the Judicial Standards Commission.

(b) Repealed by Session Laws 1971, c. 377, c. 32. (1965, c. 310, s. 1; 1967, c. 108, s. 9; c. 1049, s. 5; 1969, c. 1013, s. 2; 1971, c. 377, ss. 18, 21; 1973, c. 47, s. 2; c. 503, ss. 10, 11.)

CASE NOTES

Application of Subchapter. — In cases which were instituted after the establishment of the district court, the costs, including a "facilities fee," shall be assessed according to §§ 7A-300 through 7A-317.1. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

§ 7A-301. Disbursement of expenses.

The salaries and expenses of all personnel in the Judicial Department and other operating expenses shall be paid out of the State treasury upon warrants duly drawn thereon, except that the Administrative Office of the Courts and the Department of Administration, with the approval of the State Auditor, may establish alternative procedures for the prompt payment of juror fees, witness fees, and other small expense items. (1965, c. 310, s. 1.)

§ 7A-302. Counties and municipalities responsible for physical facilities.

In each county in which a district court has been established, courtrooms and related judicial facilities (including furniture), as defined in this Subchapter,

shall be provided by the county, except that courtrooms and related judicial facilities may, with the approval of the Administrative Officer of the Courts, after consultation with county and municipal authorities, be provided by a municipality in the county. To assist a county or municipality in meeting the expense of providing courtrooms and related judicial facilities, a part of the costs of court, known as the "facilities fee," collected for the State by the clerk of superior court, shall be remitted to the county or municipality providing the facilities. (1965, c. 310, s. 1.)

CASE NOTES

Cited in Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972); Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793 (1979).

§ 7A-303. Equipment and supplies in clerk's office.

Upon the establishment of the district court in any county, supplies and all equipment in the office of the clerk of superior court shall become the property of the State. (1965, c. 310, s. 1.)

ARTICLE 28.

Uniform Costs and Fees in the Trial Divisions.

§ 7A-304. Costs in criminal actions.

(a) In every criminal case in the superior or district court, wherein the defendant is convicted, or enters a plea of guilty or nolo contendere, or when costs are assessed against the prosecuting witness, the following costs shall be assessed and collected, except that when the judgment imposes an active prison sentence, costs shall be assessed and collected only when the judgment specifically so provides:

(1) For each arrest or personal service of criminal process, including citations and subpoenas, the sum of four dollars ($4.00), to be remitted to the county wherein the arrest was made or process was served, except that in those cases in which the arrest was made or process served by a law-enforcement officer employed by a municipality, the fee shall be paid to the municipality employing the officer.

(2) For the use of the courtroom and related judicial facilities, the sum of five dollars ($5.00) in the district court, including cases before a magistrate, and the sum of twenty-three dollars ($23.00) in superior court, to be remitted to the county in which the judgment is rendered. In all cases where the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used exclusively by the county or municipality for providing, maintaining, and constructing adequate courtroom and related judicial facilities, including: adequate space and furniture for judges, district attorneys, public defenders, magistrates, juries, and other court related personnel; office space, furniture and vaults for the clerk; jail and juvenile detention facilities; free parking for jurors; and a law library (including books) if one has heretofore been established or if the governing body hereafter decides to establish one.

In the event the funds derived from the facilities fees exceed what is needed for these purposes, the county or municipality may, with the approval of the Administrative Officer of the Courts as to the amount, use any or all of the excess to retire outstanding indebtedness incurred in the construction of the facilities, or to reimburse the county or municipality for funds expended in constructing or renovating the facilities (without incurring any indebtedness) within a period of two years before or after the date a district court is established in such county, or to supplement the operations of the General Court of Justice in the county.

(3) For the Law-Enforcement Officers' Benefit and Retirement Fund, the sum of three dollars ($3.00), to be remitted to the State Treasurer and administered as provided in Chapter 143, Article 12, of the General Statutes.

(4) For support of the General Court of Justice, the sum of nineteen dollars ($19.00) in the district court, including cases before a magistrate, and the sum of twenty-eight dollars ($28.00) in the superior court, to be remitted to the State Treasurer.

(a1) The costs assessed pursuant to subsection (a) may also be collected by clerks of court for charges in which a party elects to pay the court's costs to satisfy the requirements of G.S. 20-7.2. Costs collected pursuant to this subsection shall be allocated in the same manner as other costs collected pursuant to this section. If a party elects to pay the costs of court to satisfy the requirements of G.S. 20-7.2 and is subsequently adjudged guilty of the same charge by the court, he shall not be required to pay the costs of court again for that charge, but he is subject to any other orders of the court, including an order to pay a fine.

(b) On appeal, costs are cumulative, and costs assessed before a magistrate shall be added to costs assessed in the district court, and costs assessed in the district court shall be added to costs assessed in the superior court, except that the fee for the Law-Enforcement Officers' Benefit and Retirement Fund shall be assessed only once in each case. No superior court costs shall be assessed against a defendant who gives notice of appeal from the district court but withdraws it prior to the expiration of the 10-day period for entering notice of appeal. When a case is reversed on appeal, the defendant shall not be liable for costs, and the State shall be liable for the cost of printing records and briefs in the Appellate Division.

(c) The costs set forth in this section are complete and exclusive, and in lieu of any and all other costs and fees, except that witness fees, expenses for blood tests and comparisons incurred by G.S. 8-50.1(a), jail fees and cost of necessary trial transcripts shall be assessed as provided by law in addition thereto. Nothing in this section shall limit the power or discretion of the judge in imposing fines or forfeitures or ordering restitution.

(d) In any criminal case in which the liability for costs, fines, restitution, or any other lawful charge has been finally determined, the clerk of superior court shall, unless otherwise ordered by the presiding judge, disburse such funds when paid in accordance with the following priorities:

(1) Costs due the county;
(2) Costs due the city;
(3) Fines to the county school fund;
(4) Sums in restitution prorated among the persons entitled thereto;
(5) Costs due the State;
(6) Attorney's fees.

Sums in restitution received by the clerk of superior court shall be disbursed when:

(1) Complete restitution has been received; or

(2) When, in the opinion of the clerk, additional payments in restriction will not be collected; or
(3) Upon the request of the person or persons entitled thereto; and
(4) In any event, at least once each calendar year. (1965, c. 310, s. 1; 1967, c. 601, s. 2; c. 691, ss. 27-29; 1049, s. 5; 1969, c. 1013, s. 3; c. 1190, ss. 28, 29; 1971, c. 377, ss. 19-21; c. 1129; 1973, c. 47, s. 2; 1975, c. 558, ss. 1, 2; 1975, 2nd Sess., c. 980, s. 1; 1979, c. 576, s. 3; 1981, c. 369; c. 691, s. 1; c. 896, s. 2; c. 959, s. 1.)

Cross References. — As to items allowed as costs generally, see § 6-1 and the note thereto.

Effect of Amendments. — The first 1981 amendment, effective July 1, 1981, substituted "four dollars ($4.00)" for "two dollars ($2.00)" in subdivision (1) of subsection (a).

The second 1981 amendment, effective July 1, 1981, substituted "five dollars ($5.00)" for "three dollars ($3.00)" and substituted "twenty-three dollars ($23.00)" for "fifteen dollars ($15.00)" in the first sentence of subdivision (2) of subsection (a). Session Laws 1981, c. 691, s. 5, provides that the act shall apply to actions initiated on or after July 1, 1981.

The third 1981 amendment added subsection (a1).

The fourth 1981 amendment, effective August 1, 1981, rewrote subsection (d).

Session Laws 1981, c. 959, ss. 2 through 4, provides:

"Sec. 2. The provisions hereof shall also apply to all funds on deposit with the clerks of superior court on the effective date of this act.

"Sec. 3. For purposes of determining the effect of the provisions of Section 1, the clerks of the superior court shall for one year submit quarterly reports to the Administrative Office of the Courts and to the Department of Crime Control and Public Safety concerning the amount of court costs and fines ordered and the amount of restitution ordered, scheduled to be collected, collected, and disbursed, either through prepayment or partial payment (distinguishing between supervised and unsupervised probation) during the quarter. Such reports shall be submitted by the tenth working day following the quarters ending September 30 and December 31, 1981, and March 31 and June 30, 1982. Forms for the transcribing and reporting of this information shall be prepared and distributed by the Department of Crime Control and Public Safety in accordance with procedures approved by the Administrative Office of the Courts.

"Sec. 4. This act shall become effective August 1, 1981, and applies to sums disbursed on and after that date."

CASE NOTES

"Facilities Fee". — In cases which were instituted after the establishment of the district court, the costs, including a "facilities fee," shall be assessed according to §§ 7A-300 through 7A-317.1. The "facilities fee" assessed in this classification of cases shall be disbursed monthly by the clerk of superior court to the county or municipality providing the facilities. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

Cited in In re Board of Comm'rs, 4 N.C. App. 626, 167 S.E.2d 488 (1969).

§ 7A-305. Costs in civil actions.

(a) In every civil action in the superior or district court the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of five dollars ($5.00) in cases heard before a magistrate, and the sum of nine dollars ($9.00) in district and superior court, to be remitted to the county in which the judgment is rendered, except that in all cases in which the judgment is rendered in facilities provided by a municipality, the facilities fee shall be paid to the municipality. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.
(2) For support of the General Court of Justice, the sum of twenty-eight dollars ($28.00) in the superior court, and the sum of eighteen dollars

($18.00) in the district court, except that in the district court if the amount sued for does not exceed one thousand dollars ($1,000), excluding interest, the sum shall be five dollars ($5.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(b) On appeal, costs are cumulative, and when cases heard before a magistrate are appealed to the district court, the General Court of Justice fee and the facilities fee applicable in the district court shall be added to the fees assessed before the magistrate. When an order of the clerk of the superior court is appealed to either the district court or the superior court, no additional General Court of Justice fee or facilities fee shall be assessed.

(c) The clerk of superior court, at the time of the filing of the papers initiating the action or the appeal, shall collect as advance court costs, the facilities fee and General Court of Justice fee, except in suits in forma pauperis. He shall also collect the fee for discovery procedures under Rule 27(a) and (b) at the time of the filing of the verified petition.

(d) The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs and fees, except that the following expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.
(2) Jail fees, as provided by law.
(3) Counsel fees, as provided by law.
(4) Expense of service of process by certified mail and by publication.
(5) Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
(6) Fees for personal service and civil process and other sheriff's fees, as provided by law.
(7) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fee of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.
(8) Fees of interpreters, when authorized and approved by the court.
(9) Premiums for surety bonds for prosecution, as authorized by G.S. 1-109.

(e) Nothing in this section shall affect the liability of the respective parties for costs as provided by law. (1965, c. 310, s. 1; 1967, c. 108, s. 10; c. 691, s. 30; 1971, c. 377, ss. 23, 24; c. 1181, s. 1; 1973, c. 503, ss. 12-14; c. 1267, s. 3; 1975, c. 558, s. 3; 1975, 2nd Sess., c. 980, ss. 2, 3; 1979, 2nd Sess., c. 1234, s. 1; 1981, c. 555, s. 6; c. 691, s. 2.)

Editor's Note. — The Rules of Civil Procedure, referred to in this section, are found in § 1A-1.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, substituted "eight hundred dollars ($800.00)" for "five hundred dollars ($500.00)" in subdivision (2) of subsection (a).

Session Laws 1979, 2nd Sess., c. 1234, s. 2, provides that the act shall not affect pending litigation.

The first 1981 amendment, effective Oct. 1, 1981, substituted "one thousand dollars ($1,000)" for "eight hundred dollars ($800.00)" near the end of the first sentence of subdivision (2) of subsection (a).

The second 1981 amendment, effective July 1, 1981, inserted "the" preceding "courtroom" near the beginning of the first sentence of subdivision (1) of subsection (a), and substituted "five dollars ($5.00)" for "three dollars ($3.00)" and "nine dollars ($9.00)" for "six dollars ($6.00)" in that sentence.

Session Laws 1981, c. 691, s. 5, provides that the act shall apply to actions initiated on or after July 1, 1981.

CASE NOTES

Appealing Party Not Prejudiced by Failure of Clerk to Collect Costs. — Under the provisions of subsection (c) of this section, it is clear that the duty of collecting the additional costs at the time of the filing of the papers initiating an appeal is imposed upon the clerk. But a failure of the clerk to perform his duty in this respect should not operate to prejudice the appealing party. Porter v. Cahill, 1 N.C. App. 579, 162 S.E.2d 128 (1968).

§ 7A-305.1. Discovery, fee on filing verified petition.

When discovery procedures under Rule 27 of the Rules of Civil Procedure are utilized, the sum of twenty dollars ($20.00) shall be assessed and collected by the clerk at the time of the filing of the verified petition. If a civil action is subsequently initiated, the twenty dollars ($20.00) shall be credited against costs in the civil action. (1971, c. 377, s. 22.)

Editor's Note. — The Rules of Civil Procedure, referred to in this section, are found in § 1A-1.

§ 7A-306. Costs in special proceedings.

(a) In every special proceeding in the superior court, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of three dollars ($3.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice the sum of thirteen dollars ($13.00). In addition, in proceedings involving land, except boundary disputes, if the fair market value of the land involved is over one hundred dollars ($100.00), there shall be an additional sum of twenty cents (20¢), per one hundred dollars ($100.00) of value, or major fraction thereof, not to exceed a maximum additional sum of one hundred dollars ($100.00). Fair market value is determined by the sale price if there is a sale, the appraiser's valuation if there is no sale, or the appraised value from the property tax records if there is neither a sale nor an appraiser's valuation. Sums collected under this subsection shall be remitted to the State Treasurer.

(b) The facilities fee and thirteen dollars ($13.00) of the General Court of Justice fee are payable at the time the proceeding is initiated.

(c) The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs, fees, and commissions, except that the following additional expenses, when incurred, are assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, and for service by publication, as provided by law.

(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law. The fees of such appointees shall include reasonable reimbursement for stenographic assistance, when necessary.

(6) Fees for a special jury, if any, at two dollars ($2.00) per special juror for each proceeding. If a special proceeding lasts more than one-half day, the same daily compensation as regular jurors.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 24, s. 2; 1971, c. 377, s. 25; c. 1181, s. 1; 1973, c. 503, s. 15; 1981, c. 691, s. 3.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "the" preceding "courtroom" and substituted "three dollars ($3.00)" for "two dollars ($2.00)" in the first sentence of subdivision (1) of subsection (a).

Session Laws 1981, c. 691, s. 5, provides that the act shall apply to actions initiated on or after July 1, 1981.

§ 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of three dollars ($3.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of eight dollars ($8.00), plus an additional ten cents (10¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate. Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of realty. This fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be one dollar ($1.00). In no case shall the cumulative fee exceed two thousand dollars ($2,000). Sums collected under this subsection shall be remitted to the State Treasurer.

(b) The facilities fee and eight dollars ($8.00) of the General Court of Justice fee shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, the ten dollars ($10.00) shall be paid at the time of the qualification of the fiduciary.

(c) The uniform costs set forth in this section are complete and exclusive, and in lieu of any and all other costs, fees and commissions, except that the following additional expenses, when incurred, are also assessable or recoverable, as the case may be:

(1) Witness fees, as provided by law.

(2) Counsel fees, as provided by law.

(3) Costs on appeal, of the original transcript of testimony, if any, insofar as essential to the appeal.

(4) Fees for personal service of civil process, and other sheriff's fees, as provided by law.

(5) Fees of guardians ad litem, referees, receivers, commissioners, surveyors, arbitrators, appraisers, and other similar court appointees, as provided by law.

(d) Costs assessed before the clerk shall be added to costs assessable on appeal to the judge or upon transfer to the civil issue docket.

(e) Nothing in this section shall affect the liability of the respective parties for costs, as provided by law. (1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1; 1981, c. 691, s. 4.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "the" preceding "courtroom" and substituted "three dollars ($3.00)" for "two dollars ($2.00)" in the first sentence of subdivision (1) of subsection (a).

Session Laws 1981, c. 691, s. 5, provides that the act shall apply to actions initiated on or after July 1, 1981.

CASE NOTES

Proceeds recovered for the wrongful death of a decedent are not subject to the assessment of costs in the administration of estates of decedents provided for under subsection (a)(2) of this section, since the proceeds recovered under the wrongful death statute are not a part of the decedent's estate. In re Below, 12 N.C. App. 657, 184 S.E.2d 378 (1971).

§ 7A-308. Miscellaneous fees and commissions.

(a) The following miscellaneous fees and commissions shall be collected by the clerk of superior court and remitted to the State for the support of the General Court of Justice:

(1) Foreclosure under power of sale in deed of trust or mortgage $15.00
(2) Inventory of safe deposits of a decedent 5.00
(3) Proceeding supplemental to execution 5.00
(4) Confession of judgment 4.00
(5) Taking a deposition 3.00
(6) Execution 2.00
(7) Notice of resumption of maiden name 2.00
(8) Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge) . . . 1.00
(9) Bond, taking justification or approving 1.00
(10) Certificate, under seal 1.00
(11) Recording or docketing (including indexing) any document, per page or fraction thereof, excluding welfare liens 1.00
(12) Preparation of copies, including transcripts, per page or fraction thereof 0.25
(13) Substitution of trustee in deed of trust 1.00
(14) Probate of any instrument 0.50
(14a) Execution of passport application . . . the amount allowed by Federal Law.
(15) On all funds placed with the clerk by virtue or color of his office, to be administered, invested, or administered in part and invested in part, a commission of one percent (1%), with a minimum fee of fifteen dollars ($15.00) and a maximum fee of five hundred dollars ($500.00), except that on accounts of two hundred dollars ($200.00) or less, there shall be no commission. For purposes of assessing a commission, receipts are cumulative for the life of an account.

(b) The fees and commissions set forth in this section are not chargeable when the service is performed as a part of the regular disposition of any action or special proceeding or the administration of an estate. When a transaction involves more than one of the services set forth in this section, only the greater service fee shall be charged.

(c) The miscellaneous fees and commissions enumerated in this section are complete and exclusive, and in lieu of any and all other miscellaneous fees and commissions. (1965, c. 310, s. 1; 1967, c. 691, ss. 32, 33; 1969, c. 1190, s. 31; 1971, c. 956, s. 2; 1973, c. 503, s. 16; c. 886; 1975, c. 829; 1981, c. 313, s. 1.)

Effect of Amendments. — The 1981 amendment added subdivision (14a).

Session Laws 1981, c. 313, s. 2, provides: "This act shall become effective 30 days after ratification." The act was ratified May 4, 1981.

OPINIONS OF ATTORNEY GENERAL

Commission by Clerk of Superior Court on Interest Earned by Posted Cash Bond Deductible; Form of Order Setting Bond Precludes Deduction of Commission from Principal. — See opinion of Attorney General to Honorable Frank W. Snepp, 41 N.C.A.G. 470 (1971).

§ 7A-309. Magistrate's special fees.

The following special fees shall be collected by the magistrate and remitted to the clerk of the superior court for the use of the State in support of the General Court of Justice:

(1) Performing marriage ceremony $5.00
(2) Hearing petition for year's allowance to surviving spouse or child, issuing notices to commissioners, allotting the same, and making return 4.00
(3) Taking a deposition 3.00
(4) Proof of execution or acknowledgment of any instrument . . .50
(5) Performing any other statutory function not incident to a civil or criminal action 1.00

(1965, c. 310, s. 1; 1973, c. 503, s. 17.)

§ 7A-310. Fees of commissioners and assessors appointed by magistrate.

Any person appointed by a magistrate as a commissioner or assessor, and who shall serve, shall be paid the sum of two dollars ($2.00), to be taxed as a part of the bill of costs of the proceeding. (1965, c. 310, s. 1.)

§ 7A-311. Uniform civil process fees.

(a) In a civil action or special proceeding, the following fees and commissions shall be assessed, collected, and remitted to the county:

(1) a. Effective July 1, 1979, for every civil action filed on or after that date, for each item of civil process, including summons, subpoenas, notices, motions, orders, units and pleadings served, three dollars ($3.00). When two or more items of civil process are served simultaneously on one party, only one three-dollar ($3.00) fee shall be charged. Effective July 1, 1981, for every civil action filed on or after that date, for each item of civil process, including summons, subpoenas, notices, motions, orders, writs and pleadings served, four dollars ($4.00). When two or more items of civil process are served simultaneously on one party, only one four-dollar ($4.00) fee shall be charged.

b. When an item of civil process is served on two or more persons or organizations, a separate service charge shall be made for each person or organization. If the process is served, or attempted to be

served, by a city policeman, the fee shall be remitted to the city rather than the county. If the process is served, or attempted to be served by the sheriff, the fee shall be remitted to the county. This subsection shall not apply to service of summons to jurors.

(2) For the seizure of personal property and its care after seizure, all necessary expenses, in addition to any fees for service of process.

(3) For all sales by the sheriff of property, either real or personal, or for funds collected by the sheriff under any judgment, five percent (5%) on the first five hundred dollars ($500.00), and two and one-half percent (2 1/2%) on all sums over five hundred dollars ($500.00), plus necessary expenses of sale. Whenever an execution is issued to the sheriff, and subsequently while the execution is in force and outstanding, and after the sheriff has served or attempted to serve such execution, the judgment, or any part thereof, is paid directly or indirectly to the judgment creditor, the fee herein is payable to the sheriff on the amount so paid. The judgment creditor shall be responsible for collecting and paying all execution fees on amounts paid directly to the judgment creditor.

(4) For execution of a judgment of ejectment, all necessary expenses, in addition to any fees for service of process.

(5) For necessary transportation of individuals to or from State institutions or another state, the same mileage and subsistence allowances as are provided for State employees.

(b) All fees shall be collected in advance (except in suits in forma pauperis) except those contingent on expenses or sales prices. When the fee is not collected in advance or at the time of assessment, a lien shall exist in favor of the county on all property of the party owing the fee. If the fee remains unpaid it shall be entered as a judgment against the debtor and shall be docketed in the judgment docket in the office of the clerk of superior court.

(c) The process fees and commissions set forth in this section are complete and exclusive and in lieu of any and all other process fees and commissions in civil actions and special proceedings. (1965, c. 310, s. 1; 1967, c. 691, s. 34; 1969, c. 1190, s. 31 1/2; 1973, c. 417, ss. 1, 2; c. 503, s. 18; c. 1139; 1979, c. 801, s. 2.)

OPINIONS OF ATTORNEY GENERAL

Subdivision (a)(1) of this section requires civil process fees to be assessed, collected and remitted when the law enforcement officer serves or attempts to serve civil process. See opinion of Attorney General to Mr. Larry J. McGlothlin, Cumberland County Sheriff's Attorney, 49 N.C.A.G. 47 (1979).

§ 7A-312. Uniform fees for jurors; meals.

A juror in the General Court of Justice including a petit juror, or a coroner's juror, but excluding a grand juror, or a juror in a special proceeding shall receive eight dollars ($8.00) per day, except that if any person serves as a juror for more than five days in any 24-month period, the juror shall receive thirty dollars ($30.00) per day for each day of service in excess of five days. A grand juror shall receive twelve dollars ($12.00) per day. A juror required to remain overnight at the site of the trial shall be furnished adequate accommodations and subsistence. If required by the presiding judge to remain in a body during the trial of a case, meals shall be furnished the jurors during the period of sequestration. A juror in a special proceeding shall receive two dollars ($2.00) for each proceeding, except that if a special proceeding lasts more than one-half day, the special jurors shall receive the same daily compensation as regular

jurors. Jurors from out of the county summoned to sit on a special venire shall receive mileage at the same rate as State employees. (1965, c. 310, s. 1; 1967, c. 1169; 1969, c. 1190, s. 32; 1971, c. 377, s. 26; 1973, c. 503, s. 19; 1979, c. 985.)

CASE NOTES

Applied in State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979).

§ 7A-313. Uniform jail fees.

Any person lawfully confined in jail awaiting trial shall be liable to the county or municipality maintaining the jail in the sum of five dollars ($5.00) for each 24 hours' confinement, or fraction thereof, except that a person so confined shall not be liable for this fee if a nolle prosequi is entered, or if acquitted, or if judgment is arrested, or if probable cause is not found, or if the grand jury fails to return a true bill. (1965, c. 310, s. 1; 1969, c. 1190, s. 33; 1973, c. 503, s. 20; 1975, c. 444.)

§ 7A-314. Uniform fees for witnesses; experts; limit on number.

(a) A witness under subpoena, bound over, or recognized, other than a salaried State, county, or municipal law-enforcement officer, or an out-of-state witness in a criminal case, whether to testify before the court, Judicial Standards Commission, jury of view, magistrate, clerk, referee, commissioner, appraiser, or arbitrator shall be entitled to receive five dollars ($5.00) per day, or fraction thereof, during his attendance, which, except as to witnesses before the Judicial Standards Commission, must be certified to the clerk of superior court.

(b) A witness entitled to the fee set forth in subsection (a) of this section, and a law-enforcement officer who qualifies as a witness, shall be entitled to receive reimbursement for travel expenses as follows:

(1) A witness whose residence is outside the county of appearance but within 75 miles of the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized for State employees, for each mile necessarily traveled from his place of resident to the place of appearance and return, each day.

(2) A witness whose residence is outside the county of appearance and more than 75 miles from the place of appearance shall be entitled to receive mileage reimbursement at the rate currently authorized State employees for one round-trip from his place of residence to the place of appearance. A witness required to appear more than one day shall be entitled to receive reimbursement for actual expenses incurred for lodging and meals not to exceed the maximum currently authorized for State employees, in lieu of daily mileage.

(c) A witness who resides in a state other than North Carolina and who appears for the purpose of testifying in a criminal action and proves his attendance may be compensated at the rate of ten cents (10¢) a mile for one round-trip from his place of residence to the place of appearance, and five dollars ($5.00) for each day that he is required to travel and attend as a witness, upon order of the court based upon a finding that the person was a necessary witness. If such a witness is required to appear more than one day, he is also entitled to reimbursement for actual expenses incurred for lodging and meals, not to exceed the maximum currently authorized for State employees.

(d) An expert witness, other than a salaried State, county, or municipal law-enforcement officer, shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. A law-enforcement officer who appears as an expert witness shall receive reimbursement for travel expenses only, as provided in subsection (b) of this section.

(e) If more than two witnesses are subpoenaed, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the subpoena. (1965, c. 310, s. 1; 1969, c. 1190, s. 34; 1971, c. 377, s. 27; 1973, c. 503, ss. 21, 22.)

Cross References. — As to items allowed as costs generally, see § 6-1; as to proof of attendance by witness, see § 6-53.

CASE NOTES

The court's power to tax costs is entirely dependent upon statutory authorization. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

Subsections (a) and (d) of this section must be considered together. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

As to expert witnesses, subsection (d) modifies subsection (a) by permitting the court, in its discretion, to increase their compensation and allowances, but the modification relates only to the amount of an expert witness's fee; it does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972).

Where the witnesses did not testify in obedience to a subpoena, the trial court was without authority to allow them expert fees or to tax the losing party with the costs of their attendance. State v. Johnson, 282 N.C. 1, 191 S.E.2d 641 (1972); Couch v. Couch, 18 N.C. App. 108, 196 S.E.2d 64 (1973).

Stated in Siedlecki v. Powell, 36 N.C. App. 690, 245 S.E.2d 417 (1978).

§ 7A-315. Liability of State for witness fees in criminal cases when defendant not liable.

In a criminal action, if no prosecuting witness is designated by the court as liable for the costs, and the defendant is acquitted, or convicted and unable to pay, or a nolle prosequi is entered, or judgment is arrested, or probable cause is not found, or the grand jury fails to return a true bill, the State shall be liable for the witness fees allowed per G.S. 7A-314 and any expenses for blood tests and comparisons incurred per G.S. 8-50.1(a). (1965, c. 310, s. 1; 1979, c. 576, s. 4.)

§ 7A-316. Payment of witness fees in criminal actions.

A witness in a criminal action who is entitled to a witness fee and who proves his attendance prior to assessment of the bill of costs shall be paid by the clerk from State funds and the amount disbursed shall be assessed in the bill of costs. When the State is liable for the fee, a witness who proves his attendance not later than the last day of court in the week in which the trial was completed shall be paid by the clerk from State funds. If more than two witnesses shall be subpoenaed, bound over, or recognized, to prove a single material fact, disbursements to such additional witnesses shall be charged against the party issuing or requesting the subpoena. (1965, c. 310, s. 1; 1971, c. 377, s. 28.)

§ 7A-317. Counties and municipalities not required to advance certain fees.

Counties and municipalities are not required to advance costs for the facilities fee, the General Court of Justice fee, the miscellaneous fees enumerated in G.S. 7A-308, or the civil process fees enumerated in G.S. 7A-311. (1967, c. 691, s. 35.)

Editor's Note. — Section 35, c. 691, Session Laws 1967, which inserted this section, renumbered former §§ 7A-317 and 7A-318 as §§ 7A-318 and 7A-319 (now repealed), respectively.

OPINIONS OF ATTORNEY GENERAL

County Hospital within Exemption of County from Advance Costs. — See opinion of Attorney General to Mr. William L. Mills, Jr., Attorney for Cabarrus Memorial Hospital, 41 N.C.A.G. 232 (1971).

§ 7A-317.1. Disposition of fees in counties with unincorporated seats of court.

Notwithstanding any other provision of this Article, if a municipality listed in G.S. 7A-133 as an additional seat of district court is not incorporated, the arrest, facilities, and jail fees which would ordinarily accrue thereto, shall instead accrue to the county in which the unincorporated municipality is located. (1969, c. 1190, s. 34½.)

§ 7A-318. Determination and disbursement of costs on and after date district court established.

(a) On and after the date that the district court is established in a judicial district, costs in every action, proceeding or other matter pending in the General Court of Justice in that district, shall be assessed as provided in this Article, unless costs have been finally assessed according to prior law. In computing costs as provided in this section, the parties shall be given credit for any fees, costs, and commissions paid in the pending action, proceeding or other matter, before the district court was established in the district, except that no refunds are authorized.

(b) In the administration of estates, costs shall be considered finally assessed according to prior law when they have been assessed at the time of the filing of any inventory, account, or other report. Costs at any filing on or after the date the district court is established in a judicial district shall be assessed as provided in this Article.

(c) When the General Court of Justice fee and the facilities fee are assessed as provided in this Article and credit is given for fees, costs, and commissions paid before the district court was established in the district, the actual amount thereafter received by the clerk shall be remitted to the State for the support of the General Court of Justice.

(d) When costs have been finally assessed according to prior law, but come into the hands of the clerk after the district court is established in the district, funds so received shall be disbursed according to prior law.

(e) Cost funds in the hands of the clerk at the time the district court is established shall be disbursed according to prior law. (1965, c. 310, s. 1; 1967, c. 691, s. 35.)

Cross References. — See Editor's note to § 7A-317.

CASE NOTES

Assessment of Costs in Cases Pending When District Court Established. — This section clearly provides that in cases pending at the time of the establishment of the district court, in which costs had not been finally assessed according to prior law, the costs shall be assessed as provided in Article 27 of this Chapter. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

General Court of Justice Fee and Facilities Fee to Be Remitted to State. — This section clearly provides that the General Court of Justice fee and the "facilities fee" assessed in the class of pending cases shall be remitted to the State for the support of the General Court of Justice. The requirement of the statute is unambiguous and requires no interpretation. Blackwell v. Montague, 15 N.C. App. 564, 190 S.E.2d 384 (1972).

§ 7A-319: Repealed by Session Laws 1971, c. 377, s. 32.

§§ 7A-320 to 7A-339: Reserved for future codification purposes.

SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

ARTICLE 29.

Administrative Office of the Courts.

§ 7A-340. Administrative Office of the Courts; establishment; officers.

There is hereby established a State office to be known as the Administrative Office of the Courts. It shall be supervised by a Director, assisted by an assistant director. (1965, c. 310, s. 1.)

CASE NOTES

The holder of office under the authority of this section is an officer of the General Court of Justice assisting the Chief Justice, and serving at his pleasure. He is a servant of the General Court of Justice and the Chief Justice. As such, he acts as an extension of the judicial personality of the Chief Justice. He is considered by North Carolina to be among its judicial personnel and is equivalent to service as a judge of the Superior Court Division of the General Court of Justice in certain instances. His position entitles him to the judicial immunity held by other judicial personnel. Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972), aff'd, 478 F.2d 694 (4th Cir. 1973).

§ 7A-341. Appointment and compensation of Director.

The Director shall be appointed by the Chief Justice of the Supreme Court, to serve at his pleasure. He shall receive the annual salary provided in the Budget Appropriations Act, payable monthly, and reimbursement for travel and subsistence expenses at the same rate as State employees generally. Service as Director shall be equivalent to service as a superior court judge for the purposes of entitlement to retirement pay or to retirement for disability. (1965, c. 310, s. 1; 1967, c. 691, s. 36.)

CASE NOTES

Stated in Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

§ 7A-342. Appointment and compensation of assistant director and other employees.

The assistant director shall also be appointed by the Chief Justice, to serve at his pleasure. The assistant director shall receive the annual salary provided in the Budget Appropriations Act, payable monthly, and reimbursement for travel and subsistence expenses at the same rate as State employees generally.

The Director may appoint such other assistant and employees as are necessary to enable him to perform the duties of his office. (1965, c. 310, s. 1; 1967, c. 691, s. 37.)

§ 7A-343. Duties of Director.

The Director is the Administrative Officer of the Courts, and his duties include the following:

(1) Collect and compile statistical data and other information on the judicial and financial operation of the courts and on the operation of other offices directly related to and serving the courts;

(2) Determine the state of the dockets and evaluate the practices and procedures of the courts, and make recommendations concerning the number of judges, district attorneys, and magistrates required for the efficient administration of justice;

(3) Prescribe uniform administrative and business methods, systems, forms and records to be used in the offices of the clerks of superior court;

(4) Prepare and submit budget estimates of State appropriations necessary for the maintenance and operation of the Judicial Department, and authorize expenditures from funds appropriated for these purposes;

(5) Investigate, make recommendations concerning, and assist in the securing of adequate physical accommodations for the General Court of Justice;

(6) Procure, distribute, exchange, transfer, and assign such equipment, books, forms and supplies as are to be acquired with State funds for the General Court of Justice;

(7) Make recommendations for the improvement of the operations of the Judicial Department;

(8) Prepare and submit an annual report on the work of the Judicial Department to the Chief Justice, and transmit a copy to each member of the General Assembly;

(9) Assist the Chief Justice in performing his duties relating to the transfer of district court judges for temporary or specialized duty; and

(10) Perform such additional duties and exercise such additional powers as may be prescribed by statute or assigned by the Chief Justice. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1973, c. 47, s. 2.)

CASE NOTES

Cited in Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

§ 7A-343.1. Distribution of copies of the appellate division reports.

The Administrative Officer of the Courts shall, at the State's expense distribute such number of copies of the appellate division reports to federal, State departments and agencies, and to educational institutions of instruction, as follows:

Governor, Office of the	1
Lieutenant Governor, Office of the	1
Secretary of State, Department of the	2
Treasurer, Department of the State	1
Superintendent of Public Instruction	1
Office of the Attorney General	11
State Bureau of Investigation	1
Agriculture, Department of	1
Labor, Department of	1
Insurance, Department of	1
Budget Bureau, Department of Administration	1
Property Control, Department of Administration	1
State Planning, Department of Administration	1
Board of Natural Resources and Community Development	1
Revenue, Department of	1
Board of Human Resources	1
Commission for the Blind	1
Board of Transportation	1
Motor Vehicles, Division of	1
Utilities Commission	8
Industrial Commission	11
Employment Security Commission	1
Commission of Correction	1
Parole Commission	1
Archives and History, Division of	1
Crime Control and Public Safety, Department of	2
State Library	3
Legislative Building Library	2
Justices of the Supreme Court	1 ea.
Judges of the Court of Appeals	1 ea.
Judges of the Superior Court	1 ea.
Clerks of the Superior Court	1 ea.
District Attorneys	1 ea.
Emergency and Special Judges of the Superior Court	1 ea.
Supreme Court Library	AS MANY AS REQUESTED
Appellate Division Reporter	1
University of North Carolina, Chapel Hill	71
University of North Carolina, Charlotte	1
University of North Carolina, Greensboro	1
University of North Carolina, Asheville	1
North Carolina State University, Raleigh	1
Appalachian State University	1
East Carolina University	1

Fayetteville State University	1
North Carolina Central University	17
Western Carolina University	1
Duke University	17
Davidson College	2
Wake Forest University	25
Lenoir Rhyne College	1
Elon College	1
Campbell College	25
Federal, Out-of-State and Foreign	
Secretary of State	1
Secretary of Defense	1
Secretary of Health, Education and Welfare	1
Secretary of Housing and Urban Development	1
Secretary of Transportation	1
Attorney General	1
Department of Justice	1
Internal Revenue Service	1
Veterans' Administration	1
Library of Congress	5
Federal Judges resident in North Carolina	1 ea.
Marshal of the United States Supreme Court	1
Federal District Attorneys resident in North Carolina	1 ea.
Federal Clerks of Court resident in North Carolina	1 ea.
Supreme Court Library exchange list	1

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for his private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained by him personally to enable him to keep up-to-date his personal set of reports. (1977, c. 379, s. 2; c. 771, s. 4; 1979, c. 899, s. 1; 1979, 2nd Sess., c. 1278.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1980, added the provisions for judges of the superior court and clerks of the superior court.

§ 7A-344. Special duties of Director concerning representation of indigent persons.

In addition to the duties prescribed in G.S. 7A-343, the Director shall also:

(1) Supervise and coordinate the operation of the laws and regulations concerning the assignment of legal counsel for indigent persons under Subchapter IX of this Chapter to the end that all indigent persons are adequately represented;

(2) Advise and cooperate with the offices of the public defenders as needed to achieve maximum effectiveness in the discharge of the defender's responsibilities;

(3) Collect data on the operation of the assigned counsel and the public defender systems, and make such recommendations to the General Assembly for improvement in the operation of these systems as appear to him to be appropriate; and

(4) Accept and utilize federal or private funds, as available, to improve defense services for the indigent, including indigent juveniles alleged to be delinquent or undisciplined. To facilitate processing of juvenile cases, the administrative officer is further authorized, in any judicial

district, with the approval of the chief district court judge, to engage the services of a particular attorney or attorneys to provide specialized representation on a full-time or part-time basis. (1969, c. 1013, s. 4; 1975, c. 956, s. 12.)

Editor's Note. — The above section was inserted by Session Laws 1969, c. 1013. The section formerly numbered § 7A-344 was renumbered § 7A-345 by the 1969 act.

CASE NOTES

Cited in Fowler v. Alexander, 340 F. Supp. 168 (M.D.N.C. 1972).

§ 7A-345. Duties of assistant director.

The assistant director is the administrative assistant to the Chief Justice, and his duties include the following:

(1) Assist the Chief Justice in performing his duties relating to the assignment of superior court judges;

(2) Assist the Supreme Court in preparing calendars of superior court trial sessions; and

(3) Performing such additional functions as may be assigned by the Chief Justice or the Director of the Administrative Office. (1965, c. 310, s. 1; 1969, c. 1013, s. 4.)

Editor's Note. — Before the enactment of Session Laws 1969, c. 1013, the above section was numbered § 7A-344. The 1969 act added a new section numbered 7A-344 and renumbered former §§ 7A-344 and 7A-345 as 7A-345 and 7A-346.

CASE NOTES

Cited in State v. Morehead, 46 N.C. App. 39, 264 S.E.2d 400 (1980).

§ 7A-346. Information to be furnished to Administrative Officer.

All judges, district attorneys, public defenders, magistrates, clerks of superior court and other officers or employees of the courts and of offices directly related to and serving the courts shall on request furnish to the Administrative Officer information and statistical data relative to the work of the courts and of such offices and relative to the receipt and expenditure of public moneys for the operation thereof. (1965, c. 310, s. 1; 1967, c. 1049, s. 5; 1969, c. 1013, ss. 4, 5; 1973, c. 47, s. 2.)

Editor's Note. — Before the enactment of Session Laws 1969, c. 1013, the above section was § 7A-345. Session Laws 1969, c. 1013, s. 4 added a new section numbered § 7A-344 and renumbered former §§ 7A-344 and 7A-345 as 7A-345 and 7A-346.

CASE NOTES

Applied in State v. Wright, 290 N.C. 45, 224 S.E.2d 624 (1976).

§§ 7A-347 to 7A-354: Reserved for future codification purposes.

ARTICLE 29A.
Trial Court Administrators.

§ 7A-355. Trial court administrators.

The following judicial districts shall have trial court administrators: tenth, twenty-second, and twenty-eighth and such other judicial districts as may be designated by the Administrative Office of the Courts. (1979, c. 1072, s. 10.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 7A-356. Duties.

The duties of the trial court administrator shall be to assist the judges of the judicial districts in managing the civil docket, to improve jury utilization and to perform such duties as may be assigned by the senior resident superior court judge or by other judges designated by the senior resident superior court judge. (1979, c. 1072, s. 10.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§§ 7A-357 to 7A-374: Reserved for future codification purposes.

ARTICLE 30.
Judicial Standards Commission.

§ 7A-375. Judicial Standards Commission.

(a) The Judicial Standards Commission shall consist of: one Court of Appeals judge, one superior court judge, and one district court judge, each appointed by the Chief Justice of the Supreme Court; two members of the State Bar who have actively practiced in the courts of the State for at least 10 years, elected by the State Bar Council; and two citizens who are not judges, active or retired, nor members of the State Bar, appointed by the Governor. The Court of Appeals judge shall act as chairman of the Commission.

(b) Terms of Commission members shall be for six years, except that, to achieve overlapping of terms, one of the judges, one of the practicing members of the State Bar, and one of the citizens shall be appointed initially for a term of only three years. No member who has served a full six-year term is eligible for reappointment. If a member ceases to have the qualifications required for his appointment, he ceases to be a member. Vacancies are filled in the same

manner as the original appointment, for the remainder of the term. Members who are not judges are entitled to per diem and all members are entitled to reimbursement for travel and subsistence expenses at the rate applicable to members of State boards and commissions generally, for each day engaged in official business.

(c) If a member of the Commission who is a judge becomes disabled, or becomes a respondent before the Commission, the Chief Justice shall appoint an alternate member to serve during the period of disability or disqualification. The alternate member shall be from the same division of the General Court of Justice as the judge whose place he takes. If a member of the Commission who is not a judge becomes disabled, the Governor, if he appointed the disabled member, shall appoint, or the State Bar Council, if it elected the disabled member, shall elect, an alternate member to serve during the period of disability. In a particular case, if a member disqualifies himself, or is successfully challenged for cause, his seat for that case shall be filled by an alternate member selected as provided in this subsection.

(d) A member may serve after expiration of his term only to participate until the conclusion of a formal proceeding begun before expiration of his term. Such participation shall not prevent his successor from taking office, but the successor may not participate in the proceeding for which his predecessor's term was extended. This subsection shall apply also to any judicial member whose membership on the Commission is automatically terminated by retirement or resignation from judicial office, or expiration of the term of judicial office. (1971, c. 590, s. 1; 1973, c. 50; 1975, c. 956, s. 13.)

Editor's Note. — Former Article 30, Transitional Matters, comprising §§ 7A-400 and 7A-401, was enacted by Session Laws 1965, c. 310, s. 1, and repealed by Session Laws 1971, c. 377, s. 32, effective Oct. 1, 1971. Sections numbered 7A-400 and 7A-401 were enacted as part of new Article 31 by Session Laws 1971, c. 377, § 1.1.

Session Laws 1971, c. 590, which enacted this article, was made effective upon condition the amendment to N.C. Const., Art. IV, § 17, proposed by Session Laws 1971, c. 560 was approved by the voters. The amendment was approved at the general election held Nov. 2, 1972.

Legal Periodicals. — For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For a note discussing the power of the North Carolina Supreme Court to remove state judges in the context of In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978), see 14 Wake Forest L. Rev. 1187 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

This Article is not unconstitutional because enacted in advance of the ratification of North Carolina Const., Art. IV, § 17, since the General Assembly has power to enact a statute not authorized by the present Constitution where the statute is passed in anticipation of an amendment authorizing it, or provides that it shall take effect upon the adoption of such an amendment. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Article Is Not Unconstitutional Delegation of Authority. — In view of the constitutional mandate in North Carolina Const., Art. IV, § 17(2) that the General Assembly shall prescribe a procedure for the censure and removal of judges in addition to impeachment and address as provided in § 17(1), respondent's contention that the General Assembly in enacting this Article abrogated its legislative duties by unconstitutionally delegating them to the Judicial Standards Commission, a creature of the General Assembly, is without merit. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The Judicial Standards Commission Act, Chapter 7A, Article 30, of the General Statutes, is constitutional and, under that Article, the Supreme Court is vested with jurisdiction to act in a case involving the removal from office of a judge. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

No Violation of Doctrine of Separation of Powers. — By accepting and acting upon the original jurisdiction authorized by the people under N.C. Const., Art. IV, § 17(2) and conferred by the legislature, the Supreme Court does not usurp power constitutionally reserved to another branch of government. Thus, the exercise of such jurisdiction does not violate the constitutional doctrine of separation of powers. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Intent of Article. — By enacting this Article it was the intent of the General Assembly to provide the machinery and prescribe the procedure for the censure and removal of justices and judges for willful misconduct in office, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Commission can neither censure nor remove. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The recommendations of the Commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove, or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

§ 7A-376. Grounds for censure or removal.

Upon recommendation of the Commission, the Supreme Court may censure or remove any judge for willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Upon recommendation of the Commission, the Supreme Court may remove any judge for mental or physical incapacity interfering with the performance of his duties, which is, or is likely to become, permanent. A judge removed for mental or physical incapacity is entitled to retirement compensation if he has accumulated the years of creditable service required for incapacity or disability retirement under any provision of State law, but he shall not sit as an emergency justice or judge. A judge removed for other than mental or physical incapacity receives no retirement compensation, and is disqualified from holding further judicial office. (1971, c. 590, s. 1; 1979, c. 486, s. 2.)

Cross References. — As to censure or removal of a justice of the Supreme Court, see § 7A-378.

Legal Periodicals. — For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For survey of 1976 case law dealing with administrative law, see 55 N.C.L. Rev. 898 (1977).

For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For a note discussing the power of the North Carolina Supreme Court to remove state judges in the context of In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978), see 14 Wake Forest L. Rev. 1187 (1978).

For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

I. General Consideration.
II. Definitions.
III. Illustrative Cases.
A. Wrongful Conduct.
B. Penalty.

I. GENERAL CONSIDERATION.

Terms Not Vague or Overbroad. — The phrases, "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," are not unconstitutionally vague or overbroad. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976).

Nor Too Nebulous or Subjective. — The phrases, "willful misconduct in office" and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," are no more nebulous or less objective than the reasonable and prudent man test which has been a part of State negligence law for

centuries. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Due Process Requirements Met under This Section. — An adjudication of guilt under the provisions of this section meets the requirements of due process since the judge's misconduct must be proved by "clear and convincing evidence." In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Provision for Disqualification from Office within Power of Legislature. — An adjudication of "willful misconduct in office" by the Supreme Court in a proceeding instituted by the Judicial Standards Commission in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence," is equivalent to an adjudication of guilt of "malpractice in any office" as used in North Carolina Const., Art. VI, § 8. Therefore, the legislature acted within its power when it made disqualification from judicial office a consequence of removal for willful misconduct under this section. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L.Ed.2d 297 (1979).

Section 7A-377 in Pari Materia. — The provisions of this section and § 7A-377 are parts of the same enactment, relate to the same class of persons and are aimed at suppression of the same evil. The statutes are therefore in pari materia and must be construed accordingly. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

When this section and § 7A-377 are read together properly they provide that upon recommendation of the Judicial Standards Commission the Supreme Court may censure or remove any justice or judge, may approve or reject the recommendation of the Commission, or may remand the matter for further proceedings. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Conduct Rather Than Motives Determinative. — Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof and the impact such conduct might reasonably have upon knowledgeable observers. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975); In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Proceeding Neither Civil Nor Criminal. — A proceeding instituted by the Judicial Standards Commission, like a removal proceeding under North Carolina Const., Art. IV, § 4, is neither civil nor criminal in nature. A judge removed by impeachment or by the Supreme Court pursuant to the recommendation of the Commission may still be prosecuted in a criminal court. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Supreme Court Sits as Court of Original Jurisdiction. — In proceedings authorized by this section, the Supreme Court sits not as an appellate court but rather as a court of original jurisdiction. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Code of Judicial Conduct Is Guide. — The General Assembly intended the North Carolina Code of Judicial Conduct to be a guide to the meaning of this section. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Distinction Between Removal for Misconduct and for Mental or Physical Incapacity. — The sections of the Constitution providing for the removal of judges by impeachment or joint resolution make a careful distinction between judges removed for misconduct and those removed for "mental or physical incapacity." In following the constitutional mandate to "prescribe a procedure in addition to impeachment and address," the legislature made the same distinction in this section. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Effect of Resignation of Judge Following Filing and Service of Complaint. — The resignation of a district judge following the filing of a complaint against him by the Commission and service upon him of the verified complaint neither divested the Commission of jurisdiction over him nor rendered the question of his removal from office moot. It was immaterial that the judge, by reason of his resignation, was no longer a district court judge at the time the Commission filed its findings of fact and recommendation that he be removed from office with the Supreme Court. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

It would be a travesty if a judge could avoid the full consequences of his misconduct by resigning from office after removal proceedings had been brought against him. According to this argument, it would be possible for an involved judge, at any time before the Commission files its findings and recommendations with the Supreme Court, to bring the proceedings against him to a premature close by submitting his resignation to the Governor, who would accept it without knowledge that charges were pending against the judge. The legislature never intended any such result, and to so interpret this section would emasculate the statute and thwart the legislative intent entirely. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

II. DEFINITIONS.

Willful Misconduct Defined. — Willful misconduct in office is improper and wrong conduct of a judge acting in his official capacity done intentionally, knowingly and, generally, in bad faith. It is more than a mere error of judgment or an act of negligence. While the term would encompass conduct involving moral turpitude, dishonesty or corruption, these elements need not necessarily be present. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Willful misconduct in office is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct, and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Conduct Prejudicial to Administration of Justice That Brings Judicial Office into Disrepute Defined. — Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office. In re Edens, 290 N.C. 299, 226 S.E.2d 5 (1976); In re Stuhl, 292 N.C. 379, 233 S.E.2d 562 (1977).

Willful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute. However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

A judge may commit indiscretions, or worse, in his private life which bring the judicial office into disrepute. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

"Willful Misconduct" and "Conduct Prejudicial to Administration of Justice" Distinguished. — A careful distinction should henceforth be made between "willful misconduct in office" and "conduct prejudicial to the administration of justice." A judge should be removed from office and disqualified from holding further judicial office only for the more serious offense of willful misconduct in office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Conduct prejudicial to the administration of justice, unless knowingly and persistently repeated, is not per se as serious and reprehensible as willful misconduct in office, which is a constitutional ground for impeachment and disqualification for public office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

III. ILLUSTRATIVE CASES.

A. Wrongful Conduct.

Whether a judge receives any personal benefit from his conduct is wholly irrelevant to inquiry into conduct of judicial officer. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975); In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The fact that a judge received no personal benefit, financial or otherwise, from his conduct does not preclude his conduct from being prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

A judge may not escape responsibility for any judgments signed by him by delegating their preparation to counsel or anyone else. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Inexperience or Lack of Training No Excuse. — A trial judge cannot rely on his inexperience or lack of training to excuse acts which tend to bring the judicial office into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Knowing and Willful Persistence in Indiscretion and Misconduct. — If a judge knowingly and willfully persists in indiscretions and misconduct which the Supreme Court has declared to be, or which under the circumstances he should know to be, acts which constitute willful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Disposition of cases for reasons other than an honest appraisal of facts and law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice whenever and however it may be defined or whoever does the defining. In re Crutchfield, 289 N.C. 597, 223

S.E.2d 822 (1975); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The ex parte disposition of a case by a judge for reasons other than an honest appraisal of the law and facts as disclosed by the evidence and the advocacy of both parties to the proceeding amounts to conduct prejudicial to the administration of justice which in due course will bring the judicial office into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Ex parte disposition of a criminal case out of court will amount to conduct prejudicial to the administration of justice. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Judge's disposition of traffic cases out of court and without notice to the prosecuting attorney and in his absence constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that he: (1) improperly deprived the district attorney of the opportunity to participate in their disposition; (2) improperly removed the proceedings from the public domain; and (3) violated Canon 3(A)(4) of the North Carolina Code of Judicial Conduct. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The arbitrary dismissal of a case, after the district attorney had refused to take a nolle prosequi and without permitting the State to offer its evidence, was willful misconduct in office clearly calculated to bring the court into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Failure to Give Notice to Defense Counsel. — Where the only actual notice to defendant's counsel as to the time of a hearing at which judgment was entered against defendant was one hour before the trial judge began to receive evidence, this conduct did not afford the defendant or his counsel full right to be heard according to law and was, in effect, a willful ex parte consideration of the proceeding without proper legal notice to defendant or his counsel. Such conduct constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Gross Abuse of Motor Vehicle Statutes Amounting to Prejudicial Conduct. — Judge's execution judgments allowing limited driving privileges under § 20-179 upon a mere ex parte request without making any effect or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the judgments were supported neither in fact nor in law and were beyond the judge's jurisdiction to enter constituted a gross abuse of important provisions of the motor vehicle statutes and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

Signing Order for Delivery of Property without Notice or Opportunity To Be Heard. — The conduct of a judge in signing an order for delivery of personal property without notice to defendant or his counsel and without giving opposing party or counsel an opportunity to be heard constituted willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Use or Retention of Money Received for Purpose of Paying Defendant's Fine. — If a judge is indiscreet enough to take money for the purpose of paying a defendant's fine and costs he should forthwith pay it to the clerk of the court. Any use or retention of such funds, whether it be inadvertently, forgetfully, or because the judge is short of cash and intends to apply the money eventually to the purpose for which it was received, if not criminal — is willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Conduct Held Willful Misconduct and Conduct Prejudicial to Administration of Justice. — A district court judge was guilty of willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that: (1) he consistently and improperly precluded the district attorney from participating in the disposition of cases on which he was entitled to be heard in behalf of the State, and removed the disposition of cases from public view in open court by transacting the court's business in secrecy; (2) he dismissed cases without a trial, in the absence of the defendant, without the knowledge of the district attorney, and on a day when the cases were not calendared for trial; (3) he maintained a special file in three counties, caused the clerk to remove certain cases from the active criminal docket and to be held in the files until he directed otherwise, and in consequence these cases were not tried speedily or calendared and disposed of in open court in the normal course of business in the district courts of the respective counties; (4) from time to time he paid to the clerk money which he had collected from the defendants in cases which he disposed of in their absence; that in two cases he received $27.00 from each of two defendants for the purpose of paying his fine and costs when he disposed of his case; that he never "took care of the case," never paid the fine and costs and

never returned the money; that in a third such case, he returned the $27.00 after keeping it 11 months. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

B. Penalty.

Strict Guidelines as to Censure or Removal Not Desirable. — Strict guidelines for determining whether a judge or justice should be censured or removed should not be adopted since each case should be decided upon its own facts. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Censure Is Not Punishment. — Albeit serious, censure and removal are not to be regarded as punishment but as the legal consequences attached to adjudged judicial misconduct or unfitness. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Any Conduct Prejudicial to Administration of Justice Warrants Censure. — Any act by a judge or justice which is prejudicial to the administration of justice and brings the judicial office into disrepute warrants censure. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Financial Gain, Moral Turpitude or Corruption. — Where a judge's misconduct involves personal financial gain, moral turpitude or corruption, he should be removed from office. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978); In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The Commission can neither censure nor remove. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Commission can neither censure nor remove a judge. It is an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. To that end, it is authorized to investigate complaints, hear evidence, find facts, and make a recommendation thereon. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The recommendations of the Commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978); In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

When Judge May De Disqualified from Future Office. — When a judge is removed for "mental or physical incapacity" upon the recommendation of the Judicial Standards Commission, the remedy allowed by statute is limited to removal from office. On the other hand, when a judge is removed for reasons other than incapacity, this section (like the Const., Art. IV, § 17 provision it was intended to supplement), provides for both removal and disqualification from future judicial office. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Loss of Retirement Benefits Is Additional Sanction. — In addition to the sanctions which follow removal by impeachment (loss of office and disqualification to hold further judicial office), this section imposes an additional sanction, the loss of retirement benefits. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

The constitutional source for the remedy of loss of retirement benefits does not lie in the impeachment provisions of North Carolina Const., Art. IV, § 4, but in section 8 of that same article, which gives the General Assembly the power to "provide by general law for the retirement of Justices and Judges." Under this power the General Assembly may condition retirement benefits upon good conduct in office. Thus, it acted well within its constitutional authority when it provided in this section that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Right to Recover Contributions to Retirement Fund. — Loss of retirement benefits as the result of the removal of a judge from office for cause other than mental or physical incapacity does not mean that the judge forfeits his right to recover the contributions which he paid into the fund. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

Remedies Not Mooted by Resignation. — If this section limited the sanctions for willful misconduct in office to censure or removal, the resignation of a judge would render the proceedings moot. The statue, however, envisions not one but three remedies against a judge who engages in serious misconduct justifying his removal: loss of present office, disqualification from future judicial office, and loss of retirement benefits. Only the first of these is rendered moot by resignation. In re Peoples, 296 N.C. 109, 250 S.E.2d 890 (1978), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 297 (1979).

§ 7A-377. Procedures; employment of executive secretary, special counsel or investigator.

(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission is authorized to issue process to compel the attendance of witnesses and the production of evidence, to administer oaths, to punish for contempt, and to prescribe its own rules of procedure. No justice or judge shall be recommended for censure or removal unless he has been given a hearing affording due process of law. All papers filed with and proceedings before the Commission are confidential, unless the judge involved shall otherwise request. The recommendations of the Commission to the Supreme Court, and the record filed in support of the recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. No other publication of such testimony or evidence is privileged, except that the record filed with the Supreme Court continues to be privileged. At least five members of the Commission must concur in any recommendation to censure or remove any justice or judge. A respondent who is recommended for censure or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if he has objections to it, to have the record settled by the Commission. He is also entitled to present a brief and to argue his case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

(b) The Commission is authorized to employ an executive secretary to assist it in carrying out its duties. For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel. For specific cases the Commission may also employ an investigator or call upon the Director of the State Bureau of Investigation to furnish an investigator. While performing duties for the Commission such executive secretary, special counsel or investigator shall have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice. (1971, c. 590, s. 1; 1973, c. 808.)

Legal Periodicals. — For note on the Judicial Standards Commission, see 54 N.C.L. Rev. 1074 (1976).

For a survey of 1977 law on professional responsibility and the administration of justice, see 56 N.C.L. Rev. 871 (1978).

For a note discussing the power of the North Carolina Supreme Court to remove state judges in the context of In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978), see 14 Wake Forest L. Rev. 1187 (1978).

CASE NOTES

Commission's procedures are required to meet constitutional due process standards since a judge's interest in continuing in public office is an individual interest of sufficient importance to warrant constitutional protection against deprivation. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Because of the severe impact which adverse findings by the Judicial Standards Commission and censure or removal by the Supreme Court may reasonably be expected to have upon the individual, fundamental fairness entitles the judge to a hearing which meets the basic requirements of due process. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Due Process Not Violated by Commission's Functions. — The combination of investigative and judicial functions in the Judicial

Standards Commission does not violate a respondent's due process rights under either the federal or North Carolina Constitutions since it is an administrative agency created as an arm of the court, and any alleged partiality of the Commission is cured by the final scrutiny of the Supreme Court. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Section 7A-376 in Pari Materia. — The provisions of this section and § 7A-376 are parts of the same enactment, relate to the same class of persons and are aimed at suppression of the same evil. The statutes are therefore in pari materia and must be construed accordingly. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

A proceeding begun before the Judicial Standards Commission is neither a civil nor a criminal action. Such a proceeding is merely an inquiry into the conduct of one exercising judicial power to determine whether he is unfit to hold a judgeship. Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The function of the Commission is to conduct hearings upon complaints filed against judges and justices, to find facts and make recommendations so as to bring before the Supreme Court the questions of whether a judge or justice should be censured or removed in order to maintain proper administration of justice, public confidence in the judicial system and the honor and integrity of judges. In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

Article Does Not Vest Absolute Discretion in Commission. — There is no merit in the contention that this Article illegally vests unguided and absolute discretion in the Judicial Standards Commission to choose which complaints to investigate and what evidence it will accept. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

The quantum of proof required in proceedings before the Judicial Standards Commission of this State is proof by clear and convincing evidence — a burden greater than that of proof of a preponderance of the evidence and less than that of proof beyond a reasonable doubt. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977); In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

The Commission can neither censure nor remove. It functions as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The recommendations of the Commission are not binding upon the Supreme Court, which will consider the evidence on both sides and exercise its independent judgment as to whether it should censure, remove, or decline to do either. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

Nature of Proceeding upon Recommendation of Commission. — A proceeding before the Supreme Court on the recommendation of the Judicial Standards Commission is neither criminal nor civil in nature, but is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system and the honor and integrity of its judges. In re Crutchfield, 289 N.C. 597, 223 S.E.2d 822 (1975).

The scope of Supreme Court review in a judicial qualifications proceeding should be that of an independent evaluation of the evidence. In re Nowell, 293 N.C. 235, 237 S.E.2d 246 (1977).

Court's Options in Disposing of Commission Recommendation. — When this section and § 7A-376 are read together properly, they provide that upon recommendation of the Judicial Standards Commission the Supreme Court may censure or remove any justice or judge, may approve or reject the recommendation of the Commission, or may remand the matter for further proceedings. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

This section and § 7A-376 authorize and empower the Supreme Court, unfettered in its adjudication by the recommendation of the Commission, to make the final judgement whether to censure, remove, remand for further proceedings or dismiss the proceeding. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

The Supreme Court is authorized and empowered to order the removal of a judge when the Judicial Standards Commission has only recommended that the judge be censured. In re Hardy, 294 N.C. 90, 240 S.E.2d 367 (1978).

§ 7A-378. Censure or removal of justice of Supreme Court.

(a) The recommendation of the Judicial Standards Commission for censure or removal of any justice of the Supreme Court for any grounds provided by G.S. 7A-376 shall be made to, and the record filed with, the Court of Appeals, which shall have and shall proceed under the same authority for censure or

removal of any justice as is granted to the Supreme Court under G.S. 7A-376 and 7A-377(a) for censure or removal of any judge.

(b) The proceeding shall be heard by a panel of the Court of Appeals consisting of the Chief Judge, who shall be the presiding judge of the panel, and six other judges, the senior in service, excluding the judge who is chairman of the commission. For good cause, a judge may be excused by a majority of the panel. If the Chief Judge is excused, the presiding judge shall be designated by a majority of the panel. The vacancy created by an excused judge shall be filled by the judge of the court who is next senior in service. (1979, c. 486, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§§ 7A-379 to 7A-399: Reserved for future codification purposes.

Article 31.

Judicial Council.

§ 7A-400. Establishment and membership.

A Judicial Council is hereby created which shall consist of the Chief Justice of the Supreme Court or some other member of that Court designated by him, the Chief Judge of the Court of Appeals or some other member of that Court designated by him, two judges of the superior and one judge of the district court designated by the Chief Justice, the Attorney General or some member of his staff designated by him, two district attorneys of the superior court designated by the Chief Justice, and 10 additional members, two of whom shall be appointed by the Governor, two by the President of the senate from among the members of the Senate, two by the Speaker of the House of Representatives from among the members of the House and four by the Council of the North Carolina State Bar. All appointive members of the Judicial Council shall be selected on the basis of their interest in and competency for the study of law reform. The four members to be appointed by the Council of the North Carolina State Bar shall be active practitioners in the trial and appellate courts. (1949, c. 1052, s. 1; 1953, c. 74, s. 1; 1969, c. 1015, s. 1; 1971, c. 377, s. 1.1; 1973, c. 47, s. 2.)

Editor's Note. — Sections 7A-400 to 7A-408 were formerly §§ 7-448 through 7-456. They were transferred to their present position by Session Laws 1971, c. 377, s. 1.1. Former §§ 7A-400 and 7A-401, which were added by Session Laws 1965, c. 310, s. 1, and constituted Article 30 of this Chapter, Transitional Matters, were repealed by Session Laws 1971, c. 377, s. 32.

§ 7A-401. Terms of office.

Members of the Council shall hold office for the following terms:

(1) If he designates no other member of the Supreme Court, the Chief Justice during his term of office.

(2) If he designates no other member of the Court of Appeals, the Chief Judge during his term of office.

(3) If he designates no member of his staff, the Attorney General during his term of office.

(4) All other members shall hold office from the time of their designation or appointment until June 30th of the next odd-numbered year. Those authorized to designate or appoint members to the Council shall make such designation or appointment to take effect on July 1st of each odd-numbered year or as soon thereafter as practicable. Any member is eligible for redesignation or reappointment provided he continues to have the qualifications prescribed in G.S. 7A-400. (1949, c. 1052, s. 2; 1953, c. 74, ss. 2, 3; 1969, c. 1015, ss. 2-4; 1071, c. 377, s. 1.1.)

§ 7A-402. Vacancy appointments.

Vacancies shall be filled for the remainder of any term in the same manner as the original appointment. (1949, c. 1052, s. 3; 1971, c. 377, s. 1.1.)

§ 7A-403. Chairman of Council.

The member from the Supreme Court shall serve as chairman of the Council. (1949, c. 1052, s. 4; 1971, c. 377, s. 1.1.)

§ 7A-404. Meetings.

The Council shall meet at least once each quarter of the calendar year, or more often at the call of the chairman. (1949, c. 1052, s. 5; 1971, c. 377, s. 1.1.)

§ 7A-405. Duties of Council.

It is the duty of the Judicial Council:

(1) To make a continuing study of the administration of justice in this State, and the methods of administration of each and all of the courts of the State, whether of record or not of record.

(2) To receive reports of criticisms and suggestions pertaining to the administration of justice in the State.

(3) To recommend to the legislature, or the courts, such changes in the law or in the organization, operation or methods of conducting the business of the courts, or with respect to any other matter pertaining to the administration of justice, as it may deem desirable. (1949, c. 1052, s. 6; 1971, c. 377, s. 1.1.)

§ 7A-406. Annual report; submission of recommendations.

The Council shall annually file a report with the Governor. The Council shall submit any recommendations it may have for the improvement of the administration of justice to the Governor, who shall transmit the same to the General Assembly. (1949, c. 1052, s. 7; 1971, c. 377, s. 1.1.)

§ 7A-407. Compensation of members.

The members of the Council shall be paid the sum of seven dollars ($7.00) per day and such necessary travel expenses and subsistence as may be incurred. (1949, c. 1052, s. 8; 1971, c. 377, s. 1.1.)

§ 7A-408. Executive secretary; stenographer or clerical assistant.

The Council and the Chief Justice of the Supreme Court, by and with the advice, consent and approval of the Governor and Council of State, may employ an executive secretary who shall be a licensed attorney and fix his salary and

also may employ a stenographer or clerical assistant and fix his or her salary. Said salaries shall be paid out of the Contingency and Emergency Fund. The executive secretary shall perform such duties as the Council may assign to him. When not actively engaged in the discharge of duties assigned to him by said Council, he shall perform such duties as the Chief Justice may assign to him. (1949, c. 1052, s. 9; 1953, c. 1111, ss. 1, 2; 1957, c. 1417; 1971, c. 377, s. 1.1.)

SUBCHAPTER VIII.

ARTICLES 32 TO 35.

§§ 7A-409 to 7A-449: Reserved for future codification purposes.

SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

ARTICLE 36.

Entitlement of Indigent Persons Generally.

§ 7A-450. Indigency; definition; entitlement; determination; change of status.

(a) An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter. An interpreter is a necessary expense as defined in Chapter 8A of the General Statutes for a deaf person who is entitled to counsel under this subsection.

(b) Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation. The professional relationship of counsel so provided to the indigent person he represents is the same as if counsel had been privately retained by the indigent person.

(c) The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation.

(d) If, at any stage in the action or proceeding, a person previously determined to be indigent becomes financially able to secure legal representation and provide other necessary expenses of representation, he must inform the counsel appointed by the court to represent him of that fact. In such a case, that information is not included in the attorney client privilege, and counsel must promptly inform the court of that information. (1969, c. 1013, s. 1; 1981, c. 409, s. 2; c. 937, s. 3.)

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, added subsection (d).

The second 1981 amendment, effective Oct. 1, 1981, added the second sentence of subsection (a).

Session Laws 1981, c. 937, s. 4, provides that the act applies to all trial court, legislative, or administrative proceedings initiated or in process on or after October 1, 1981.

Legal Periodicals. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

For a note on providing indigent criminal

defendants state-paid investigators, see 13 Wake Forest L. Rev. 655 (1977).

For note on an indigent's constitutional right to a state-paid expert, see 16 Wake Forest L. Rev. 1031 (1980).

CASE NOTES

I. General Consideration.
II. Appointment of Counsel.
III. Appointment of Experts.
IV. Furnishing Transcripts.

I. GENERAL CONSIDERATION.

Legislative Intent. — This Article clearly manifests the legislative intent that every defendant in a criminal case, to the limit of his ability to do so, shall pay the cost of his defense. It is not the public policy of this State to subsidize any portion of a defendant's defense which he himself can pay. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Responsibility of State. — It is manifest that the State has the responsibility to provide an indigent defendant with the effective assistance of counsel and the other necessary resources which are incident to presenting a defense in a criminal prosecution. State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, — U.S. —, 101 S. Ct. 1731, 68 L. Ed. 220 (1981).

Who Is Indigent. — An indigent is not one who lacks sufficient funds over and above his homestead and personal property exemptions and his preexisting debts and obligations to pay the total costs of his defense from beginning to end. An indigent is one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

The court makes the final determination of indigency, and this may be determined or redetermined by the court at any stage of the proceeding at which the indigent is entitled to representation. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

Applied in State v. Cradle, 13 N.C. App. 120, 185 S.E.2d 35 (1971); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633 (1972).

Quoted in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); State v. Hardy, 293 N.C. 105, 235 S.E 2d 828 (1977).

Cited in State v. Sanders, 294 N.C. 337, 240 S.E.3d 788 (1978).

II. APPOINTMENT OF COUNSEL.

Right to Counsel Attaches upon Determination of Indigency. — If a defendant is determined to be indigent, he is entitled to have counsel provided by the State to represent him during any critical stage of the action or proceeding. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

The requirement that the State furnish counsel to each defendant charged with a criminal offense beyond the class of petty misdemeanor is conditioned upon a showing of indigency and inability to procure counsel for that reason. State v. Turner, 283 N.C. 53, 194 S.E.2d 831 (1973).

Where a defendant is charged with a felony or a serious misdemeanor, it is the duty of the trial judge to (1) settle the question of indigency, and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

Determination of Right to More Than One Lawyer. — An indigent defendant's right to court-appointed counsel does not include the right to require the court to appoint more than one lawyer unless there is a clear showing that the first appointed counsel is not adequately representing the interests of the accused. In making that determination the legitimate interest that the state has in securing the best utilization of its legal resources must be considered along with the interests of the defendant. State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, — U.S. —, 100 S. Ct. 3050, 65 L. Ed. 2d 1137, rehearing denied, — U.S. —, 101 S. Ct. 41, 65 L. Ed. 2d 1181 (1980); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, — U.S. —, 101 S. Ct. 1731, 68 L. Ed. 2d 220 (1981).

Appointment of Counsel for Limited Purpose Where Defendant Conducts Own Defense. — Defendant was not prejudiced in any respect by the appointment of counsel for

the limited purpose of furnishing advice to him if so requested, even though defendant did waive counsel and conducted his own defense. State v. Harper, 21 N.C. App. 30, 202 S.E.2d 795, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

Right Is Limited to Direct Appeals Taken as of Right. — Section 7A-450 et seq. has generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right, not discretionary appeals. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

Defendant Not Indigent at Time of Arrest and Interrogation. — The record affirmatively disclosed that at the time of his interrogation on the morning of his arrest defendant had funds, immediately available and adequate, with which to employ counsel to provide the legal advice he then needed. His ability to pay the costs of subsequent proceedings was not then a question. That was a matter to be determined when that question arose. The admissibility of defendant's statements to the officers was not, therefore, affected by this article. The statements were competent evidence and defendant's assignments of error relating to their admission are overruled. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

At the time of defendant's arrest, according to his sworn statement, he had $160 in the bank. The Supreme Court took judicial notice that for a fee of less than $160 defendant could have obtained counsel for the purpose of advising him with reference to the course of conduct which would serve his best interest at that time. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

The trial court erred in failing to determine defendant's indigency and to appoint counsel for him until after he had entered his plea and the jury had been selected, sworn and empaneled. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

The trial court erred in finding that defendant was not an indigent and in refusing to appoint counsel to represent her at her preliminary hearing on a felony charge where defendant's affidavit of indigency stated that she had no income, no money and no property except a 1958 automobile which was paid for, and that she had three children, an unemployed husband and owed $3,000, and nothing in the record refuted or contradicted the import of defendant's affidavit of indigency. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 499 (1972).

In a prosecution for the capital crime of rape, the trial court erred in finding that defendant was not indigent and could employ counsel at the time he confessed and that he, therefore, could not invoke the former provision of § 7A-457 that counsel could not be waived in a capital case, where the evidence before the court disclosed that when arrested defendant was earning $149.00 per month, that he had $5.00 in cash, an automobile on which $56.00 per month was due, and two bonds costing $18.75 each which were in his mother's possession, that his stepfather earned $9,000 per year and had a wife and eleven children other than defendant, and that any contribution the stepfather might make would have to be borrowed. State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972).

The fact that the defendant was a painter capable of earning $60.00 per week when he was able to obtain work and that he had made little, if any, effort to secure counsel either privately or by court appointment, was not sufficient to sustain a finding that he was not indigent at the time of trial, and, therefore, not entitled to a court-appointed attorney when it was requested at the trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Denial of counsel without evidence to support a finding of nonindigency entitles defendant to a new trial. State v. Haire, 19 N.C. App. 89, 198 S.E.2d 31 (1973).

Waiver of counsel may not be presumed from a silent record. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

III. APPOINTMENT OF EXPERTS.

Discretion of Trial Judge. — This section and the better reasoned decisions place the question of whether an expert should be appointed at State expense to assist an indigent defendant within the sound discretion of the trial judge. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

The appointment of experts to assist an indigent in his defense depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977); State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979).

When Right to Investigator Arises. — This section has never been construed to extend to the employment of an investigator in the absence of a showing of a reasonable likelihood that such an investigator could discover evidence favorable to the defendant. State v. Montgomery, 291 N.C. 91, 229 S.E.2d 572 (1976); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

Denial of a state-paid private investigator to an indigent defendant under subsection (b) of this section does not, ipso facto, constitute a denial of equal protection of the laws, notwithstanding that such investigators might be available to indigent defendants represented by public defenders under § 7A-468, and to

pecunious defendants. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

Subsection (b) of this section and § 7A-454 require that private investigators or expert assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the State nor the federal Constitution requires more. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977); State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978).

An indigent defendant's constitutional and statutory right to a state appointed investigator arises only upon a showing by defendant that there is a reasonable likelihood that such an investigator would discover evidence which would materially assist defendant in the preparation of his defense. State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979); State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

The statutory plan established in this section and § 7A-454 and the plan of § 7A-468 for State provision of investigative or expert assistance are substantially equivalent. In neither case is a defendant entitled to an investigator at State expense upon demand. In both instances he is entitled to a state-appointed investigator when he has made a showing of need sufficient to convince a public official, in the exercise of his discretion, that those services are necessary to a fundamentally fair trial. There is then no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of state-provided investigative assistance. Therefore, the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

Psychiatric Examination Two and One-Half Years after Incident. — It was within the exercise of his discretion for the court to find that a psychiatric examination two and one-half years after the shooting incident would not materially assist the indigent defendant in showing his mental condition at the time of the incident. State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978).

Additional Psychiatric Evaluation. — Where there was no evidence presented in the motion to have a court appointed psychiatrist under this section, or at the hearing on the motion to support even a suspicion, much less a reasonable likelihood, that defendant could establish a meritorious defense of insanity, the court's refusal to require the state to pay for an additional psychiatric evaluation was not error. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

IV. FURNISHING TRANSCRIPTS.

An indigent appellant is entitled to receive a copy of the trial transcript at State expense in order to perfect an appeal. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971), appeal dismissed, 280 N.C. 304, 186 S.E.2d 179 (1972).

Burden of Proving Inadequacy of Alternatives to Transcript. — A defendant who claims the right to a free transcript does not bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight. Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

An indigent defendant was not entitled, as a matter of right, to a daily transcript of his trial. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971), appeal dismissed, 280 N.C. 304, 186 S.E.2d 179 (1972).

There was no deprivation of a substantial constitutional right by denial of an indigent defendant's motion that he be provided a daily transcript of the testimony during the trial where defendant could not show that he would be deprived of an opportunity to receive adequate review. State v. Rich, 13 N.C. App. 60, 185 S.E.2d 288 (1971), appeal dismissed, 280 N.C. 304, 186 S.E.2d 179 (1972).

A daily transcript is not a necessary expense of representation which the State is required to provide an indigent defendant under this section. State v. Phillips, 300 N.C. 678, 268 S.E.2d 452 (1980).

Substantially Equivalent Alternative to Transcript. — Where the trials of a case took place in a small town, and according to defendant's counsel, the court reporter was a good friend of all the local lawyers and was reporting the second trial, and it appeared that the reporter would at any time have read back to counsel his notes of the mistrial, well in advance of the second trial, if counsel had simply made an informal request, the defendant could have obtained from the court reporter far more assistance than that available to the ordinary defendant, and consequently he had available an informal alternative which appears to be substantially equivalent to a transcript. Thus the State court properly determined that the mistrial transcript requested was not needed for a proper defense. Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

§ 7A-451. Scope of entitlement.

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;

(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;

(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;

(4) A hearing for revocation of probation;

(5) A hearing in which extradition to another state is sought;

(6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentally Ill Criminals) or the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5A of Chapter 122 of the General Statutes;

(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;

(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;

(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;

(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and

(11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;

(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;

(13) A proceeding to find a person incompetent under Chapter 35, Article 1A, of the General Statutes;

(14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7A-289.23;

(15) An action brought pursuant to Article 24B of Chapter 7A of the General Statutes to terminate an indigent person's parental rights.

(b) In each of the actions and proceedings enumerated in subsection (a) of this section, entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding, including, if applicable:

(1) An in-custody interrogation;

(2) A pretrial identification procedure which occurs after formal charges have been preferred and at which the presence of the indigent is required;

(3) A hearing for the reduction of bail, or to fix bail if bail has been earlier denied;

(4) A preliminary hearing;

(5) Trial and sentencing; and

(6) Review of any judgment or decree pursuant to G.S. 7A-27, 7A-30(1), 7A-30(2), and Subchapter XIV of Chapter 15A of the General Statutes.

(1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 3; c. 616; c. 726, s. 4; c. 1116,

s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 711, ss. 7, 8; c. 725, s. 2; 1979, 2nd Sess., c. 1206, s. 3; 1981, c. 966, s. 4.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Chapter 108, Article 4, referred to in subsection (a) of this section, was rewritten by Session Laws 1975, c. 797, and recodified as Chapter 108, Article 4A (§§ 108-102 to 108-106.8). Chapter 108 was repealed in its entirety by Session Laws 1981, c. 275, which enacted a new Chapter 108A. Chapter 122, Article 7, referred to in subsection (a) of this section, was repealed by Session Laws 1973, c. 726 and Session Laws 1977, c. 738. See now Chapter 122, Article 5A.

Article 7 of Chapter 122, referred to in subdivision (6) of this section, was repealed by Session Laws 1973, c. 726, s. 2 and Session Laws 1977, c. 738, s. 2. As to involuntary commitment, see § 122-58.1 et seq.

Article 23 of Chapter 7A, referred to in subdivision (12) of this section, was repealed by Session Laws 1979, c. 815, s. 1, effective Jan. 1, 1980. As to the North Carolina Juvenile Code, see §§ 7A-516 through 7A-732.

Effect of Amendments. — The 1979, 2nd Sess., amendment, ratified June 24, 1980, and effective 60 days after ratification, added subdivision (14) to subsection (a).

Session Laws 1979, 2nd Sess., c. 1206, s. 6, provides that the act shall not apply to any action brought prior to its effective date.

The 1981 amendment added subdivision (15) of subsection (a).

Session Laws 1981, c. 966, s. 5, provides: "This act shall become effective 30 days after ratification and shall only apply to cases brought on or after the effective date." The act was ratified July 10, 1981.

Legal Periodicals. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

For survey of 1972 case law on the right to counsel for the "undisciplined child," see 51 N.C.L. Rev. 1023 (1973).

For note discussing the right to counsel on discretionary appeal, see 53 N.C.L. Rev. 560 (1974).

For a survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

CASE NOTES

I. General Considerations.
II. Right to Counsel in Particular Actions.
III. Right to Counsel at Critical Stages of Proceedings.
A. In-Custody Interrogation.
B. Pretrial Identification.
C. Preliminary Hearing.

I. GENERAL CONSIDERATIONS.

History of Section. — See Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

An indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972).

And Is Not Entitled to Have Court Appoint Counsel of His Own Choosing. — An indigent is entitled to have the court appoint competent counsel to represent him at his trial, but he is not entitled to have the court appoint counsel of his own choosing or to have the court change his counsel in the middle of the trial. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972).

Clearly, and for cogent reasons, an indigent defendant is not entitled to have the court appoint counsel of his own choosing. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

Dissatisfaction with Court-Appointed Counsel. — An expression of an unfounded dissatisfaction with his court-appointed counsel does not entitle defendant to the services of another court-appointed attorney. State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972).

Confessions Made Without Counsel — Admission Held Error. — The trial court erred in the admission of a confession made by defendant in a prosecution for the capital crime of rape at a time when he was indigent and without counsel. State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972).

Same — Waiver of Counsel. — Undisputed evidence on the voir dire examination fully supported the findings by the trial court to the effect that the defendant voluntarily went to the police station, waived in writing his right to counsel and his right to remain silent, voluntarily, with full understanding of his rights and while not under arrest, made, in the presence of his parents, the oral confession, which was subsequently reduced to writing, and voluntarily signed the written statement of it. Under these circumstances, there was no error in the admission in evidence of either the written confession or the written waiver. State v. Williams, 279 N.C. 515, 184 S.E.2d 282 (1971).

Same — Minor May Waive Counsel. — A minor who has arrived at the age of accountability for crime may waive counsel in the manner provided by law and make a voluntary confession without the presence of either counsel or an adult member of his family, provided he fully understands his constitutional rights and the meaning and consequences of his statement. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Applied in State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Sadler, 40 N.C. App. 22, 251 S.E.2d 902 (1979).

Quoted in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); State v. Lee, 40 N.C. App. 165, 252 S.E.2d 225 (1979).

Stated in State v. McKenzie, 46 N.C. App. 34, 264 S.E.2d 391 (1980).

Cited in State v. Butcher, 10 N.C. App. 93, 177 S.E.2d 924 (1970); State v. Jenkins, 12 N.C. App. 387, 183 S.E.2d 268 (1971); Farrington v. North Carolina, 391 F. Supp. 714 (M.D.N.C. 1975); State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978); State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978); State v. Wall, 49 N.C. App. 672, 272 S.E.2d 152 (1980).

II. RIGHT TO COUNSEL IN PARTICULAR ACTIONS.

Purpose of Subdivision (a)(1). — A joint review of legislative history and case law developments in the area of the Sixth Amendment right to appointed counsel leaves no doubt that the purpose of subdivision (a)(1) of this section is to state the scope of an indigent's entitlement to court appointed counsel in criminal cases subject to Sixth Amendment limitations. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

Determining Whether Offense Is Petty or Serious. — Whether an offense is petty or serious is measured, in both State and federal courts, by the punishment authorized by law for the particular offense in question. State v. Green, 277 N.C. 188, 176 S.E.2d 756 (1970); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971). (The above cases were decided prior to the 1973 amendments to this section — Ed. note.)

The provisions of subdivision (a)(1) have application only to criminal cases. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

Revocation of Suspended Sentence. — Subsection (a) would apply to revocation of a suspended sentence. State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977).

There was no prejudice to the defendant when he was not appointed counsel prior to a revocation of sentence hearing in district court where upon his appeal of the district court order he was awarded a trial de novo in superior court, and counsel was appointed for him in the superior court in ample time to prepare for his defense. State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977).

Misdemeanor Charge — Admissibility of Statements in Subsequent Felony Prosecution. — Statements made by an indigent defendant to the arresting officer without benefit of counsel were admissible in a first degree murder prosecution where defendant had been arrested only for a petty misdemeanor when the statements were made and the officer had no knowledge that a capital felony had been committed, since at all times pertinent to the statements, the indigent was charged with a petty misdemeanor and was not entitled to the services of counsel at the State's expense. State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972), decided prior to the 1973 amendments to this section.

Consolidated Trial of Two Petty Offenses. — The State's duty to furnish counsel does not extend to include those cases consolidated for trial in which an individual is charged with more than one petty offense. State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971), decided prior to the 1973 amendments of this section.

Possibility of Incarceration Shown. — Where eleven charges were made against defendant, six for issuing worthless checks in amounts below $50.00 and five for checks in amounts above $50.00, the indigent defendant was entitled to court-appointed counsel under subsection (a)(1) since, upon his fourth conviction for any of the charges against him, defendant could have been incarcerated for as long as two years as a general misdemeanant. Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973), decided prior to the 1973 amendments to this section.

Representation As Matter of Right on Felony Charge. — An indigent charged with a felony is entitled to representation by counsel as a matter of right, and the right to counsel includes the right of counsel to consult with witnesses and to prepare a defense. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479, cert.

denied, 281 N.C. 157, 188 S.E.2d 366 (1972), decided prior to the 1973 amendments to this section.

The right to free counsel provided by the legislature survives the release of a debtor upon the expiration of 72 hours (see § 23-30.1), even if the creditor has not insisted on an adversary hearing at that time. In such a situation the question of indigency and the other side of the coin — concealment or diversion of assets — is unresolved. The debtor contends he is indigent, and the creditor may later choose to insist that he is concealing assets. The clerk or a judge under such circumstances must make a provisional determination of whether the debtor can provide his own counsel and upon a finding of apparent indigency, one should be appointed for him at the expense of the State. Grimes v. Miller, 429 F. Supp. 1350 (M.D.N.C.), aff'd, 434 U.S. 978, 98 S. Ct. 600, 54 L. Ed. 2d 473 (1977).

No Right to Counsel at Hearing on Initial Petition Alleging Child to Be Undisciplined. — Subsection (a)(8) does not afford a child the right to counsel at the hearing on the initial petition alleging him to be an undisciplined child, where a hearing could not result in his commitment to an institution in which his freedom would be curtailed. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

No Right in Civil Contempt Proceedings. — This section does not grant to indigent persons the right to be represented by appointed counsel in civil contempt proceedings. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

This section does not cover appointment of counsel in federal habeas corpus or State or federal civil rights actions, all of which are encompassed by the constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977).

There is no constitutional right to appointed counsel to seek discretionary review in either a State forum or the United States Supreme Court. Morgan v. Yancy County Dep't of Cors., 527 F.2d 1004 (4th Cir. 1975).

And Failure to Appoint Counsel for Defendant Seeking Discretionary Review Does Not Violate Constitution. — A defendant is not denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking discretionary review in that court. At that stage he will have a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and often an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make pro se, would appear to provide the Supreme Court of North Carolina with an adequate basis on which to base its decision to grant or deny review. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

The duty of the State is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).

III. RIGHT TO COUNSEL AT CRITICAL STAGES OF PROCEEDINGS.

A. In-Custody Interrogation.

The entitlement to counsel begins as soon as possible after the defendant is taken into custody and continues through any critical stage of the proceeding, including an in-custody interrogation. State v. Jackson, 12 N.C. App. 566, 183 S.E.2d 812 (1971).

In-custody interrogation is a critical stage in the proceeding, at which time the defendant is entitled to counsel. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

The standard for determining when an "in-custody interrogation" occurs under this section is a question of State law which is not inextricably linked to the evolving federal standard for an "in-custody interrogation" actionable under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976).

Custodial interrogation means questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

And Where There Was No "In-Custody Interrogation" Counsel Was Not Required. — Where it was clear that defendant was in custody, but equally clear that no statements were made as a result of questions from the police officers and that statements made by defendant were volunteered, the Supreme Court held that there was no "in-custody interrogation"; thus the presence of counsel was not required, and the trial judge correctly admitted into evidence the statements made by defendant. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

Since Voluntary Statements Are Not Barred. — The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police

without benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, State or federal. And a voluntary in-custody statement does not become the product of an "in-custody interrogation" simply because an officer, in the course of defendant's narration, asks defendant to explain or clarify something he has already said voluntarily. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Where defendant's narrative confession was not the result of an in-custody interrogation, even though his indigency be assumed, the presence of counsel was not required at that time. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Defendant Indigent on Day of Interrogation Has Right to Counsel. — If defendant is indigent on the day of the interrogation, he is entitled to the services of counsel at the interrogation. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

When Article Renders Statements Made on Interrogation Inadmissible. — If, at the time of his custody interrogation, defendant was indigent and had not signed a written waiver of counsel, this Article renders the statements made on interrogation inadmissible; and this is true whether the evidence offered to prove them be the testimony of a witness who was present or a sound recording of the interrogation itself. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Admission of Statement Where Defendant Had Previously Testified to Same Facts While Represented by Counsel. — Admission over objection of an in-custody statement made by defendant without the presence of counsel was harmless error where defendant, while represented by counsel, had testified to the same facts at the trial of his alleged accomplice. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652, death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1972).

B. Pretrial Identification.

Accused Is Entitled to Counsel at Pretrial In-Custody Lineup. — A pretrial in-custody lineup for identification purposes is a critical stage in the proceedings, and an accused so exposed is entitled to the presence of counsel. State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972).

But Not When Eyewitnesses Are Viewing Photographs for Purposes of Identification. — A suspect has no constitutional right to the presence of counsel when eyewitnesses are viewing photographs for purposes of identification, and this is true regardless of whether he is at liberty or in custody at the time. Such pretrial identification procedure is not a critical stage of the proceeding. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972).

Counsel Required at Pretrial Identification Proceedings Only after Formal Charges Preferred. — The General Assembly amended subdivision (b)(2) to require counsel for indigents at pretrial identification proceedings only after formal charges have been preferred and at which the presence of the indigent was required. This amendment apparently stems from the holding in Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972). State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Waiver of Right. — One who, under § 7A-457 as it stood before the 1971 amendment thereto, was precluded in a capital case from waiving the right to counsel during an in-custody, pretrial lineup stood in the same position as an accused who did not knowingly, understandingly and voluntarily waive the right to counsel before the enactment of this Article. But where, the State, on voir dire, showed by clear and convincing evidence that an in-court identification was of independent origin and was not tainted by the lineup procedures, the in-court identification evidence was competent. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

C. Preliminary Hearing.

Prior to the enactment of this section a defendant did not have a right to an attorney at a preliminary hearing. Dawson v. State, 8 N.C. App. 566, 174 S.E.2d 610 (1970).

A preliminary hearing is not an essential prerequisite to a bill of indictment; however, since this section declares a preliminary hearing to be "a critical stage of the action," it follows that an indigent defendant is entitled to the appointment of counsel if such a hearing is held. State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972).

The initial appearance before a district court judge is not a critical stage because it is not an adversarial judicial proceeding where rights and defenses are preserved or lost or a plea taken. Therefore, the reference in subsection (b)(4) of this section to a preliminary hearing does not mean that a defendant has a

Sixth Amendment right to counsel at the initial appearance before the district court judge. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Defendant Found Not Indigent for Purpose of Preliminary Hearing Has No Right to Appointed Counsel. — If found not indigent for the purpose of the preliminary hearing, a defendant does not have the right to appointed counsel, and he can waive counsel and elect to defend himself. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

Failure to Appoint Counsel for Preliminary Hearing Held Harmless Error. — The failure to appoint counsel to represent an indigent defendant at her preliminary hearing on charges of forgery and uttering a forged check was harmless error beyond a reasonable doubt where the testimony at the hearing was not transcribed and was never put before the trial court, the jury which convicted defendant never knew that a preliminary hearing had been conducted, the record did not show that defendant pled guilty or made any disclosures at the preliminary hearing which were used against her at the trial, and the record did not show the loss of any defenses or pleas or motions by failure to assert them at the preliminary hearing. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

Subsequent Pleas of Guilty Not Invalidated. — Failure to accord an indigent defendant his statutory right to counsel at the time he waived preliminary hearing did not invalidate his subsequent pleas of guilty, where the pleas were given at a time when defendant was represented by counsel and the trial court fully inquired into the voluntariness of the pleas. State v. Elledge, 13 N.C. App. 462, 186 S.E.2d 192 (1972).

§ 7A-452. Source of counsel; fees; appellate records.

(a) Counsel for an indigent person shall be assigned by the court. In those districts which have a public defender, however, the public defender may tentatively assign himself or an assistant public defender to represent an indigent person, subject to subsequent approval by the court.

(b) Fees of assigned counsel and salaries and other operating expenses of the offices of the public defenders shall be borne by the State.

(c)(1) The clerk of superior court is authorized to make a determination of indigency and to appoint counsel, as authorized by this Article. The word "court," as it is used in this Article and in any rules pursuant to this Article, includes the clerk of superior court.

(2) A judge of superior or district court having authority to appoint counsel in a particular case may give directions to the clerk with regard to the appointment of counsel in that case; may, if he finds it appropriate, change or modify the appointment of counsel when counsel has been appointed by the clerk; and may set aside a finding of waiver of counsel made by the clerk.

(d) Unless a public defender or assistant public defender is appointed to serve, the trial judge appointing standby counsel under G.S. 15A-1243 shall award reasonable compensation to be paid by the State. (1969, c. 1013, s. 1; 1971, c. 377, s. 32; 1973, c. 1286, s. 8; 1977, c. 711, s. 9.)

Editor's Note. — Session Laws 1977, ch. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

Quoted in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

§ 7A-453. Duty of custodian of a possibly indigent person; determination of indigency.

(a) In districts which have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the public defender. The public defender shall make a preliminary determination as to the person's entitlement to his services, and proceed accordingly. The court shall make the final determination.

(b) In districts which do not have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court.

(c) In any district, if a defendant, upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the defender or the clerk of superior court, as the case may be, who shall take action as provided in this Article.

(d) The duties imposed by this section upon authorities having custody of persons who may be indigent are in addition to the duties imposed upon arresting officers under G.S. 15-47. (1969, c. 1013, s. 1; 1973, c. 1286, s. 8.)

Editor's Note. — Section 15-47, referred to in this section, was repealed by Session Laws 1973, c. 1286. See now §§ 15A-401 through 15A-405.

CASE NOTES

The court makes the final determination of indigency, and this may be determined or redetermined by the court at any stage of the proceeding at which the indigent is entitled to representation. State v. Cradle, 281 N.C. 198, 188 S.E.2d 296, cert. denied, 409 U.S. 1047, 93 S. Ct. 537, 34 L. Ed. 2d 499 (1972).

Applied in State v. Cradle, 13 N.C. App. 120, 185 S.E.2d 35 (1971); State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975).

Quoted in State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Stated in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

§ 7A-454. Supporting services.

The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State. (1969, c. 1013, s. 1.)

Legal Periodicals. — For a note on providing indigent criminal defendants state-paid investigators, see 13 Wake Forest L. Rev. 655 (1977).

For note on an indigent's constitutional right to a state-paid expert, see 16 Wake Forest L. Rev. 1031 (1980).

CASE NOTES

The statutory plan established in § 7A-450 and this section and the plan of § 7A-468 for State provision of investigative or expert assistance are substantially equivalent. In neither case is a defendant entitled to an investigator at State expense upon demand. In both instances he is entitled to a state-appointed investigator when he has made a showing of need sufficient to convince a public official, in the exercise of his discretion, that those services are necessary to a fundamentally fair trial. There is then no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of state-provided investigative assistance. Therefore, the denial of defendant's motion for the appointment of an investigator

did not violate his constitutionally guaranteed rights to equal protection of the laws. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

This section permits but does not compel providing an expert to criminally accused at State expense. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

When Private Investigators or Expert Assistance Provided. — Section 7A-450(b) and this section require that private investigators or expert assistance be provided only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial. Neither the State nor the federal Constitution requires more. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

Discretion of Trial Judge. — This section and the better reasoned decisions place the question of whether an expert should be appointed at State expense to assist an indigent defendant within the sound discretion of the trial judge. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

The language contained in this section is consistent with the rule that appointment of experts lies within the discretion of the trial judge. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

Where the motion to the court submitted by defendant's counsel simply stated, "That the defendant is an indigent person with court-appointed counsel, and, in the opinion of counsel, psychiatric evidence will be necessary and proper in behalf of the defense of the charges of murder against the defendant," without more, there was not abuse of the trial court's discretion in denying the motion. State v. Grainger, 29 N.C. App. 694, 225 S.E.2d 595 (1976).

Applied in State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979).

Quoted in State v. Woods, 293 N.C. 58, 235 S.E.2d 47 (1977).

Stated in State v. Lewis, 7 N.C. App. 178, 171 S.E.2d 793 (1970); In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Cited in State v. Shook, 38 N.C. App. 465, 248 S.E.2d 425 (1978).

§ 7A-455. Partial indigency; liens; acquittals.

(a) If, in the opinion of the court, an indigent person is financially able to pay a portion, but not all, of the value of the legal services rendered for him by assigned counsel or by the public defender, and other necessary expenses of representation, he shall order the partially indigent person to pay such portion to the clerk of superior court for transmission to the State treasury.

(b) In all cases the court shall fix the money value of services rendered by assigned counsel or the public defender, and such sum, to the extent not reimbursed to the State by the indigent person as provided in subsection (a), plus any sums allowed by the court for other necessary expenses of representing the indigent person, shall be entered as a judgment in the office of the clerk of superior court, and shall constitute a lien as prescribed by the general law of the State applicable to judgments. Funds collected by reason of any such judgment shall be deposited in the State treasury.

(c) If the indigent person is not finally convicted, the foregoing provisions with respect to partial payments and liens shall not be applicable. (1969, c. 1013, s. 1.)

CASE NOTES

State Not to Pay What Defendant Can. — It is not the public policy of this State to subsidize any portion of a defendant's defense which he himself can pay. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

When Judgment for Cost of Public Defender Services Vacated. — Judgment, after criminal conviction, for amount of cost of public defender services will be vacated where court finds judgment not supported in record by sufficient findings of fact or conclusions of law. State v. Crews, 284 N.C. 427, 201 S.E.2d 840 (1974).

Applied in State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980).

Quoted in State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

§ 7A-456. False statements; penalty.

A false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes perjury, and upon conviction thereof, the defendant may be punished as provided in G.S. 14-209. (1969, c. 1013, s. 1.)

§ 7A-457. Waiver of counsel; pleas of guilty.

(a) An indigent person who has been informed of his right to be represented by counsel at any in-court proceeding, may, in writing, waive the right to in-court representation by counsel, if the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver. In making such a finding, the court shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the crime charged.

(b) If an indigent person waives counsel as provided in subsection (a), and pleads guilty to any offense, the court shall inform him of the nature of the offense and the possible consequences of his plea, and as a condition of accepting the plea of guilty the court shall examine the person and shall ascertain that the plea was freely, understandably and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency.

(c) An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, either orally or in writing, waive the right to out-of-court representation by counsel. (1969, c. 1013, s. 1; 1971, c. 1243; 1973, c. 151, s. 3.)

Cross References. — As to scope of entitlement to counsel, see § 7A-451.

Legal Periodicals. — For a note on waiver of Miranda rights, see 16 Wake Forest L. Rev. 219 (1980).

CASE NOTES

I. General Consideration.
II. Waiver of Counsel.
A. In General.
B. Requirement of Writing.
C. Voluntary Statements.
D. Self-Representation.
III. Guilty Pleas.

I. GENERAL CONSIDERATION.

Prior to the passage of this Article it was unquestioned that an accused could waive his right to counsel at in-custody proceedings, either orally or in writing, if he did so freely, voluntarily and understandingly. State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972).

Prior to the enactment of § 7A-450 et seq., there was no difference in the requirements for a waiver of counsel by indigents and nonindigents. Each could waive the right either orally or in writing. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

The purpose of the statutory provision for appointment of counsel, at public expense, for indigent defendants is to put indigent defendants on an equality with affluent defendants in trials upon criminal charges. To deny, or to restrict the right of the indigent to waive counsel, i.e., to represent himself, while permitting the affluent defendant to exercise such right, has no reasonable relation to the objective of equal opportunity to prevail at the trial of the case. Such classification is beyond the power of the legislature. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Applied in State v. Griffin, 10 N.C. App. 134, 177 S.E.2d 760 (1970); State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Wright, 281

N.C. 38, 187 S.E.2d 761 (1972); State v. Edwards, 282 N.C. 201, 192 S.E.2d 304 (1972); State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975); State v. Monroe, 27 N.C. App. 405, 219 S.E.2d 270 (1975); State v. Hodge, 27 N.C. App. 502, 219 S.E.2d 568 (1975); State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Cited in State v. Blackmon, 280 N.C. 42, 185 S.E.2d 123 (1971); State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972); In re Martin, 286 N.C. 66, 209 S.E.2d 766 (1974); State v. Boyd, 31 N.C. App. 328, 229 S.E.2d 229 (1976); State v. House, 295 N.C. 189, 244 S.E.2d 654 (1978).

II. WAIVER OF COUNSEL.

A. In General.

The rule is that one may waive counsel if he does so freely and voluntarily and with full understanding that he has the right to be represented by an attorney. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

But Waiver Must Be Specifically Made after Miranda Warnings. — No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the Miranda warnings. Silence and waiver are not synonymous. Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

And waiver of counsel may not be presumed from a silent record. State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972).

Necessity for Evidence or Findings of Waiver. — Admission of a defendant's inculpatory statement to the police was erroneous where there was neither evidence nor findings to show that defendant had waived his right to counsel as provided by this section. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Waiver Is Required Only Where Defendant Is Subjected to In-Custody Interrogation. — Miranda warnings and waiver of counsel are only required where defendant is being subjected to custodial interrogation. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

And the standard for determining when an "in-custody interrogation" occurs under this section is a question of State law which is not inextricably linked to the evolving federal standard for an "in-custody interrogation" actionable under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976).

Waiver in Capital Case Prior to 1971 Amendment. — See State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972); State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971), death sentence vacated, 408 U.S. 940, 92 S. Ct. 2878, 33 L. Ed. 2d 764 (1972); State v. Bass, 280 N.C. 435, 186 S.E.2d 384 (1972); State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

B. Requirement of Writing.

Stringency of Requiring Waiver in Writing. — In imposing the requirement that an indigent's waiver of counsel must be in writing, the North Carolina General Assembly imposed a more stringent requirement than the federal courts have done. State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

Words of subsection (a), "in writing," are directory only and not mandatory. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

Waiver at Out-of-Court Proceeding No Longer Required to Be in Writing. — The General Assembly, by Session Laws 1971, c. 1243, amended this section so as to relax the requirement that a waiver of counsel must be in writing. State v. Turner, 281 N.C. 118, 187 S.E.2d 750 (1972).

Printing Name Rather Than Writing It. — The fact that defendant printed his name instead of signing it to a waiver of rights form was without legal significance and did not warrant suppression of in-custody statements of defendant. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Refusal to Sign Waiver of Counsel Will Not Defeat Determination That Counsel Was Properly Waived. — When all of the provisions of this section have been otherwise fully complied with, and the indigent defendant has refused to accept court-appointed counsel, his refusal to sign a waiver of counsel will not defeat a determination that such defendant freely, voluntarily and understandingly waived in-court representation by counsel, and in such case the State may proceed with the trial of the indigent defendant without counsel. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

Refusal to sign a written waiver is a fact which may tend to show that no waiver occurred, but it is not conclusive in the face of other evidence tending to show waiver. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

A refusal to sign a waiver form does not necessarily preclude a valid oral waiver. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

The waiver in writing once given is good and sufficient until the proceeding finally

terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver, and have counsel assigned to him. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (1974).

The burden of showing the change in the desire of the defendant for counsel rests upon the defendant. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (1974).

This section does not require successive waivers in writing at every court level of the proceeding and trial in district court and trial in superior court on appeal constitute one in-court proceeding. State v. Watson, 21 N.C. App. 374, 204 S.E.2d 537, cert. denied, 285 N.C. 595, 206 S.E.2d 866 (1974).

C. Voluntary Statements.

No waiver is involved with respect to volunteered statements. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

A volunteered confession is admissible by constitutional standards even in the absence of warning or waiver of rights since an indigent's right to or waiver of counsel under this section does not arise and is not involved with respect to volunteered statements. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Defendant's volunteered confession would have been admissible by constitutional standards even in the absence of warning or waiver of his rights. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Any statement given freely and voluntarily without any compelling influence is admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Assuming defendant's indigency, the presence of counsel was not required because defendant's statement at the police station was not the result of an in-custody interrogation initiated by the officers. Rather, it was defendant's own voluntary narration, freely and understandingly related. State v. Haddock, 281 N.C. 675, 190 S.E.2d 208 (1972).

Although defendant was in custody at the time he made the incriminating statements, where his statements were not made in response to police "interrogation," as that word is defined in Miranda, but were more in the nature of volunteered assertions and narrations, statements were admissible. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Where there was no evidence of any interrogation or other police procedure tending to overbear the will of the accused and defendant spoke in the voluntary exercise of his own will and without the slightest compulsion of in-custody interrogation procedures, his statements were properly admitted into evidence as volunteered statements made under circumstances requiring neither warnings nor the presence of counsel. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

D. Self-Representation.

Right of Defendant to Represent Himself. — A defendant in a criminal proceeding has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

The United States Constitution does not deny to a defendant the right to defend himself. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Having been fully advised by the court that an attorney would be appointed to represent him if he so desired, the defendant had the right to reject the offer of such appointment and to represent himself in the trial and disposition of his case. State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

Appointment of Counsel for Limited Purpose Where Defendant Represents Himself. — Defendant was not prejudiced in any respect by the appointment of counsel for the limited purpose of furnishing advice to him if so requested, even though defendant did waive counsel and conducted his own defense. State v. Harper, 21 N.C. App. 30, 202 S.E.2d 795, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

III. GUILTY PLEAS.

Failure to Interrogate Defendant Entering Plea of Guilty. — Failure on the part of the trial judge to follow the recommended procedure that he interrogate every defendant, whether represented by counsel or not, who enters a plea of guilty, in order to be sure that he has freely, voluntarily and intelligently consented to and authorized the entry of such plea, is not fatal to a conviction. This rule has not been modified by this section. However, when a defendant who is represented by counsel tenders a plea of guilty or a plea of nolo contendere it must appear affirmatively in the record that he did so voluntarily and understandingly. State v. Ford, 281 N.C. 62, 187 S.E.2d 741 (1972).

Failure to Inform Defendant Pleading Nolo Contendere of Minimum Sentence. — Where the trial court informed defendant that he could be imprisoned for as much as 30 years upon his plea of nolo contendere to a charge of armed robbery, the failure of the court to inform defendant that the minimum sentence was five years did not vitiate defendant's plea of nolo contendere. State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972).

§ 7A-458. Counsel fees.

In districts which do not have a public defender, the court shall fix the fee to which an attorney who represents an indigent person is entitled. In doing so, the court shall allow a fee based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, the time, effort and responsibility involved, and the fee usually charged in similar cases. Fees shall be fixed by the district court judge for actions or proceedings finally determined in the district court and by the superior court judge for actions or proceedings originating in, heard on appeal in, or appealed from the superior court. Even if the trial, appeal, hearing or other proceeding is never held, preparation therefor is nevertheless compensable. (1969, c. 1013, s. 1.)

§ 7A-459. Implementing regulations by State Bar Council.

In districts which do not have a public defender, the North Carolina State Bar Council shall make rules and regulations consistent with this article relating to the manner and method of assigning counsel, the procedure for the determination of indigency, the waiver of counsel, the adoption and approval of plans by any district bar regarding the method of assignment of counsel among the licensed attorneys of the district, and such other matters as shall provide for the protection of the constitutional rights of all indigent persons and the reasonable allocation of responsibility for the representation of indigent persons among the licensed attorneys of this State. Such rules and regulations shall not become effective until certified to and approved by the Supreme Court of North Carolina. (1969, c. 1013, s. 1.)

Cross References. — For regulations relating to the appointment of counsel for indigent defendants in Criminal Cases, see Vol. 4A, Appendix VIII.

Legal Periodicals. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

CASE NOTES

Appointment of additional counsel under this section is clearly discretionary with the trial or appellate court, and failure to appoint or continue the appointment of associate counsel will be held error only when it amounts to a clear abuse of that discretion, i.e., only when it is denied in the face of a showing by defendant of a reasonable likelihood that additional counsel would materially assist in the preparation of his defense, or that without such help it is probable that defendant will not receive a fair trial. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

§§ 7A-460 to 7A-464: Reserved for future codification purposes.

ARTICLE 37.

The Public Defender.

§ 7A-465. Public defender; defender districts; qualifications; compensation.

The office of public defender is established, effective January 1, 1970, in the following judicial districts: the twelfth and the eighteenth.

The office of public defender is established, effective July 1, 1973, in the twenty-eighth judicial district.

The office of public defender is established, effective July 1, 1975, in the twenty-sixth and twenty-seventh judicial districts. Effective July 1, 1978, the twenty-seventh judicial district is divided into judicial districts 27A and 27B. On that date the current public defender of the twenty-seventh district shall become the public defender for district 27A.

Effective January 1, 1981, the office of public defender is established in the third judicial district.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3; 1979, 2nd Sess., c. 1284, s. 1.)

Effect of amendments. — The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, added the fourth paragraph.

Legal Periodicals. — For comment on assigned counsel and public defender systems, see 49 N.C.L. Rev. 705 (1971).

OPINIONS OF ATTORNEY GENERAL

Entitlement of Public Defender to District Attorney's Travel Allowance and Full-Time Duties. — See opinion of Attorney General to Mr. Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, 40 N.C.A.G. 142 (1969).

§ 7A-466. Selection of defender; term; removal.

The public defender in the third, twelfth, eighteenth, twenty-sixth and twenty-seventh-A judicial districts shall be appointed by the Governor from a list of not less than two and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The public defender in the twenty-eighth judicial district shall be appointed by the senior resident superior court judge of that judicial district from a list of not less than two names and not more than three names nominated by written ballot of the attorneys resident in the district who are licensed to practice law in North Carolina. The balloting shall be conducted pursuant to regulations promulgated by the Administrative Office of the Courts. The terms of office of the public defenders authorized in G.S. 7A-465 are for four years, beginning on the dates specified in that section for each district, and each fourth year thereafter.

A vacancy in the office of public defender is filled, in the same manner as the original appointment, for the unexpired term.

A public defender or assistant public defender may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a superior court district attorney. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 148, s. 5; c. 799, s. 2; 1975, c. 956, ss. 15, 16; 1977, c. 1130, s. 7; 1979, 2nd Sess., c. 1284, s. 2.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective Jan. 1, 1981, inserted "third" near the beginning of the first sentence of the first paragraph.

§ 7A-467. Assistant defenders; assigned counsel.

Each public defender is entitled to at least one full-time assistant public defender, and to such additional assistants, full-time or part-time, as may be authorized by the Administrative Office of the Courts. Assistants are appointed by the public defender and serve at his pleasure. Compensation of assistants shall be as provided in the biennial budget appropriations act.

Assistants shall perform such duties as may be assigned by the public defender.

A member of the district bar who consents to such service may be assigned by the public defender to represent an indigent person, and when so assigned is entitled to the services of the defender's office to the same extent as a full-time public defender. In assigning assistant defenders and members of the bar generally the defender shall consider the nature of the case and the skill of counsel, to the end that all indigent persons are adequately represented.

If a conflict of interests prohibits the public defender from representing an indigent person, or in unusual circumstances when, in the opinion of the court the proper administration of justice requires it, the court may assign any member of the district bar to represent an indigent person, and when so assigned, counsel is entitled to the services of the defender's office to the same extent as counsel assigned by the public defender.

Members of the bar assigned by the defender or by the court are compensated in the same manner as assigned counsel are compensated in districts which do not have a public defender. (1969, c. 1013, s. 1.)

§ 7A-468. Investigative services.

Each public defender is entitled to the services of one investigator, to be appointed by the defender to serve at his pleasure. The Administrative Officer of the Courts shall fix the compensation of each investigator, and may authorize additional investigators, full-time or part-time, upon a showing of need. (1969, c. 1013, s. 1.)

CASE NOTES

No Equal Protection Violation. — Denial of a state-paid private investigator to an indigent defendant under subsection (b) of § 7A-450 does not, ipso facto, constitute a denial of equal protection of the laws notwithstanding that such investigators might be available to indigent defendants represented by public defenders under this section and to pecunious defendants. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

Employment of Investigator. — Nothing in this section requires or contemplates the employment or use of an investigator for the purpose of embarking upon a statewide, or worldwide, search for evidence in the absence of any indication whatever that such evidence exists anywhere. State v. Montgomery, 291 N.C. 91, 229 S.E.2d 572 (1976).

The services of an investigator are at the disposal of each public defender, to be used by him whenever, in his discretion, a particular case indicates the need therefor. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

The statutory plan established in §§ 7A-450 and 7A-454 and the plan of this section for State provision of investigative or expert assistance are substantially equivalent. In neither case is a defendant entitled to an investigator at State expense upon demand. In both instances he is entitled to a state-appointed investigator when he has made a showing of need sufficient to convince a public official, in the exercise of his discretion, that those services are necessary to a fundamentally fair trial. There is then no real distinction between indigent defendants represented by a public defender and those with court-appointed counsel with respect to the availability of state-provided investigative assistance. Therefore, the denial of defendant's motion for the appointment of an investigator did not violate his constitutionally guaranteed rights to equal protection of the laws. State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976).

§ 7A-469. Support for office of defender.

The Administrative Officer of the Courts shall procure office equipment and supplies for the public defender, and provide secretarial and library support from State funds appropriated to his office for his purpose. (1969, c. 1013, s. 1.)

§ 7A-470. Reports.

The public defender shall keep appropriate records and make periodic reports, as requested, to the Administrative Office of the Courts on matters related to the operation of his office. (1969, c. 1013, s. 1.)

§§ 7A-471 to 7A-474: Reserved for future codification purposes.

ARTICLE 38.

Appellate Defender Office.

§ 7A-475. Appellate defender office established.

(a) There is established the office of appellate defender.

(b) The appellate defender shall be an attorney licensed to practice law in North Carolina and shall devote his full time to the duties of the office. (1981, c. 964, s. 11.)

§ 7A-476. Term of office.

The initial term of office of the appellate defender shall be from October 1, 1981, through June 30, 1985. Subsequent terms shall be four years. (1981, c. 964, s. 11.)

§ 7A-477. Appointment; vacancy; removal.

(a) The appellate defender shall be appointed by the Governor.

(b) A vacancy in the office of appellate defender shall be filled by appointment by the Governor for the unexpired term.

(c) The appellate defender may be suspended or removed from office and reinstated for the same causes and under the same procedures as are applicable to removal of a district attorney. (1981, c. 964, s. 11.)

§ 7A-478. Duties.

The appellate defender shall:

(1) Represent indigent persons subsequent to conviction in trial courts pursuant to assignments by trial court judges under the general supervision of the Chief Justice of the Supreme Court of North Carolina. The appellate defender shall only accept that number of assignments and maintain that caseload which will insure quality criminal defense appellate services consistent with the resources available to the appellate defender.

(2) Maintain a repository of briefs prepared by the appellate defender to be made available to private counsel representing indigents in criminal cases.

(3) Provide continuing legal education training to assistant appellate defenders and to private counsel representing indigents in criminal appeals, as resources are available. (1981, c. 964, s. 11.)

§ 7A-479. Assistants and staff.

The appellate defender shall appoint assistants and staff, not to exceed the number authorized by the Administrative Office of the Courts. The assistants and staff shall serve at the pleasure of the appellate defender. (1981, c. 964, s. 11.)

§ 7A-480. Funds.

Funds to operate the office of appellate defender, including office space, office equipment, supplies, postage, telephone, library, staff salaries, training and travel, shall be provided by the Administrative Office of the Courts from funds authorized by law. Salaries shall be set by the Administrative Office of the Courts. (1981, c. 964, s. 11.)

§ 7A-481. Acceptance of property.

The Administrative Office of the Courts may accept the property purchased by the Appellate Defender Project for North Carolina, pursuant to the National Legal Aid and Defender Association Agreement with Legal Services of North Carolina, Inc., dated August 15, 1980. (1981, c. 964, s. 11.)

§ 7A-482. Records and reports.

The appellate defender shall keep appropriate records and make periodic reports, as requested, to the Administrative Office of the Courts. (1981, c. 964, s. 11.)

§ 7A-483. Effective date and expiration of Article.

This Article shall become effective October 1, 1981, and shall expire June 30, 1985. (1981, c. 964, s. 11.)

Article 39.

§§ 7A-484 to 7A-499: Reserved for future codification purposes.

SUBCHAPTER X. NORTH CAROLINA COURTS COMMISSION.

Article 40.

North Carolina Courts Commission.

§§ 7A-500 to 7A-505: Repealed by Session Laws 1975, c. 956, s. 18.

Cross References. — As to the North Carolina Courts Commission, see §§ 7A-506 through 7A-510.

ARTICLE 40A.

North Carolina Courts Commission.

§ 7A-506. Creation; members; terms; qualifications; vacancies.

The North Carolina Courts Commission is hereby created. It shall consist of 15 voting members, five to be appointed by the Governor, five by the President of the Senate, and five by the Speaker of the House of Representatives. At least three of the appointees of each appointing authority shall be practicing attorneys, at least three appointees of each appointing authority shall be members or former members of the General Assembly, and at least one appointee of each appointing authority shall be a layman. Three of the initial appointees of the Governor shall serve for two years, and two shall serve for four years. Three of the initial appointees of the President and the Speaker shall serve for four years, and two shall serve for two years. All initial terms shall begin July 1, 1979. Subsequent terms are for four years, beginning July 1, 1981, and July 1 of each odd-numbered year thereafter. A vacancy in membership shall be filled by the appointing authority who made the initial appointment. A member whose term expires may be reappointed.

Effective July 1, 1981, the membership of the Commission is increased to 23 voting members. The Governor shall appoint two additional voting members, one of whom shall be a district attorney, and one of whom shall be a member of the General Assembly. The President of the Senate shall appoint three additional voting members, one of whom shall be a regular superior court judge, and two of whom shall be members of the General Assembly. The Speaker of the House shall appoint three additional voting members, one of whom shall be a district court judge, and two of whom shall be members of the General Assembly. The legislators shall each serve a term of four years, or until they cease to be members of the General Assembly, whichever is earlier. The district attorney and trial judges shall serve an initial term of two years, or until they cease to occupy their respective offices, whichever is later. Their successors appointed on July 1, 1983, and quadrennially thereafter, shall serve for terms of four years, or until they cease to occupy their respective offices, whichever is later. A vacancy in an additional voting membership shall be filled for the unexpired term by the appointing authority who made the original appointment. An additional voting member whose term expires may be reappointed. (1979, c. 1077, c. 1; 1981, c. 847.)

Effect of Amendments. — The 1981 amendment added the second paragraph.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 7A-507. Ex officio members.

The following additional members shall serve ex officio: the Administrative Officer of the Courts; a representative of the N. C. State Bar appointed by the Council thereof; and a representative of the N. C. Bar Association appointed by the Board of Governors thereof. Ex officio members have no vote. (1979, c. 1077, s. 1.)

CASE NOTES

Cited in State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

§ 7A-508. Duties.

It shall be the duty of the Commission to make continuing studies of the structure, organization, jurisdiction, procedures and personnel of the Judicial Department and of the General Court of Justice and to make recommendations to the General Assembly for such changes therein as will facilitate the administration of justice. (1979, c. 1077, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1221, s. 6, provides: "It is the understanding of the General Assembly that pursuant to Chapter 1077 of the 1979 Session Laws the North Carolina Courts Commission is authorized to make continuing studies of the structure, organization, jurisdiction, procedures and personnel, including the office of the public defender, of the Judicial Department and of the General Court of Justice and to make recommendations to the General Assembly to facilitate the administration of justice."

§ 7A-509. Chairman; meetings; compensation of members.

The Governor shall appoint a chairman from the legislative members of the Commission. The term of the chairman is two years, and he may be reappointed. The Commission shall meet at such times and places as the chairman shall designate. The facilities of the State Legislative Building shall be available to the Commission, subject to approval of the Legislative Services Commission. The members of the Commission shall receive the same per diem and reimbursement for travel expenses as members of State boards and commissions generally. (1979, c. 1077, s. 1.)

§ 7A-510. Supporting services.

The Commission is authorized to contract for such professional and clerical services as are necessary in the proper performance of its duties. (1979, c. 1077, s. 1.)

§§ 7A-511 to 7A-515: Reserved for future codification purposes.

SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

ARTICLE 41.

Purpose; Definitions.

§ 7A-516. Purpose.

This Article shall be interpreted and construed so as to implement the following purposes and policies:

(1) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety;

(2) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents; and

(3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — The annotations under this section are from cases decided under former § 7A-277.

The purpose of former § 7A-277 was to give to delinquent children the control and environment which might lead to their reformation and enable them to become law abiding and useful citizens — a support and not a hindrance to the State. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

The court must consider the welfare of the delinquent child as well as the best interest of the State. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

State's Interest in Juvenile Proceeding. — The fact that the proceeding is not an ordinary criminal prosecution, but is a juvenile proceeding, does not lessen, but should actually increase, the burden upon the State to see that the child's rights were protected. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

Delinquency Proceedings May Result in Commitment. — Juvenile proceedings to determine delinquency, though not the same as criminal prosecutions of an adult, may nevertheless result in commitment to an institution in which the juvenile's freedom is curtailed. In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975).

Stated in In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

§ 7A-517. Definitions.

Unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused Juveniles. — Any juvenile less than 18 years of age whose parent or other person responsible for his care:

a. Inflicts or allows to be inflicted upon the juvenile a physical injury by other than accidental means which causes or creates a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ; or

b. Creates or allows to be created a substantial risk of physical injury to the juvenile by other than accidental means which would be likely to cause death, disfigurement, impairment of physical health, or loss or impairment of the function of any bodily organ; or

c. Commits or allows the commission of any sexual act upon a juvenile in violation of law; commits, permits or encourages any act of prostitution with or by the juvenile; or

d. Creates or allows to be created serious emotional damage to the juvenile and refuses to permit, provide for, or participate in treatment. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others; or

e. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

(2) Aftercare. — The supervision of a juvenile who has been returned to the community on conditional release after having been committed to the Division of Youth Services.

(3) Administrator for Juvenile Services. — The person who is responsible for the planning, organization, and administration of a statewide system of juvenile intake, probation, and aftercare services.

(4) Director of the Division of Youth Services. — The person responsible for the supervision of the administration of institutional and detention services.

(5) Caretaker. — Any person other than a parent who is in care of a juvenile, including any blood relative, stepparent, foster parent, or house parent, cottage parent or other person supervising a juvenile in a child-care facility.

(6) Chief Court Counselor. — The person responsible for administration and supervision of juvenile intake, probation, and aftercare in each judicial district, operating under the supervision of the Administrator for Juvenile Services.

(7) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(8) Community-Based Program. — A program providing nonresidential or residential treatment to a juvenile in the community where his family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.

(9) Court. — The District Court Division of the General Court of Justice.

(10) Court Counselor. — A person responsible for probation and aftercare services to juveniles on probation or on conditional release from the Division of Youth Services under the supervision of the chief court counselor.

(11) Custodian. — The person or agency that has been awarded legal custody of a juvenile by a court.

(12) Delinquent Juvenile. — Any juvenile less than 16 years of age who has committed a criminal offense under State law or under an ordinance of local government, including violation of the motor vehicle laws.

(13) Dependent Juvenile. — A juvenile in need of assistance or placement because he has no parent, guardian or custodian responsible for his care or supervision or whose parent, guardian, or custodian is unable to provide for his care or supervision.

(14) Detention. — The confinement of a juvenile pursuant to an order for secure custody pending an adjudicatory or dispositional hearing or admission to a placement with the Division of Youth Services.

(15) Detention Home. — An authorized facility providing secure custody for juveniles.

(16) Holdover Facility. — A place in a jail which has been approved by the Department of Human Resources as meeting the State standards for detention as required in G.S. 153A-221 providing close supervision where the juvenile cannot converse with, see, or be seen by the adult population.

(16.1) In Loco Parentis. — A person acting in loco parentis means one, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.

(17) Intake Counselor. — A person who screens a petition alleging that a juvenile is delinquent or undisciplined to determine whether the petition should be filed.

(18) Interstate Compact on Juveniles. — An agreement ratified by 50 states and the District of Columbia providing a formal means of returning a juvenile, who is an absconder, escapee or runaway, to his home state.

(19) Judge. — Any district court judge.

(20) Juvenile. — Any person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States. For the purposes of subdivisions (12) and (28) of this section, a juvenile is any person who has not reached his sixteenth birthday and is not married, emancipated, or a member of the armed forces. A juvenile who is married, emancipated, or a member of the armed forces, shall be prosecuted as an adult for the commission of a criminal offense. Wherever the term "juvenile" is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well.

(21) Neglected Juvenile. — A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

(22) Petitioner. — The individual who initiates court action, whether by the filing of a petition or of a motion for review alleging the matter for adjudication.

(23) Probation. — The status of a juvenile who has been adjudicated delinquent, is subject to specified conditions under the supervision of a court counselor, and may be returned to the court for violation of those conditions during the period of probation.

(24) Prosecutor. — The assistant district attorney assigned by the district attorney to juvenile proceedings.

(25) Protective Supervision. — The status of a juvenile who has been adjudicated delinquent or undisciplined and is under the supervision of a court counselor.

(26) Regional Detention Home. — A state-supported and administered regional facility providing detention care.

(27) Shelter Care. — The temporary care of a juvenile in a physically unrestricting facility pending court disposition.

(28) Undisciplined Juvenile. — A juvenile less than 16 years of age who is unlawfully absent from school; or who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home.

The singular includes the plural, the masculine singular includes the feminine singular and masculine and feminine plural unless otherwise specified. (1979, c. 815, s. 1; 1981, c. 336; c. 359, s. 2; c. 469, ss. 1-3; c. 716, s. 1.)

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, substituted the second and third sentences of subdivision (20) for the former second sentence of the subdivision, which read: "For the purposes of subdivisions (12) and (28) of this section, a juvenile is any person who has not reached his sixteenth birthday."

The second 1981 amendment substituted "in care of a juvenile" for "acting in loco parentis to a juvenile" near the beginning of subdivision (5).

The third 1981 amendment, effective Oct. 1, 1981, substituted "Serious" for "Severe" at the beginning of the second sentence of paragraph d of subdivision (1), added subdivision (16.1), and substituted "Any district court judge" for "The district judge assigned by the chief district judge to hear juvenile cases" in subdivision (19).

The fourth 1981 amendment inserted "commits, permits or encourages any act of prostitution with or by the juvenile" near the end of paragraph c of subdivision (1).

Legal Periodicals. — For note on juries in the juvenile justice system, see 48 N.C.L. Rev. 666 (1970).

For article, "The Jurisdictional Dilemma of the Juvenile Court," see 51 N.C.L. Rev. 195 (1972).

For survey of 1976 case law on domestic relations, see 55 N.C.L. Rev. 1018 (1977).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — The annotations under this section are from cases and opinion of the attorney general decided and issued under former § 7A-278.

Constitutionality. — Former § 7A-278 did not violate the equal protection clause of the United States Constitution by classifying and treating children differently from adults. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent, did not deny equal protection of the laws to the undisciplined child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

The provisions of subdivision (5) of former § 7A-278, defining "undisciplined child" (see now subdivision (28) of this section defining "undisciplined juvenile") were not unconstitutionally vague or indefinite. In re Walker, 14 N.C. App. 356, 188 S.E.2d 731, aff'd, 282 N.C. 28, 191 S.E.2d 702 (1972).

Distinction between Undisciplined and Delinquent Children Is Relevant to State's Objective. — In seeking solutions which provide in each case for the protection, treatment, rehabilitation and correction of the child, it is impellingly relevant to the achievement of the State's objective that distinctions be made between undisciplined children on the one hand and delinquent children on the other. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

"Community-based program". — Although the term "community-based program" is a term of art, its usage by the General Assembly reflects its concern that responses to the problems of the juveniles coming before the courts be fashioned in a flexible manner so as to address the best interests of the child in ways other than probation and commitment to training schools. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

The term community ought to be interpreted in a broad manner, connoting an interrelationship among persons who live in the same general area, but who also share the same laws, rights, and interests. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

"Neglected" Child. — It is fundamental that a child who receives proper care and supervision in modern times is provided a basic education. A child does not receive "proper care" and lives in an "environment injurious to his welfare" when he is deliberately refused this education, and he is "neglected". In re McMillan, 30 N.C. App. 235, 226 S.E.2d 693 (1976).

Same — Parental Rights Terminated. — The trial court properly terminated respondent mother's parental rights in her two children where the evidence supported findings by the court that the children were neglected children within the meaning of former § 7A-278(4) and that respondent failed to pay any portion of their foster care costs for more than six months preceding the filing of the petition as called for under § 7A-289.32(4). In re Biggers, 50 N.C. App. 332, 274 S.E.2d 236 (1981).

"Undisciplined Child". — A finding in a juvenile commitment proceeding that a 15-year-old girl was beyond the disciplinary control of her parents or custodian and was therefore a delinquent child in need of the supervision, protection, and custody of the State, was sufficient to bring the girl within the statutory definition of an "undisciplined child" (now see definition of "undisciplined juvenile.") In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970).

District court had no right to assume custody jurisdiction of minor children upon its finding that they were "neglected" children to the exclusion of the district court which had previously acquired custody jurisdiction in a divorce and custody proceeding of the children's parents. In re Greer, 26 N.C. App. 106, 215 S.E.2d 404, cert. denied, 287 N.C. 664, 216 S.E.2d 910 (1975).

No Finding of Delinquency Where Evidence Insufficient to Convict Juvenile of Crime. — Where the evidence in a juvenile hearing was insufficient to convict the juvenile of the crime alleged in the petition, subornation of perjury, there could be no finding that the juvenile was a delinquent. In re Roberts, 8 N.C. App. 513, 174 S.E.2d 667 (1970).

Evidence Sufficient to Convict of Crime Is Sufficient to Permit Finding of Delinquency. — Where there was sufficient evidence to convict the accused of the crime alleged in the petition, then there was sufficient evidence to permit a finding that the accused was a delinquent child. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

A motion to dismiss a petition seeking to declare a juvenile a delinquent was properly denied when there was substantial evidence that the juvenile respondent committed a criminal offense or violated a condition of a probationary judgment. In re Byers, 295 N.C. 256, 244 S.E.2d 665 (1978).

OPINIONS OF ATTORNEY GENERAL

The Definition of "Sexual Abuse" as Set Forth in the Recent Amendments to the Child Abuse Prevention and Treatment Act (42 U.S.C. § 5101 et seq., as Amended by P.L. 95-266) was Encompassed within the Definition of "Abused Child" as Set Forth in former § 110-117 and the Definition of "Neglected Child" as Set Forth in former § 7A-278(4). — See opinion of Attorney General to Mr. Carl H. Harper, Regional Attorney, Region IV, United States Department of Health, Education and Welfare, 48 N.C.A.G. 1 (1978).

§§ 7A-518 to 7A-522: Reserved for future codification purposes.

ARTICLE 42.

Jurisdiction.

§ 7A-523. Jurisdiction.

The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent. This jurisdiction does not extend to cases involving adult defendants alleged to be guilty of abuse or neglect. For purposes of determining jurisdiction, the age of the juvenile either at the time of the alleged offense or when the conditions causing the juvenile to be abused, neglected, or dependent arose, governs. There is no minimum age for juveniles alleged to be abused, dependent or neglected. For juveniles alleged to be delinquent or undisciplined, the minimum age is six years of age.

The court also has exclusive original jurisdiction of the following proceedings:

(1) Proceedings under the Interstate Compact on Juveniles and the Interstate Parole and Probation Hearing Procedures for Juveniles;
(2) Proceedings to determine whether a juvenile who is on conditional release and under the aftercare supervision of the court counselor has violated the terms of his conditional release established by the Division of Youth Services;
(3) Proceedings involving judicial consent for emergency surgical or medical treatment for a juvenile when his parent, guardian, legal custodian, or other person standing in loco parentis refuses to consent for treatment to be rendered;
(4) Proceedings to determine whether a juvenile should be emancipated;
(5) Proceedings to terminate parental rights. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — The annotations under this section are from a case and opinions of the attorney general decided and issued under former §§ 7A-278 and 7A-279.

This Article vests exclusive, original jurisdiction over any case involving a child in the district court judge and provides in detail for procedures in the district court in cases involving children. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972).

OPINIONS OF ATTORNEY GENERAL

District Courts Have Original, Exclusive Jurisdiction of a Person under the Age of Fourteen Charged with a Crime. — See opinion of Attorney General to Mr. Charles B. Winberry, Chief District Prosecutor, Seventh Judicial District, 41 N.C.A.G. 23 (1970).

Jurisdiction Extends to Minor Who Becomes 16 Prior to Hearing. — The juvenile jurisdiction of the district court extends to a minor alleged to be delinquent who was under 16 years of age at the time of the commission of the criminal offense but who attains the age of 16 prior to any judicial hearing. See opinion of Attorney General to the Hon. Larry Thomas Black, District Court Judge, Nov. 8, 1977.

§ 7A-524. Retention of jurisdiction.

When the court obtains jurisdiction over a juvenile, jurisdiction shall continue until terminated by order of the court or until he reaches his eighteenth birthday. Any juvenile who is under the jurisdiction of the court and commits a criminal offense after his sixteenth birthday is subject to prosecution as an adult. Any juvenile who is transferred to and sentenced by the superior court for a felony offense shall be prosecuted as an adult for all other crimes alleged to have been committed by him while he is under the active supervision of the superior court. Nothing herein shall be construed to divest the court of jurisdiction in abuse, neglect, or dependency proceedings. (1979, c. 815, s. 1; 1981, c. 469, s. 4.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "shall be prosecuted" for "is subject to prosecution" near the middle of the third sentence.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

§§ 7A-525 to 7A-529: Reserved for future codification purposes.

ARTICLE 43.

Screening of Delinquency and Undisciplined Petitions.

§ 7A-530. Intake services.

The Chief Court Counselor, under the direction of the Administrator of Juvenile Services, shall establish intake services in each judicial district of the State for all delinquency and undisciplined cases.

The purpose of intake services shall be to determine from available evidence whether there are reasonable grounds to believe the facts alleged are true, to determine whether the facts alleged constitute a delinquent or undisciplined offense within the jurisdiction of the court, to determine whether the facts alleged are sufficiently serious to warrant court action and to obtain assistance from community resources when court referral is not necessary. The intake counselor shall not engage in field investigations to substantiate complaints or

to produce supplementary evidence but may refer complainants to law-enforcement agencies for those purposes. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-531. Preliminary inquiry.

When a complaint is received, the intake counselor shall make a preliminary determination as to whether the juvenile is within the jurisdiction of the court as a delinquent or undisciplined juvenile. If the intake counselor finds that the facts contained in the complaint do not state a case within the jurisdiction of the court, that legal sufficiency has not been established, or that the matters alleged are frivolous, he shall, without further inquiry, refuse authorization to file the complaint.

When requested by the intake counselor, the prosecutor shall assist in determining the sufficiency of evidence as it affects the quantum of proof and the elements of offenses.

If the intake counselor finds reasonable grounds to believe that the juvenile has committed one of the following offenses, he shall, without further inquiry, authorize the complaint to be filed as a petition: murder; rape; arson; any violation of Article 5, Chapter 90 of the North Carolina General Statutes which would constitute a felony if committed by an adult; first degree burglary; crime against nature; or any felony which involves the willful infliction of serious bodily injury upon another or which was committed by use of a deadly weapon. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-532. Evaluation.

Upon a finding of legal sufficiency, except in the nondivertible offenses set out in G.S. 7A-531, the intake counselor shall determine whether a complaint should be filed as a petition, the juvenile diverted to a community resource, or the case resolved without further action. He shall consider criteria which shall be provided by the Administrator of Juvenile Services in making his decision. The intake process shall include the following steps if practicable:

(1) Interviews with the complainant and the victim if someone other than the complainant;
(2) Interviews with the juvenile, his parent, guardian, or custodian;
(3) Interviews with persons known to have information about the juvenile or family which information is pertinent to the case.

Interviews required by this section shall be conducted in person unless it is necessary to conduct them by telephone. (1979, c. 815, s. 1; 1981, c. 469, s. 5.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added "if practicable" at the end of the last sentence of the introductory paragraph.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-533. Evaluation decision.

The evaluation of a particular complaint shall be completed within 15 days, with an extension for a maximum of 15 additional days at the discretion of the Chief Court Counselor. The intake counselor must decide within this time period whether or not a complaint will be filed as a juvenile petition. If the intake counselor determines that a complaint should be filed as a petition, he shall assist the complainant when necessary with the preparation and filing of the petition, or help with the preparation and filing of the petition, shall endorse on it the date and the words "Approved for filing," shall sign it beneath such words, and shall transmit it to the clerk of superior court. If the intake counselor determines that a petition should not be filed, he shall immediately notify the complainant in writing with reasons for his decision and shall include notice of the complainant's right to have the decision reviewed by the prosecutor. The intake counselor shall then sign his name on the complaint beneath the words "Not approved."

Any complaint not approved for filing as a juvenile petition shall be destroyed by the intake counselor after holding the complaint for a temporary period to allow follow-up and review as provided in G.S. 7A-534 and 7A-536. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-534. Referral and follow-up.

The intake counselor may refer any case to an appropriate public or private resource unless the offense is one in which a petition is required as set out in G.S. 7A-531. After making a referral, the intake counselor shall ascertain that the juvenile actually contacted or was seen by the resource to which he was referred. In the event that the juvenile does not contact or visit the community resource, the intake counselor may reconsider his decision to divert and may authorize the filing of a complaint as a petition within 60 days from the date of the referral. If the juvenile contacts or is seen by the resource, the intake counselor shall close the file. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-535. Request for review by prosecutor.

The complainant has five calendar days, from receipt of the intake counselor's decision not to approve the filing of a complaint, to request review by the prosecutor. The intake counselor shall notify the prosecutor immediately of such request and shall transmit to the the prosecutor a copy of the complaint. The prosecutor shall notify the complainant and the intake counselor of the time and place for the review. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-536. Review of determination that petition should not be filed.

The prosecutor shall review the intake counselor's determination, that a juvenile petition should not be filed, no later than 20 days after the complainant is notified. Review shall include conferences with the complainant and the intake counselor. At the conclusion of the review, the prosecution shall: (i) affirm the decision of the intake counselor or direct the filing of a petition and (ii) notify the complainant of his action. (1979, c. 815, s. 1; 1981, c. 469, s. 6.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted the last sentence for the former last sentence, which read: "At the conclusion of the review, the prosecutor may either affirm the decision of the intake counselor or may direct the filing of a petition."

CASE NOTES

Cited in State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

§§ 7A-537 to 7A-541: Reserved for future codification purposes.

ARTICLE 44.

Screening of Abuse and Neglect Complaints.

§ 7A-542. Protective services.

The Director of the Department of Social Services in each county of the State shall establish protective services for juveniles alleged to be abused, neglected, or dependent.

Protective services shall include the investigation and screening of complaints, casework or other counseling services to parents or other caretakers as provided by the director to help the parents or other caretakers and the court to prevent abuse or neglect, to improve the quality of child care, to be more adequate parents or caretakers, and to preserve and stabilize family life.

The provisions of this Article shall also apply to day-care facilities and day-care plans as defined in G.S. 110-86. (1979, c. 815, s. 1; 1981, c. 359, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Effect of Amendments. — The 1981 amendment added the last paragraph.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-543. Duty to report child abuse or neglect.

Any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the present

whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse or neglect and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention. If the report is made orally or by telephone, the person making the report shall give his name, address, and telephone number. Refusal of the person making the report to give his name shall not preclude the Department's investigation of the alleged abuse or neglect.

In the case of any report of abuse, the Director of Social Services, upon receipt of the report, may immediately provide the appropriate local law-enforcement agency with information on the nature of the report. The law-enforcement agency may investigate the report, and upon request of the Director of the Department of Social Services, the law-enforcement agency shall provide assistance with the investigation. (1979, c. 815, s. 1.)

Cross References. — As to authority of medical professionals in abuse cases, see § 7A-549.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-544. Investigation by Director; notification of person making the report.

When a report of abuse or neglect is received, the Director of the Department of Social Services shall make a prompt and thorough investigation in order to ascertain the facts of the case, the extent of the abuse or neglect, and the risk of harm to the juvenile, in order to determine whether protective services should be provided or the complaint filed as a petition. The investigation and evaluation shall include a visit to the place where the juvenile resides. All information received by the Department of Social Services shall be held in strictest confidence by the Department.

If the investigation reveals abuse or neglect, the Director shall decide whether immediate removal of the juvenile or any other juveniles in the home is necessary for their protection. If immediate removal does not seem necessary, the Director shall immediately provide or arrange for protective services. If the parent or other caretaker refuses to accept the protective services provided or arranged by the Director, the Director shall sign a complaint seeking to invoke the jurisdiction of the court for the protection of the juvenile or juveniles.

If immediate removal seems necessary for the protection of the juvenile or other juveniles in the home, the Director shall sign a complaint which alleges the applicable facts to invoke the jurisdiction of the court. Where the investigation shows that it is warranted, a protective services worker may assume temporary custody of the juvenile for the juvenile's protection pursuant to Article 46 of this Chapter.

In performing any of these duties, the Director may utilize the staff of the county Department of Social Services or any other public or private community agencies that may be available. The Director may also consult with the available State or local law-enforcement officers who shall assist in the investigation and evaluation of the seriousness of any report of abuse or neglect when requested by the Director.

Unless a petition is filed within five working days after receipt of the report of abuse or neglect, the Director shall give written notice to the person making the report that:

(1) There is no finding of abuse or neglect; or

(2) The county Department of Social Services is taking action to protect the welfare of the juvenile and what specific action it is taking.

The notification shall include notice that, if the person making the report is not satisfied with the Director's decision, he may request review of the decision by the prosecutor within five working days of receipt. The person making the report may waive his right to this notification and no notification is required if the person making the report does not identify himself to the Director. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-545. Evaluation for court.

In all cases in which a petition is filed, the Director of the Department of Social Services shall prepare a report for the court containing a home placement plan and a treatment plan deemed by the Director to be appropriate to the needs of the juvenile. The report shall be available to the judge immediately following the adjudicatory hearing. (1979, c. 815, s. 1.)

§ 7A-546. Request for review by prosecutor.

The person making the report shall have five working days, from receipt of the decision of the Director of the Department of Social Services not to petition the court, to notify the prosecutor that he is requesting a review. The prosecutor shall notify the person making the report and the Director of the time and place for the review and the Director shall immediately transmit to the prosecutor a copy of the investigation report. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-547. Review by prosecutor.

The prosecutor shall review the Director's determination that a petition should not be filed within 20 days after the person making the report is notified. The review shall include conferences with the person making the report, the protective services worker, the juvenile, if practicable, and other persons known to have pertinent information about the juvenile or his family. At the conclusion of the conferences, the prosecutor may affirm the decision made by the Director or may authorize the filing of a petition. (1979, c. 815, s. 1; 1981, c. 469, s. 7.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, inserted "if practicable" following "the juvenile" near the middle of the second sentence.

§ 7A-548. Duty of county Department of Social Services to report evidence of abuse.

If the Director finds evidence that a juvenile has been abused as defined by statute, he shall immediately make a written report of his findings to the prosecutor who shall determine whether criminal prosecution is appropriate and who may request the Director to sign the appropriate criminal warrant. The Director of the Department of Social Services shall submit a report of alleged abuse or neglect to the central registry under the policies adopted by the Social Services Commission. (1979, c. 815, s. 1.)

§ 7A-549. Authority of medical professionals in abuse cases.

(a) Any physician or administrator of a hospital, clinic, or other medical facility to which a suspected abused juvenile is brought for medical diagnosis or treatment shall have the right, when authorized by the chief district court judge of the district or his designee, to retain physical custody of the juvenile in the facility when the physician who examines the juvenile certifies in writing that the juvenile who is suspected of being abused should remain for medical treatment or that, according to his medical evaluation, it is unsafe for the juvenile to return to his parent, guardian, custodian, or caretaker. This written certification must be signed by the certifying physician and must include the time and date that the judicial authority to retain custody is given. Copies of the written certification must be appended to the juvenile's medical and judicial records and another copy must be given to the juvenile's parent, guardian, custodian, or caretaker. The right to retain custody in the facility shall exist for up to 12 hours from the time and date contained in the written certification.

(b) Immediately upon receipt of judicial authority to retain custody, the physician, the administrator, or his designee shall so notify the director of social services for the county in which the facility is located. The director shall treat this notification as a report of suspected abuse and shall immediately begin an investigation of the case.

(1) If the investigation reveals (i) that it is the opinion of the certifying physician that the juvenile is in need of medical treatment to cure or alleviate physical distress, or to prevent the juvenile from suffering serious physical harm which might result in death, disfigurement, or substantial impairment of bodily function, and (ii) that it is the opinion of the physician that the juvenile should for these reasons remain in the custody of the facility for 12 hours, but (iii) that the juvenile's parent, guardian, custodian or caretaker cannot be reached or, upon request, will not consent to the treatment within the facility, the director shall within the initial 12-hour period file a juvenile petition alleging abuse and setting forth supporting allegations and shall seek a nonsecure custody order. A petition filed and a nonsecure custody order obtained in accordance with this subdivision shall come on for hearing under the regular provisions of this Subchapter unless the director and the certifying physician together voluntarily dismiss the petition.

(2) In all cases except those described in subdivision (1) above, the director shall conduct his investigation and may initiate juvenile proceedings and take all other steps authorized by the regular provisions of this Subchapter. If the director decides not to file a petition, the physician, the administrator or his designee may ask the prosecutor to review this decision according to the provisions of G.S. 7A-546 and 7A-547.

(c) If, upon hearing, the court determines that the child is found in a county other than the county of legal residence, in accord with G.S. 153A-257, the child may be transferred, in accord with G.S. 7A-647(2), to the custody of the department of social services in the county of residence.

(d) If the court, upon inquiry, determines that the medical treatment rendered was necessary and appropriate, the cost of that treatment may be charged to the parents, guardian, custodian, or caretaker, or, if the parents are unable to pay, to the county of residence in accordance with G.S. 7A-647(3) and 7A-650.

(e) Except as otherwise provided, a petition begun under this section shall proceed in like manner with petitions begun under G.S. 7A-544.

(f) The procedures in this section are in addition to, and not in derogation of, the child abuse and neglect reporting provisions of G.S. 7A-543 and the temporary custody provisions of G.S. 7A-571. Nothing in this section shall preclude a physician or administrator and a director of social services from following the procedures of G.S. 7A-543 and 7A-571 whenever these procedures are more appropriate to the juvenile's circumstances. (1979, c. 815, s. 1; 1981, c. 716, s. 2.)

Effect of Amendments. — The 1981 amendment rewrote this section.

Session Laws 1981, c. 716, s. 3, provides that the act shall be effective 90 days after ratification. The act was ratified June 29, 1981.

§ 7A-550. Immunity of persons reporting.

Anyone who makes a report pursuant to this Article, cooperates with the county department of social services in any ensuing inquiry or investigation, testifies in any judicial proceeding resulting from the report, or otherwise participates in the program authorized by this Article, is immune from any civil or criminal liability that might otherwise be incurred or imposed for such action provided that the person was acting in good faith. In any proceeding involving liability, good faith is presumed. (1979, c. 815, s. 1; 1981, s. 469, s. 8.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, inserted "cooperates with the county department of social services in any ensuing inquiry or investigation" following "Article" near the beginning of the section.

§ 7A-551. Privileges not grounds for excluding evidence.

Neither the physician-patient privilege nor the husband-wife privilege shall be grounds for excluding evidence of abuse or neglect in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse or neglect is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as said privileges relate to the competency of the witness and to the exclusion of confidential communications. (1979, c. 815, s. 1.)

§ 7A-552. Central registry.

The Department of Human Resources shall maintain a central registry of abuse and neglect cases reported under this Article in order to compile data for appropriate study of the extent of abuse and neglect within the State and to identify repeated abuses of the same juvenile or of other juveniles in the same family. This data shall be furnished by county directors of social services to the Department of Human Resources and shall be confidential, subject to policies adopted by the Social Services Commission which provide for its appropriate use for study and research. Data shall not be used at any hearing or court proceeding unless based upon a final judgment of a court of law. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§§ 7A-553 to 7A-557: Reserved for future codification purposes.

ARTICLE 45.

Venue; Petition; Summons.

§ 7A-558. Venue.

(a) A proceeding in which a juvenile is alleged to be delinquent or undisciplined shall be commenced and adjudicated in the district in which the offense is alleged to have occurred.

When a proceeding in which a juvenile is alleged to be delinquent or undisciplined is commenced in a district other than that of the juvenile's residence, the judge shall proceed to adjudication in that district. After adjudication, these procedures shall be available to the court:

(1) The judge may transfer the proceeding to the court in the district where the juvenile resides for disposition.

(2) Where the proceeding is not transferred under subsection (1), the judge shall immediately notify the Chief District Judge in the district in which the juvenile resides. If the Chief District Judge requests a transfer within five days after receipt of notification, the judge shall transfer the proceeding.

(3) Where the proceeding is not transferred under (1) or (2), the judge, upon motion of the juvenile, shall transfer the proceeding to the court in the district where the juvenile resides for disposition. The judge shall advise the juvenile of the juvenile's right to transfer under this section.

(b) A proceeding in which a juvenile is alleged to be abused, neglected, or dependent may be commenced in the district in which the juvenile resides or is present. When a proceeding is commenced in a district other than that of the juvenile's residence, the judge, in his discretion or upon motion of the juvenile, may transfer the proceeding to the court in the district where the juvenile resides. A transfer under this subsection may be made at any time. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980. Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-559. Pleading and process.

The pleading in a juvenile action is the petition. The process in a juvenile action is the summons. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-560. Petition.

The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of his parent, guardian, or custodian and shall allege the facts which invoke jurisdiction over the juvenile. Except in cases in which delinquency or undisciplined behavior is alleged, the petition may contain information on more than one juvenile, when the juveniles are from the same home and are before the court for the same reason. In cases of alleged delinquency or undisciplined behavior, the petitions shall be separate.

A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the accusation.

Sufficient copies of the petition shall be prepared so that copies will be available for each juvenile, for each parent if living separate and apart, for the court counselor or social worker, and for any person determined by the court to be a necessary party. (1979, c. 815, s. 1; 1981, c. 469, s. 9.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, inserted in the first paragraph "or undisciplined behavior" near the beginning of the second sentence and in the third sentence.

CASE NOTES

Cited in In re Thomas, 45 N.C. App. 525, 263 S.E.2d 355 (1980).

§ 7A-561. Receipt of complaints; filing of petition.

(a) All reports concerning a juvenile alleged to be delinquent or undisciplined shall be referred to the intake counselor for screening. Thereafter, if it is determined by the intake counselor that a petition should be drawn and filed, the petition shall be drawn by the intake counselor or the clerk, signed by the complainant and verified before an official authorized to administer oaths. If the circumstances indicate a need for immediate attachment of jurisdiction and if the intake counselor is out of the county or otherwise unavailable to receive a complaint and to draw a petition when it is needed, the clerk shall assist the complainant in communicating his complaint to the intake counselor by telephone and, with the approval of the intake counselor, shall draw a petition and file it when signed and verified. A copy of the complaint and petition shall be transmitted to the intake counselor. Procedures for receiving delinquency and undisciplined complaints and drawing petitions thereon, consistent with this Article and Article 43, shall be established by administrative order of the chief judge in each judicial district under G.S. 7A-146(3).

(b) All complaints concerning a juvenile alleged to be abused, neglected, or dependent shall be referred to the Director of the Department of Social Services for screening. Thereafter, if it is determined by the Director that a complaint should be filed as a petition, the petition shall be drawn by the Director, verified before an official authorized to administer oaths, and filed by the clerk, recording the date of filing.

(c) All complaints, and any decision of the intake counselor or of the director of social services not to authorize that a complaint be filed as a petition shall be reviewed by the prosecutor, if review is requested pursuant to G.S. 7A-535 or G.S. 7A-546. If the prosecutor, after making his review, shall authorize a complaint to be filed as a petition, he shall prepare the complaint to be filed by the clerk as a petition, recording the day of filing. (1979, c. 815, s. 1; 1981, c. 469, ss. 10, 11.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "if review is requested pursuant to G.S. 7A-535 or G.S. 7A-546" for "pursuant to G.S. 7A-536 or G.S. 7A-547" at the end of the first sentence of subsection (c), and substituted "by the clerk" for "with the clerk" near the end of the second sentence of subsection (c).

§ 7A-562. Immediate need for petition when clerk's office is closed.

(a) All complaints which may arise when the office of the clerk of superior court is closed shall be referred to the intake counselor or the Director of Social Services according to the nature of the complaint.

(b) When the office of the clerk of superior court is closed, a magistrate may be authorized by the Chief District Judge to draw, verify, and issue petitions as follows:

(1) When an intake counselor requests a petition alleging a juvenile to be delinquent or undisciplined, or

(2) When the Director of the Department of Social Services requests a petition alleging a juvenile to be abused, neglected, or dependent.

(c) The authority of the magistrate under subsection (b) is limited to emergency situations when a petition is required in order to obtain a secure or nonsecure custody order. Any petition issued under this section shall be delivered to the clerk's office for processing as soon as that office is open for business. (1979, c. 815, s. 1.)

§ 7A-563. Commencement of action.

An action is commenced by the filing of a petition in the clerk's office when that office is open, or by the issuance of a juvenile petition by a magistrate when the clerk's office is closed, which issuance shall constitute filing. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-564. Issuance of summons.

After a petition has been filed, the clerk of superior court shall issue a summons to the juvenile, to the parent, and to the guardian, custodian, or caretaker requiring them to appear for a hearing at the time and place stated in the summons. A copy of the petition shall be attached to each summons. The summons shall advise the parent that upon service, jurisdiction over him is obtained and that failure of the parent to comply with any order of the court pursuant to G.S. 7A-650 may cause the court to issue a show cause order for contempt.

A summons shall be directed to the person summoned to appear and shall be delivered to any law-enforcement officer having authority and territorial jurisdiction to execute the process. (1979, c. 815, s. 1.)

§ 7A-565. Service of summons.

The summons shall be personally served upon the parent, the guardian, custodian, or caretaker, and the juvenile or counsel or guardian ad litem, not less than five days prior to the date of the scheduled hearing. The time for service may be waived in the discretion of the judge.

If the parent, guardian, or custodian entitled to receive a summons cannot be found by a diligent effort, the judge may authorize service of the summons and petition by mail or by publication. The cost of the service by publication shall be advanced by the petitioner and may be charged as court costs as the judge, in his discretion, may direct.

If the parent, guardian, or custodian is personally served as herein provided and fails without reasonable cause to appear and to bring the juvenile before the court, he may be proceeded against as for contempt of court.

The provisions of G.S. 15A-301(a), (c), (d), and (e) relating to criminal process apply to juvenile process; provided the period of time for return of an unserved summons is 30 days. (1979, c. 815, s. 1.)

Legal Periodicals. — For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

For a survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Editor's Note. — The annotations under this section are from cases decided under former § 7A-283.

Trial Court Is without Jurisdiction Where No Notice Was Served. — A trial court did not have jurisdiction to enter orders in a juvenile delinquency proceeding where no summons, petition or other notice was ever served on the juvenile, her parents, guardian or custodian prior to any of the hearings. In re McAllister, 14 N.C. App. 614, 188 S.E.2d 723 (1972).

Failure of Record to Show Time and Manner of Service. — Failure of a record of a juvenile delinquency proceeding to show the exact time and manner of service of the summons and petition upon the juvenile and his parents was not fatal where the record affirmatively shows that the juvenile and his mother were in fact accorded sufficient notice of the hearing at which he was adjudicated delinquent to provide adequate opportunity to prepare, that at least seven days prior to the hearing he had been represented by privately employed counsel, and that he was represented by such counsel at the hearing, which had already been once continued. In re Collins, 12 N.C. App. 142, 182 S.E.2d 662 (1971).

Service on Only One Parent Required. — In order to have a child declared dependent, it is not necessary to serve the petition on both parents, but only on one of them or the guardian or custodian. In re Yow, 40 N.C. App. 688, 253 S.E.2d 647, cert. denied, 297 N.C. 610, 257 S.E.2d 223 (1979).

The Fourteenth Amendment did not proscribe a finding of dependency binding upon the mother of a child so that his custody could be placed with a suitable person, where the mother was not served with any notice before the first hearing, but where the facts showed that his father was served with notice, and it was found as a fact that the mother's address was unknown and no evidence to dispute the finding was in the record. In re Yow, 40 N.C. App. 688, 253 S.E.2d 647, cert. denied, 297 N.C. 610, 257 S.E.2d 223 (1979).

§§ 7A-566 to 7A-570: Reserved for future codification purposes.

Article 46.

Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.

§ 7A-571. Taking a juvenile into temporary custody.

Temporary custody means the taking of physical custody and providing personal care and supervision until a court order for secure or nonsecure custody can be obtained. A juvenile may be taken into temporary custody under the following circumstances:

(1) A juvenile may be taken into temporary custody by a law-enforcement officer without a court order if grounds exist for the arrest of an adult in identical circumstances under G.S. 15A-401(b).

(2) A juvenile may be taken into temporary custody without a court order by a law-enforcement officer or a court counselor if there are reasonable grounds to believe that he is an undisciplined juvenile.

(3) A juvenile may be taken into temporary custody without a court order by a law-enforcement officer or a Department of Social Services

worker if there are reasonable grounds to believe that the juvenile is abused, neglected, or dependent and that he would be injured or could not be taken into custody if it were first necessary to obtain a court order.

(4) A juvenile may be taken into custody without a court order by a law-enforcement officer, by a court counselor, or by personnel of the Division of Youth Services as designated by the Department of Human Resources if there are reasonable grounds to believe the juvenile is an absconder from any State training school or approved detention facility. (1979, c. 815, s. 1.)

Cross References. — As to authority of medical professionals in abuse cases, see § 7A-549.

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-572. Duties of person taking juvenile into temporary custody.

(a) A person who takes a juvenile into custody without a court order under G.S. 7A-571(1), (2), or (3) shall proceed as follows:

(1) Notify the juvenile's parent, guardian, or custodian that the juvenile has been taken into temporary custody and advise the parent, guardian, or custodian of his right to be present with the juvenile until a determination is made as to the need for secure or nonsecure custody. Failure to notify the parent that the juvenile is in custody shall not be grounds for release of the juvenile;

(2) Release the juvenile to his parent, guardian, or custodian if the person having the juvenile in temporary custody decides that continued custody is unnecessary.

(3) If the juvenile is not released under subsection (b), the person having temporary custody shall proceed as follows:

a. In the case of a juvenile alleged to be delinquent or undisciplined, he shall request a petition be drawn pursuant to G.S. 7A-561 or if the clerk's office is closed, the magistrate pursuant to G.S. 7A-562. Once the petition has been drawn and verified, the person shall communicate with the intake counselor who shall consider prehearing diversion. If the decision is made to file a petition, the intake counselor shall contact the judge or person delegated authority pursuant to G.S. 7A-573 if other than the intake counselor for a determination of the need for continued custody.

b. In the case of a juvenile alleged to be abused, neglected, or dependent, he shall communicate with the Director of the Department of Social Services who shall consider prehearing diversion. If the decision is made to file a petition, the director shall contact the judge or person delegated authority pursuant to G.S. 7A-573 for a determination of the need for continued custody.

(4) A juvenile taken into temporary custody under this Article shall not be held for more than 12 hours unless:

a. A petition or motion for review has been filed by an intake counselor or the Director of the Department of Social Services, and

b. An order for secure or nonsecure custody has been entered by a judge.

(b) A person who takes a juvenile into custody under G.S. 7A-571(4) shall, after contacting a judge and receiving an order for secure custody, transport the

juvenile to the nearest approved facility providing secure custody. He shall then contact the administrator of the training school or detention facility from which the juvenile absconded, who shall be responsible for returning the juvenile to that facility. (1979, c. 815, s. 1; 1981, c. 335, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, inserted "or person delegated authority pursuant to G.S. 7A-573 if other than the intake counselor" following "judge" in the last sentence of paragraph a of subdivision (3) of subsection (a), and inserted "or person delegated authority pursuant to G.S. 7A-573" following "judge" in the second sentence of paragraph b of subdivision (3) of subsection (a).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-573. Authority to issue custody orders; delegation.

In the case of any juvenile alleged to be within the jurisdiction of the court, when the judge finds it necessary to place the juvenile in custody, he may order that the juvenile be placed in secure or nonsecure custody pursuant to criteria set out in G.S. 7A-574.

Any district court judge shall have the authority to issue secure and nonsecure custody orders pursuant to G.S. 7A-574. The chief district judge may delegate the court's authority to persons other than district court judges by administrative order which shall be filed in the office of the clerk of superior court. The administrative order shall specify which persons shall be contacted for approval of a secure or nonsecure custody order pursuant to G.S. 7A-574 and may include intake counselors and other members of the chief court counselor's staff. (1979, c. 815, s. 1; 1981, c. 425.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, rewrote the second paragraph.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-574. Criteria for secure or nonsecure custody.

(a) When a request is made for nonsecure custody, the judge shall order nonsecure custody only when he finds that there is a reasonable factual basis to believe the matters alleged in the petition are true, and

(1) The juvenile has been abandoned; or

(2) The juvenile has suffered physical injury or sexual abuse; or

(3) The juvenile is exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, or custodian has created the conditions likely to cause injury or abuse or has failed to provide, or is unable to provide, adequate supervision or protection; or

(4) The juvenile is in need of medical treatment to cure, alleviate, or prevent suffering serious physical harm which may result in death, disfigurement, or substantial impairment of bodily functions, and his parent, guardian, or custodian is unwilling or unable to provide or consent to the medical treatment; or

(5) The parent, guardian or custodian consents to the nonsecure custody order.

In no case shall a juvenile alleged to be abused, neglected, or dependent be placed in secure custody.

(b) When a request is made for secure custody, the judge may order secure custody only where he finds there is a reasonable factual basis to believe that the juvenile actually commited the offense as alleged in the petition, and

(1) Repealed by Session Laws 1981, c. 426, s. 1, effective October 1, 1981.

(2) That the juvenile is presently charged with one or more felonies; or
(3) That the juvenile has willfully failed to appear on the pending delinquency charge or has a record of willful failures to appear at court proceedings; or
(4) That by reason of the juvenile's threat to flee from the court's jurisdiction or circumstances indicating preparation or design to flee from the court's judisdiction there is reasonable cause to believe the juvenile will not appear in court on a pending delinquency charge unless he is detained; or
(5) That exhaustive efforts to identify the juvenile have been futile or by reason of his being a nonresident of the State of North Carolina there is reasonable cause to believe the juvenile will not appear in court on a pending delinquency charge unless he is detained; or
(6) That the juvenile is an absconder from any State training school or detention facility in this or another state; or
(7) That the juvenile has a recent record of adjudications for violent conduct resulting in serious physical injury to others, the petition pending is for delinquency, and the charge involves physical injury; or
(8) That by reason of the juvenile's recent self-inflicted injury or attempted self injury there is reasonable cause to believe the juvenile should be detained for his own protection for a period of less than 24 hours while action is initiated to determine the need for inpatient hospitalization, provided that the juvenile has been refused admittance by one appropriate hospital; or
(9) That the juvenile alleged to be undisciplined by virtue of his being a runaway may be detained for a period of no more than 72 hours to facilitate evaluation of the juvenile's need for medical or psychiatric treatment or to facilitate reunion with his parents.

(c) When a juvenile has been adjudicated delinquent, the judge may order secure custody pending the dispositional hearing or pending placement of a delinquent juvenile pursuant to G.S. 7A-649. The judge may also order secure custody for a juvenile who is alleged to have violated the terms of his probation or conditional release.

(d) In determining whether secure custody should be ordered, the judge should consider the nature and circumstances of the offense; the weight of the evidence against the juvenile; the juvenile's family ties, character, mental condition, and school attendance record; and whether the juvenile is on conditional release. If the criteria for secure custody as set out in subsections (b) or (c) are met, the judge may enter an order directing an officer or other authorized person to assume custody of the juvenile and to take the juvenile to the place as is designated in the order. (1979, c. 815, s. 1; 1981, c. 426, ss. 1-4; c. 526.)

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, deleted subdivision (1) of subsection (b), which read "The juvenile is charged with a nondivertible offense; or". The amendment also substituted "may be detained for a period of no more than 72 hours to facilitate evaluation of the juvenile's need for medical or psychiatric treatment or to facilitate reunion with his parents" for "should be detained for a period of less than 24 hours to facilitate reunion with his parents or to facilitate evaluation of the juvenile's need for medical or psychiatric treatment" at the end of subdivision (9) of subsection (b), added the second sentence of subsection (c), and substituted "(b) or (c)" for "(b) and (c)" in the second sentence of subsection (d).

The second 1981 amendment, effective Oct. 1, 1981, in subsection (a), inserted "he" following "only when" near the middle of the introductory paragraph, rewrote subdivision (2), added subdivision (3), consisting of subject matter similar to that formerly contained in subdivision (2), and redesignated former subdivisions (3) and (4) as subdivisions (4) and (5) respectively.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

OPINIONS OF ATTORNEY GENERAL

Secure Custody Following Probation Violation. — A juvenile who has been adjudicated delinquent and placed on probation can later be placed in secure custody if that juvenile violates the terms of his probation without at the same time committing a new delinquent act. A delinquent juvenile who violates probation may be held in secure custody pending further disposition of his case according to subsections (c) and (d) of this section. See opinion of Attorney General to the Honorable Willis P. Whichard, Senator, North Carolina General Assembly, 49 N.C.A.G. 183 (1980).

A juvenile alleged to be undiscipline by virtue of being truant or disobedient cannot be held in secure custody. See Opinion of Attorney General to the Honorable Willis P. Whichard, Senator, North Carolina General Assembly, 49 N.C.A.G. 183 (1980).

Subsection (d) of this section does not prohibit issuance of a secure custody order for a delinquent juvenile prior to adjudication. See opinion of Attorney General to Sarah F. Patterson, Courts Specialist, Governor's Crime Commission, 50 N.C.A.G. 2 (1980).

§ 7A-575. Order for secure or nonsecure custody.

The custody order shall be in writing and shall direct a law-enforcement officer or other authorized person to assume custody of the juvenile and to make due return on the order. A copy of the order shall be given to the juvenile's parent, guardian, or custodian by the official executing the order. If the order is for secure custody, copies of the petition and custody order shall accompany the juvenile to the detention facility or holdover facility of the jail.

An officer receiving an order for custody which is complete and regular on its face may execute it in accordance with its terms and need not inquire into its regularity or continued validity, nor does he incur criminal or civil liability for its due service. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-576. Place of secure or nonsecure custody.

(a) A juvenile meeting the criteria set out in G.S. 7A-574, subsection (a), may be placed in nonsecure custody with the Department of Social Services or a person designated in the order for temporary residential placement in:

(1) A licensed foster home or a home otherwise authorized by law to provide such care or

(2) A facility operated by the Department of Social Services or

(3) Any other home or facility approved by the court and designated in the order.

(b) A juvenile meeting the criteria set out in G.S. 7A-574(b) may be temporarily detained in an approved county detention home or a regional detention facility which shall be separate from any jail, lockup, prison, or other adult penal institution. It shall be unlawful for a county or any unit of government to operate a juvenile detention home unless the facility meets the standards promulgated by the Department of Human Resources.

(c) Until July 1, 1983, if no juvenile detention home is available, a juvenile meeting the criteria set out in G.S. 7A-574(b) may be detained in a holdover facility which shall be inspected pursuant to G.S. 108-79 through 108-81, and 153A-222, and shall meet the State standards provided for in G.S. 153A-221.

(d) Subsection (c) expires on June 30, 1983. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-577. Hearing to determine need for continued secure or nonsecure custody.

(a) No juvenile shall be held under a custody order for more than five calendar days without a hearing on the merits or a hearing to determine the need for continued custody. In every case in which an order has been entered by an official exercising authority delegated pursuant to G.S. 7A-573, a hearing to determine the need for continued custody shall be conducted on the day of the next regularly scheduled session of district court in the city or county where the order was entered if such session precedes the expiration of the five calendar day period: Provided, that if such session does not precede the expiration of the five calendar day period, the hearing may be conducted at another regularly scheduled session of district court in the district where the order was entered.

(b) Any juvenile who is alleged to be delinquent shall be advised of his right to have an attorney represent him as provided in G.S. 7A-584 if he appears without counsel at the hearing.

(c) At a hearing to determine the need for continued custody, the judge shall receive testimony and shall allow the juvenile, and his parent, guardian, or custodian an opportunity to introduce evidence, to be heard in their own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that restraints on the juvenile's liberty are necessary and that no less intrusive alternative will suffice. The judge shall not be bound by the usual rules of evidence at such hearings.

(d) The judge shall be bound by criteria set forth in G.S. 7A-574 in determining whether continued custody is warranted.

(e) The judge shall impose the least restrictive interference with the liberty of a juvenile who is released from secure custody including:

(1) Release on the written promise of the juvenile's parent, guardian, or custodian to produce him in court for subsequent proceedings; or

(2) Release into the care of a responsible person or organization; or

(3) Release conditioned on restrictions on activities, associations, residence or travel if reasonably related to securing the juvenile's presence in court; or

(4) Any other conditions reasonably related to securing the juvenile's presence in court.

(f) If the judge determines that the juvenile meets the criteria in G.S. 7A-574 and should continue in custody, he shall issue an order to that effect. The order shall be in writing with appropriate findings of fact. The findings of fact shall include the evidence relied upon in reaching the decision and the purposes which continued custody is to achieve.

(g) Pending a hearing on the merits, further hearings to determine the need for continued custody shall be held at intervals of no more than seven calendar days. (1979, c. 815, s. 1; 1981, c. 469, s. 13.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "city or county" for "district" near the middle of the second sentence of subsection (a), and added the proviso at the end of the second sentence of subsection (a).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-578. Telephonic communication authorized.

All communications, notices, orders, authorizations, and requests authorized or required by G.S. 7A-572, 7A-574, and 7A-575 may be made by telephone when other means of communication are impratical. All written orders pursuant to telephonic communication shall bear the name and the title of the person communicating by telephone, the signature and the title of the official entering the order, and the hour and the date of the authorization. (1979, c. 815, s. 1.)

§§ 7A-579 to 7A-583: Reserved for future codification purposes.

ARTICLE 47.

Basic Rights.

§ 7A-584. Juvenile's right to counsel; presumption of indigence.

(a) A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. In any proceeding in which delinquency is alleged, the judge shall appoint counsel unless counsel is retained for the juvenile.

(b) All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

§ 7A-585. Appointment of guardian.

In any case when no parent appears in a hearing with the juvenile or when the judge finds it would be in the best interest of the juvenile, the judge may appoint a guardian of the person for the juvenile. The guardian shall operate under the supervision of the court with or without bond and shall file only such reports as the court shall require. The guardian shall have the care, custody, and control of the juvenile or may arrange a suitable placement for him and may represent the juvenile in legal actions before any court. The guardian shall also have authority to consent to certain actions on the part of the juvenile in place of the parent including marriage, enlisting in the armed forces, and undergoing major surgery. The authority of the guardian shall continue until the guardianship is terminated by order, until the juvenile is emancipated pursuant to Article 56, or until the juvenile reaches the age of majority. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-586. Appointment and duties of guardian ad litem.

When in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile. The duties of the guardian ad litem shall be to make an investigation to determine the facts, the needs of the juvenile, and the available resources within the family and community to meet those needs; to facilitate, when appropriate, the settlement of disputed issues; to explore options with the judge at the dispositional hearing; and to protect and promote the best interest of the juvenile until formally relieved of the responsibility by the judge. When the appointed guardian ad litem is not an attorney licensed to practice in the State of North Carolina, he may employ an attorney when the employment is authorized by the court and pursuant to Chapter 7A or request the appointment of an attorney to appear on behalf of the juvenile in the court proceeding and to assist the guardian ad litem by performing necessary and appropriate legal services on the juvenile's behalf, to present relevant facts to the judge at the adjudicatory hearing and to appeal, when advisable, from an adjudication or order of disposition to the Court of Appeals.

The judge may order the Department of Social Services or the guardian ad litem to conduct follow-up investigations to insure that the orders of the court are being properly executed and to report to the court when the needs of the juvenile are not being met. The judge may also authorize the guardian ad litem to accompany the juvenile to court in any criminal action wherein he may be called on to testify in a matter relating to abuse.

The judge may grant the guardian ad litem the authority to demand any information or reports whether or not confidential, that may in the guardian ad litem's opinion be relevant to the case. Neither the physician-patient privilege nor the husband-wife privilege may be invoked to prevent the guardian ad litem and the court from obtaining such information. The confidentiality of the information or reports shall be respected by the guardian ad litem and no disclosure of any information or reports shall be made to anyone except by order of the judge. (1979, c. 815, s. 1; 1981, c. 528.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote the first paragraph, substituted "accompany the juvenile to court" for "appear with the juvenile" near the middle of the second sentence of the second paragraph, and deleted the former first and second sentences of the last paragraph, which read: "The guardian ad litem shall be an attorney-at-law, licensed to practice in the State of North Carolina. In no case may the judge appoint a public defender as guardian ad litem."

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-587. Parent's right to counsel.

In cases where the juvenile petition alleges that a juvenile is abused, neglected or dependent, the parent has the right to counsel and to appointed counsel in cases of indigency unless the parent waives the right. In no case may the judge appoint a county attorney, prosecutor or public defender. (1979, c. 815, s. 1; 1981, c. 469, s. 14.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the second sentence.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Counsel Not Required in Every Termination Proceeding. — If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that due process did not therefore require the appointment of counsel, but since due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed, it cannot be said that the Constitution requires the appointment of counsel in every parental termination proceeding; therefore the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings is to be answered in the first instance by the trial court, subject, of course, to appellate review. Lassiter v. Department of Social Servs., — U.S. —, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

§ 7A-588. Payment of court appointed attorney or guardian ad litem.

An attorney or guardian ad litem appointed pursuant to G.S. 7A-584, 7A-586 or 7A-587 of this Article shall be paid a reasonable fee fixed by the court in the same manner as fees for attorneys appointed in cases of indigency. The judge may require the parent or a custodian other than a Department of Social Services to pay the attorney's fee or reimburse the State unless the parent or custodian is indigent. The test of the parent's or custodian's ability to pay shall be the test applied to appointment of an attorney in cases of indigency. A person who does not comply with the court's order of payment may be punished for contempt as provided in G.S. 5A-21. (1979, c. 815, s. 1.)

§§ 7A-589 to 7A-593: Reserved for future codification purposes.

Article 48.

Law-Enforcement Procedures in Delinquency Proceedings.

§ 7A-594. Role of the law-enforcement officer.

A law-enforcement officer, when he takes a juvenile into temporary custody, should select the least restrictive course of action appropriate to the situation and needs of the juvenile from the following:

(1) To divert the juvenile from the court by
   a. Release;
   b. Counsel and release;
   c. Release to parents;
   d. Referral to community resources;
(2) To seek a petition;
(3) To seek a petition and request a custody order. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

§ 7A-595. Interrogation procedures.

(a) Any juvenile in custody must be advised prior to questioning:
   (1) That he has a right to remain silent; and
   (2) That any statement he does make can be and may be used against him; and

(3) That he has a right to have a parent, guardian or custodian present during questioning; and

(4) That he has a right to consult with an attorney and that one will be appointed for him if he is not represented and wants representation.

(b) When the juvenile is less than 14 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a); however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

(c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that he does not wish to be questioned further, the officer shall cease questioning.

(d) Before admitting any statement resulting from custodial interrogation into evidence, the judge must find that the juvenile knowingly, willingly, and understandingly waived his rights. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Cited in In re Horne, 50 N.C. App. 97, 272 S.E.2d 905 (1980).

OPINIONS OF ATTORNEY GENERAL

Waiver of Right to Have Attorney Present. — A juvenile, less than 14 years of age, may waive his right to have an attorney present during interrogation. See opinion of Attorney General to Sgt. James Preston Simmons, Elkin Police Department, 49 N.C.A.G. 88 (1979).

§ 7A-596. Authority to issue nontestimonial identification order where juvenile alleged to be delinquent.

Nontestimonial identification procedures shall not be conducted on any juvenile without a court order issued pursuant to this Article unless the juvenile has been transferred to superior court for trial as an adult in which case procedures applicable to adults as set out in Articles 14 and 23 of Chapter 15A shall apply. A nontestimonial identification order authorized by this Article may be issued by any judge of the district court or of the superior court upon request of a prosecutor. As used in this Article, "nontestimonial identification" means identification by fingerprints, palm prints, footprints, measurements, blood specimens, urine specimens, saliva samples, hair samples, or other reasonable physical examination, handwriting exemplars, voice samples, photographs, and lineups or similar identification procedures requiring the presence of a juvenile. (1979, c. 815, s. 1; 1981, c. 454, s. 1.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the language beginning "unless the juvenile has been transferred" at the end of the first sentence.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-597. Time of application for nontestimonial identification order.

A request for a nontestimonial identification order may be made prior to taking a juvenile into custody or after custody and prior to the adjudicatory hearing. (1979, c. 815, s. 1; 1981, c. 454, s. 2.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, deleted "or prior to trial in superior court where a case is transferred pursuant to Article 49 of this Chapter" at the end of the section.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-598. Grounds for order.

An order may issue only on affidavit or affidavits sworn to before the judge and establishing the following grounds for the order:

(1) That there is probable cause to believe that an offense has been committed which if committed by an adult would be punishable by imprisonment for more than two years; and

(2) That there are reasonable grounds to suspect that the juvenile named or described in the affidavit committed the offense; and

(3) That the results of specific nontestimonial identification procedures will be of material aid in determining whether the juvenile named in the affidavit committed the offense. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-599. Issuance of order.

Upon a showing that the grounds specified in G.S. 7A-598 exist, the judge may issue an order following the same procedure as in the case of adults under G.S. 15A-274, 15A-275, 15A-276, 15A-277, 15A-278, 15A-279, 15A-280, and 15A-282. (1979, c. 815, s. 1.)

CASE NOTES

Purpose of References to Statutes. — Reference to the designated statutes in Article 14 of Chapter 15A for adult defendants is essential to comply with the new code provisions for juveniles. For example, trial judges should pay particular attention to § 15A-278 which specifies the necessary contents for the order. In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-600. Nontestimonial identification order at request of juvenile.

A juvenile in custody for or charged with an offense which if committed by an adult would be punishable by imprisonment for more than two years may request that nontestimonial identification procedures be conducted upon himself. If it appears that the results of specific nontestimonial identification procedures will be of material aid to the juvenile's defense, the judge to whom the request was directed must order the State to conduct the identification procedures. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-601. Destruction of records resulting from nontestimonial identification procedures.

The results of any nontestimonial identification procedures shall be retained or disposed of as follows:

(1) If a petition is not filed against a juvenile who has been the subject of nontestimonial identification procedures, all records of such evidence shall be destroyed.

(2) If in the district court or superior court pursuant to a transfer a juvenile is found not guilty, all records resulting from a nontestimonial order shall be destroyed. Further, in the case of a juvenile who is under 14 years of age and who is adjudicated to have committed a delinquent act, which would be less than a felony had the juvenile been an adult, all records shall be destroyed.

(3) If a juvenile 14 years of age or older is found to have committed a delinquent act which would be a felony if committed by an adult, all records resulting from a nontestimonial order may be retained in the court file. Special precautions shall be taken to ensure that these records will be maintained in such a manner and under such safeguards as to limit their use to inspection for comparison purposes by law-enforcement officers only in the investigation of a crime.

(4) If the juvenile is transferred to superior court, all records resulting from nontestimonial identification procedures shall be processed as in the case of an adult.

(5) Any evidence seized pursuant to a nontestimonial order shall be retained by law-enforcement officers until further order is entered by the court.

(6) Destruction of nontestimonial identification records pursuant to this section shall be performed by the law-enforcement agency having

possession of such records. Following destruction, the law-enforcement agency shall make written certification to the court of such destruction. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-602. Penalty for willful violation.

Any person who willfully violates provisions of this Article which prohibit conducting nontestimonial identification procedures without an order issued by a judge shall be guilty of a misdemeanor. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§§ 7A-603 to 7A-607: Reserved for future codification purposes.

Article 49.

Transfer to Superior Court.

§ 7A-608. Transfer of jurisdiction of juvenile to superior court.

The court after notice, hearing, and a finding of probable cause may transfer jurisdiction over a juvenile 14 years of age or older to superior court if the juvenile was 14 years of age or older at the time he allegedly committed an offense which would be a felony if committed by an adult. If the alleged felony constitutes a capital offense and the judge finds probable cause, the judge shall transfer the case to the superior court for trial as in the case of adults. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For article, "The Jurisdictional Dilemma of the Juvenile Court," see 51 N.C.L. Rev. 195 (1972).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former § 7A-280.

Transfer of Case Is within Discretion of Judge. — The decision on whether the case will be transferred to the superior court is left solely within the sound discretion of the district court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

No Right to Particular Trial Division. — Neither the juvenile defendant nor the State has the right to have a felony case disposed of in a particular trial division of the General Court of Justice. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Detailed Findings of Fact as to Probable Cause Not Required. — The North Carolina statutes relating to juveniles do not require that a determination of probable cause be supported by detailed findings of fact. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974).

Findings of Fact Not Required for Transfer. — The judge is not required to make findings of fact to support his conclusion that the needs of the juvenile or the best interest of the State would be served by transferring the case to the superior court division. It is only required that if he elects to order the transfer, he must state his reasons therefor. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

§ 7A-608.1. Fingerprinting juvenile transferred to superior court.

When jurisdiction over a juvenile is transferred to the superior court, the juvenile shall be fingerprinted and his fingerprints shall be sent to the State Bureau of Investigation. (1981, c. 862, s. 2.)

Editor's Note. — Session Laws 1981, c. 862, s. 5, provides that the act shall become effective Jan. 1, 1982.

§ 7A-609. Probable-cause hearing.

(a) The judge shall conduct a hearing to determine probable cause in all felony cases in which a juvenile was 14 years of age or older when the offense was allegedly committed unless counsel for the juvenile waives in writing his right to the hearing and stipulates to a finding of probable cause. The judge may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted.

(b) At the probable-cause hearing,

(1) A prosecutor must represent the State;

(2) The juvenile shall be represented by counsel in accordance with G.S. 7A-584;

(3) The juvenile may testify as a witness in his own behalf and call and examine other witnesses and produce other evidence in his behalf; and

(4) Each witness must testify under oath or affirmation and be subject to cross-examination.

(c) The State must by nonhearsay evidence, or by evidence that satisfies an exception to the hearsay rule, show that there is probable cause to believe that the offense charged has been committed and that there is probable cause to believe that the juvenile committed it, except:

(1) A report or copy of a report made by a physicist, chemist, firearms identification expert, fingerprint technician, or an expert or technician in some other scientific, professional, or medical field, concerning the results of an examination, comparison, or test performed by him in connection with the case in issue, when stated by that person in a report made by him, is admissible in evidence;

(2) If there is no serious contest, reliable hearsay is admissible to prove value, ownership of property, possession of property in another than the juvenile, lack of consent of the owner, possessor, or custodian of property to the breaking or entering of premises, chain of custody, and authenticity of signatures.

(d) The juvenile's attorney has the right to examine any court or probation records considered by the court in exercising its discretion to transfer the case. (1979, c. 815, s. 1; 1981, c. 469, ss. 15, 16.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the second sentence of subsection (a), and substituted "shall be represented" for "may be represented" in subdivision (2) of subsection (b).

Legal Periodicals. — For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former § 7A-280.

Transfer of Case Is within Discretion of Judge. — The decision on whether the case will be transferred to the superior court is left solely within the sound discretion of the district court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

No Right to Particular Trial Division. — Neither the juvenile defendant nor the State has the right to have a felony case disposed of in a particular trial division of the General Court of Justice. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Findings of Fact Not Required for Transfer. — The judge is not required to make findings of fact to support his conclusion that the needs of the juvenile or the best interest of the State would be served by transferring the case to the superior court division. It is only required that if he elects to order the transfer, he must state his reasons therefor. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Juvenile Not Placed in Jeopardy where Only Probable Cause Determined. — Where there was only a determination of probable cause in a hearing before the district court, even though the district court order referred to the hearing as having been adjudicatory and dispositional, the juveniles were not placed in jeopardy by the hearing in the district court before the case's transfer to the superior court. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974).

§ 7A-610. Procedure upon finding of probable cause.

(a) If probable cause is found, the prosecutor or the juvenile may move that the case be transferred to the superior court for trial as in the case of adults. If the alleged felony does not constitute a capital offense, the judge may proceed to determine whether the needs of the juvenile or the best interest of the State will be served by transfer of the case to superior court for trial as in the case of adults.

(b) If probable cause is not found, the judge shall dismiss the proceeding.

(c) Any order of transfer shall specify the reasons for transfer.

(d) A finding of no probable cause shall not preclude the judge from adjudicating the juvenile delinquent for the commission of a lesser included offense. (1979, c. 815, s. 1.)

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former § 7A-280.

Findings of Fact Not Required for Transfer. — The judge is not required to make findings of fact to support his conclusion that

the needs of the juvenile or the best interest of the State would be served by transferring the case to the superior court division. It is only required that if he elects to order the transfer, he must state his reasons therefor. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

Transfer of Case Is within Discretion of Judge. — The decision on whether the case will be transferred to the superior court is left solely within the sound discretion of the district court judge who conducts the probable cause hearing. The exercise of that discretion is not subject to review in the absence of a showing of gross abuse. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

No Right to Particular Trial Division. — Neither the juvenile defendant nor the State has the right to have a felony case disposed of in a particular trial division of the General Court of Justice. In re Bunn, 34 N.C. App. 614, 239 S.E.2d 483 (1977).

§ 7A-611. Right to pretrial release; detention.

Once the order of transfer has been entered, the juvenile has the right to pretrial release as provided in G.S. 15A-533 and 15A-534. Pending release under this Article, the judge may order that the juvenile be detained in a juvenile detention home or a separate section of a local jail as provided by G.S. 7A-576. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-612. When jeopardy attaches.

Jeopardy attaches in an adjudicatory hearing when the judge begins to hear evidence. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Juvenile Not Placed in Jeopardy where Only Probable Cause Determined. — Where there was only a determination of probable cause in a hearing before the district court, even though the district court order referred to the hearing as having been adjudicatory and dispositional, the juveniles were not placed in jeopardy by the hearing in the district court before the case's transfer to the superior court. In re Bullard, 22 N.C. App. 245, 206 S.E.2d 305, appeal dismissed, 285 N.C. 758, 209 S.E.2d 279 (1974), decided under former § 7A-280.

§§ 7A-613 to 7A-617: Reserved for future codification purposes.

ARTICLE 50.

Discovery.

§ 7A-618. Disclosure of evidence by petitioner.

(a) Statement of the Juvenile. — Upon motion of a juvenile alleged to be delinquent, the judge shall order the petitioner:

(1) To permit the juvenile to inspect and copy any relevant written or recorded statements within the possession, custody, or control of the petitioner made by the juvenile or any other party charged in the same action; and

(2) To divulge, in written or recorded form, the substance of any oral statement made by the juvenile or any other party charged in the same action.

(b) Names of Witnesses. — Upon motion of the juvenile, the judge shall order the petitioner to furnish the names of persons to be called as witnesses. A copy of the record of witnesses under the age of 16 shall be provided by the petitioner to the juvenile upon his motion if accessible to the petitioner.

(c) Documents and Tangible Objects. — Upon motion of the juvenile, the judge shall order the petitioner to permit the juvenile to inspect and copy books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or portions thereof:

(1) Which are within the possession, custody, or control of the petitioner, the prosecutor, or any law-enforcement officer conducting an investigation of the matter alleged; and

(2) Which are material to the preparation of his defense, are intended for use by the petitioner as evidence, and were obtained from or belong to the juvenile.

(d) Reports of Examinations and Tests. — Upon motion of a juvenile, the judge shall order the petitioner to permit the juvenile to inspect and copy results of physical or mental examinations or of tests, measurements or experiments made in connection with the case, within the possession, custody, or control of the petitioner. In addition upon motion of a juvenile, the judge shall order the petitioner to permit the juvenile to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it or tests or experiments made in connection with the evidence in the case if it is available to the petitioner, the prosecutor, or any law-enforcement officer conducting an investigation of the matter alleged and if the petitioner intends to offer the evidence at trial.

(e) Except as provided in subsections (a) through (d), this Article does not require the production of reports, memoranda, or other internal documents made by the petitioner, law-enforcement officers, or other persons acting on behalf of the petitioner in connection with the investigation or prosecution of the case or of statements made by witnesses or the petitioner to anyone acting on behalf of the petitioner.

(f) Nothing in this section prohibits a petitioner from making voluntary disclosures in the interest of justice. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-619. Disclosure of evidence by juvenile.

(a) Names of Witnesses. — Upon motion of the petitioner, the judge shall order the juvenile to furnish to the petitioner the names of persons to be called as witnesses.

(b) Documents and Tangible Objects. — If the court grants any relief sought by the juvenile under G.S. 7A-618, subsection (c), upon motion of the petitioner the judge shall order the juvenile to permit the petitioner to inspect and copy books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or portions thereof which are within the possession, custody, or control of the juvenile and which the juvenile intends to introduce in evidence.

(c) Reports of Examinations and Tests. — If the court grants any relief sought by the juvenile under G.S. 7A-618, subsection (d), upon motion of the petitioner, the judge shall order the juvenile to permit the petitioner to inspect and copy results of physical or mental examinations or of tests, measurements or experiments made in connection with the case within the possession and control of the juvenile which he intends to introduce in evidence or which were

prepared by a witness whom he intends to call if the results relate to the witness's testimony. In addition, upon motion of a petitioner, the judge shall order the juvenile to permit the petitioner to inspect, examine, and test, subject to appropriate safeguards, any physical evidence or a sample of it if the juvenile intends to offer the evidence or tests or experiments made in connection with the evidence in the case. (1979, c. 815, s. 1.)

§ 7A-620. Regulation of discovery; protective orders.

(a) Upon written motion of a party and a finding of good cause, the judge may at any time order that discovery or inspection be denied, restricted, or deferred.

(b) The judge may permit a party seeking relief under subsection (a) to submit supporting affidavits or statements to the court for in camera inspection. If thereafter, the judge enters an order granting relief under subsection (a), the material submitted in camera must be available to the Court of Appeals in the event of an appeal. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-621. Continuing duty to disclose.

If a party, subject to compliance with an order issued pursuant to this Article, discovers additional evidence prior to or during the hearing or decides to use additional evidence, and if the evidence is or may be subject to discovery or inspection under this Article, he shall promptly notify the other party of the existence of the additional evidence or of the name of each additional witness. (1979, c. 815, s. 1.)

§§ 7A-622 to 7A-626: Reserved for future codification purposes.

Article 51.

Hearing Procedures.

§ 7A-627. Amendment of petition.

The judge may permit a petition to be amended when the amendment does not change the nature of the offense alleged or the conditions upon which the petition is based. If a motion to amend is allowed, the juvenile shall be given a reasonable opportunity to prepare a defense to the amended allegations. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Allowing Amendment Discretionary. — Where the petition sufficiently alleged the offense of larceny, and the amendment in no way changed the nature of the offense but simply identified more specifically the owner of the property allegedly stolen, allowing the amendment under these circumstances was within the sound discretion of the court. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971), decided under former § 7A-285.

§ 7A-628. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

The provisions of G.S. 15A-1001, 15A-1002, and 15A-1003 apply to all cases in which a juvenile is alleged to be delinquent. No juvenile committed under this section may be placed in a situation where he will come in contact with adults committed for any purpose. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-629. Adjudicatory hearing.

The adjudicatory hearing shall be held in the district at such time and place as the chief district judge shall designate. The judge may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former § 7A-285.

Exclusion of Public. — It has never been the practice in juvenile proceedings wholly to exclude parents, relatives or friends, or to refuse juveniles the benefit of counsel. Even so, such proceedings are usually conducted without admitting the public generally. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd, sub. nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

It is a discretionary matter with the trial judge whether the general public (which includes newspaper reporters) is excluded from a juvenile hearing. In re Potts, 14 N.C. App. 387, 188 S.E.2d 643, cert. denied, 281 N.C. 622, 190 S.E.2d 471 (1972).

§ 7A-630. Participation of the prosecutor.

A prosecutor from the District Attorney's office shall represent the State in contested delinquency hearings including detention, probable cause, adjudicatory, dispositional, probation revocation and conditional release hearings. (1979, c. 815, s. 1; 1981, c. 469, s. 12.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added "including detention, probable cause, adjudicatory, dispositional, probation revocation and conditional release hearings" at the end of the section.

§ 7A-631. Conduct of hearing.

The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the judge shall protect the following rights of the juvenile and his parent to assure due process of law: the right to written notice of the facts alleged in the petition, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, the right of discovery and all rights afforded adult offenders except the right to

bail, the right of self-representation, and the right of trial by jury. (1979, c. 815, s. 1.)

Legal Periodicals. — For note on juries in the juvenile justice system, see 48 N.C.L. Rev. 666 (1970).

For comment on due process in juvenile proceedings, see 3 N.C. Cent. L.J. 255 (1972).

For survey of 1972 case law on the right to counsel for the "undisciplined child," see 51 N.C.L. Rev. 1023 (1973).

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under former § 7A-285.

I. General Consideration.
II. Due Process Rights.

I. GENERAL CONSIDERATION.

Juvenile Proceedings Designed to Foster Individualized Disposition. — Juvenile proceedings are something less than a full blown determination of criminality. They are designed to foster individualized disposition of juvenile offenders under protection of the courts in accordance with constitutional safeguards. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Juvenile proceedings are not criminal prosecutions. Nor is a finding of delinquency in a juvenile proceeding synonymous with conviction of a crime. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd, sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971); In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971); State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972); In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

But Proceedings Are Criminal for Fifth Amendment Purposes. — Juvenile proceedings must be regarded as "criminal" for Fifth Amendment purposes of the privilege against self-incrimination. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Juvenile delinquency hearings place juveniles in danger of confinement, and, therefore, the proceedings are to be treated as criminal proceedings, and conducted with due process in accord with constitutional safeguards of the Fifth Amendment. In re Chavis, 31 N.C. App. 579, 230 S.E.2d 198 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977).

And Double Jeopardy Rule Applies. — Although distinctions between juvenile proceedings and criminal prosecutions do still exist, they are sufficiently similar in nature that the double jeopardy provisions of the United States and North Carolina Constitutions are applicable to them. Accordingly, jeopardy attaches to the initial petition once an adjudicatory hearing on the merits is held. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Duty of District Court. — It is the constant duty of the district court to give each child subject to its jurisdiction such oversight and control as will be conducive to the welfare of the child and to the best interest of the State, and to ensure that the juvenile be carefully afforded all constitutional safeguards at every stage of the hearings. In re Eldridge, 9 N.C. App. 723, 177 S.E.2d 313 (1970).

Trial Judge May Question Witnesses. — The trial judge in a juvenile delinquency proceeding may question the witnesses to elicit relevant testimony and to aid in arriving at the truth. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

And May Give Opinion on Evidence. — The provisions of former § 1-180 prohibiting a court from giving an opinion on the evidence do not apply in a juvenile delinquency proceeding where no jury is present. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

II. DUE PROCESS RIGHTS.

Juvenile Entitled to Constitutional Safeguards. — A juvenile cited under a petition to appear for an inquiry into his alleged delinquency is entitled to the constitutional safeguards of due process and fairness. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971).

A juvenile is entitled to certain constitutional safeguards and fairness. State v. Rush, 13 N.C. App. 539, 186 S.E.2d 595 (1972).

Juveniles in delinquency proceedings are entitled to constitutional safeguards similar to those afforded adult criminal defendants. In re

Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Scope of juvenile due process is not as extensive as that incident to adversary adjudication for adult criminal defendants. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Requirements of Due Process. — So long as proceedings in the juvenile court meet the requirements of due process, they are constitutionally sound and must be upheld. This means that: (1) The basic requirements of due process and fairness must be satisfied in a juvenile court adjudication of delinquency. (2) The Fourteenth Amendment applies to prohibit the use of a coerced confession of a juvenile. (3) Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity. (4) In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same. (5) Juvenile proceedings to determine delinquency, as a result of which the juvenile may be committed to a State institution, must be regarded as "criminal" for Fifth Amendment purposes of the privilege against self-incrimination. The privilege applies in juvenile proceedings the same as in adult criminal cases. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd, sub nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Due process for a juvenile includes written notice of specific charges in advance of hearing, notification to child and parent of the right to counsel and that, if necessary, counsel will be appointed; the privilege against self-incrimination, proof of the offense charged beyond a reasonable doubt and determination of delinquency based on sworn testimony subject to cross-examination in the absence of a valid confession. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Due process safeguards include notice of the charge or charges upon which the petition is based. In re Jones, 11 N.C. App. 437, 181 S.E.2d 162, appeal dismissed, 279 N.C. 616, 184 S.E.2d 267 (1971).

Counsel Is Required in Delinquency Proceedings. — The due process clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child. In re Garcia, 9 N.C. App. 691, 177 S.E.2d 461 (1970).

But counsel is not constitutionally required at the hearing on an undisciplined child petition. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

And Distinction Does Not Deny Equal Protection. — Allowing a child to be adjudged undisciplined and placed on probation without benefit of counsel, while at the same time requiring counsel before a child may be adjudged delinquent, does not deny equal protection of the laws to the undisciplined child. In re Walker, 282 N.C. 28, 191 S.E.2d 702 (1972).

Trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Absent a statute providing for a jury trial, it is almost universally held that in juvenile court delinquency proceedings the alleged delinquent has no right under the pertinent State or federal Constitution to demand that the issue of his delinquency be determined by a jury. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969), aff'd, sub. nom. McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Dual Role as Judge and Prosecutor Unconstitutional. — Due process rights of a juvenile were violated in that the trial judge examined the witnesses for the State because of the absence of the district attorney or other counsel to represent the State. In re Thomas, 45 N.C. App. 525, 263 S.E.2d 355 (1980).

The presiding judge in a juvenile proceeding that could lead to detention should not assume the role of prosecuting attorney where the juvenile is represented by counsel and the hearing is adversary in nature. Such procedure would clearly violate due process in adult criminal prosecutions, nor does a dual role of judge and prosecutor measure up to the essentials of due process and fair treatment in juvenile proceedings where detention could result. In re Thomas, 45 N.C. App. 525, 263 S.E.2d 355 (1980).

§ 7A-632. Continuances.

The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice. (1979, c. 815, s. 1.)

CASE NOTES

Applied in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-633. When admissions by juvenile may be accepted.

(a) A judge may accept an admission from a juvenile only after first addressing him personally and

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
(2) Determining that he understands the nature of the charge;
(3) Informing him that he has a right to deny the allegations;
(4) Informing him that by his admissions he waives his right to be confronted by the witnesses against him;
(5) Determining that the juvenile is satisfied with his representation; and
(6) Informing him of the most restrictive disposition on the charge.

(b) By inquiring of the prosecutor, the juvenile's attorney, and the juvenile personally, the judge shall determine whether there were any prior discussions involving admissions, whether the parties have entered into any arrangement with respect to the admissions and the terms thereof, and whether any improper pressure was exerted. The judge may accept an admission from a juvenile only after determining that the admission is a product of informed choice.

(c) The judge may accept an admission only after determining that there is a factual basis for the admission. This determination may be based upon any of the following information: a statement of the facts by the prosecutor; a written statement of the juvenile; sworn testimony which may include reliable hearsay; or a statement of facts by the juvenile's attorney. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

Editor's Note. — The annotations under this section are from cases decided under former § 7A-285.

Acceptance of Admission. — In a juvenile hearing to determine delinquency, which may lead to commitment to a State institution, an admission by the juvenile of the allegations of the petition must be made with awareness of the consequences of the admission and must be made understandingly and voluntarily, and these facts must affirmatively appear in the record of the proceeding. In re Chavis, 31 N.C. App. 579, 230 S.E.2d 198 (1976), cert. denied, 291 N.C. 711, 232 S.E.2d 203 (1977); In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

An admission by the juvenile to the allegations of the petition is the equivalent to a plea of guilty by an adult in a criminal prosecution. In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

§ 7A-634. Rules of evidence.

(a) Where delinquent or undisciplined behavior is alleged and the allegation is denied, the court shall proceed in accordance with the rules of evidence applicable to criminal cases. In addition, no statement made by a juvenile to the intake counselor during the preliminary inquiry and evaluation process shall be admissible prior to the dispositional hearing.

(b) Where the juvenile is alleged to be abused, neglected or dependent, the rules of evidence in civil cases shall apply. (1979, c. 815, s. 1; 1981, ch. 469, s. 17.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, deleted "against the juvenile" following "admissible" near the end of the second sentence of subsection (a).

§ 7A-635. Quantum of proof in adjudicatory hearing.

The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt. The allegations in a petition alleging abuse, neglect, dependence, or undisciplined behavior shall be proved by clear and convincing evidence. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

CASE NOTES

The proper quantum of proof in a juvenile hearing to determine delinquency is proof beyond a reasonable doubt. In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977), decided under former § 7A-285.

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-636. Record of proceedings.

All adjudicatory and dispositional hearings and hearings on transfer to superior court shall be recorded by stenographic notes or by electronic or mechanical means. Records shall be reduced to a written transcript only when timely notice of appeal has been given. The judge may order that other hearings be recorded. (1979, c. 815, s. 1.)

§ 7A-637. Adjudication.

If the judge finds that the allegations in the petition have been proved as provided in G.S. 7A-635, he shall so state. If the judge finds that the allegations have not been proven, he shall dismiss the petition with prejudice and the juvenile shall be released from secure or nonsecure custody. (1979, c. 815, s. 1.)

§ 7A-638. Legal effect of adjudication of delinquency.

An adjudication that a juvenile is delinquent or commitment of a juvenile to the Division of Youth Services shall neither be considered conviction of any criminal offense nor cause the juvenile to forfeit any citizenship rights. (1979, c. 815, s. 1.)

§ 7A-639. Predisposition investigation and report.

The judge shall proceed to the dispositional hearing upon receipt of sufficient social, medical, psychiatric, psychological, and educational information. No predisposition report shall be submitted to or considered by the judge prior to the completion of the adjudicatory hearing. The judge shall permit the juvenile to inspect any predisposition report to be considered by him in making his disposition unless the judge determines that disclosure would seriously harm his treatment or rehabilitation or would violate a promise of confidentiality. Opportunity to offer evidence in rebuttal shall be afforded the juvenile and his parent, guardian, or custodian at the dispositional hearing. The judge may order counsel not to disclose parts of the report to the juvenile or the juvenile's parent, guardian, or custodian if the judge finds that disclosure would seriously harm the treatment or rehabilitation of the juvenile or would violate a promise of confidentiality given to a source of information. (1979, c. 815, s. 1.)

CASE NOTES

Continuance at Request of Juvenile. — This section and § 7A-640 make clear the legislative intent that the dispositional hearing must be continued for the juvenile respondent to present evidence when he requests such a continuance. This is particularly so in light of the provision of § 7A-632 that "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice." In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-640. Dispositional hearing.

The dispositional hearing may be informal, and the judge may consider written reports or other evidence concerning the needs of the juvenile. The juvenile and his parent, guardian, or custodian shall have an opportunity to present evidence, and they may advise the judge concerning the disposition they believe to be in the best interest of the juvenile. The judge may exclude the public from the hearing unless the juvenile moves that the hearing be open, which motion shall be granted. (1979, c. 815, s. 1; 1981, c. 469, s. 18.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the last sentence.

CASE NOTES

Consideration of Unadjudicated Acts Unrelated to Petition. — Trial courts giving consideration at a dispositional hearing to unadjudicated acts allegedly committed by a juvenile, unrelated to that for which he stands petitioned, must first determine that such information is reliable and accurate and that it was competently obtained. This does not mean that a full "trial" must be held to make the required determination about the unrelated acts. The trial court should have wide discretion in making the required determination from the sources available to it, but it must make the determination. In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

Continuance at Request of Juvenile. — Section 7A-639 and this section make clear the legislative intent that the dispositional hearing must be continued for the juvenile respondent to present evidence when he requests such a continuance. This is particularly so in light of the provision of § 7A-632 that "The judge may continue at any time any case to allow additional factual evidence, social information or other information needed in the best interest of the juvenile or in the interest of justice." In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-641. Consent judgment in abuse, neglect or dependency proceeding.

Nothing in this Article precludes the judge from entering a consent order or judgment on a petition for abuse, neglect or dependency when all parties are present, the juvenile is represented by counsel and all other parties are either represented by counsel or have waived counsel, and sufficient findings of fact are made by the judge. (1981, c. 371, s. 1.)

Editor's Note. — Session Laws 1981, c. 371, s. 2, makes the act effective Oct. 1, 1981.

§§ 7A-642 to 7A-645: Reserved for future codification purposes.

ARTICLE 52.

Dispositions.

§ 7A-646. Purpose.

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and his family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate community-level services to be provided to the juvenile and his family in order to strengthen the home situation.

In choosing among statutorily permissible dispositions for a delinquent juvenile, the judge shall select the least restrictive disposition both in terms of kind and duration, that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile. A juvenile should not be committed to training school or to any other institution if he can be helped through community-level resources. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

CASE NOTES

Editor's Note. — Some of the annotations under this section are from cases decided under former § 7A-286.

Purpose of Juvenile Code. — The stated purpose of the North Carolina Juvenile Code is to avoid commitment of the juvenile to training school if he could be helped through community-level resources. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

Discretion of Court. — It was the legislature's intention that the district courts exercise sound discretion in fashioning an appropriate response to each particular instance of delinquency. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Duty of District Court. — It is the constant duty of the district court to give each child subject to its jurisdiction such oversight and control as will conduce to the welfare of the child and to the best interest of the State, and to ensure that the juvenile be carefully afforded all constitutional safeguards at every stage of the hearings. In re Eldridge, 9 N.C. App. 723, 177 S.E.2d 313 (1970).

The court is required to consider the welfare of the delinquent child as well as the best interest of the State. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

Determination of Child's Interest. — What is or is not in the best interest of the child

must be determined in tandem with the perception of the legislature as to what is in the best interest of the state as enunciated by the terms of the Juvenile Code and by its general theme as deduced from the impetus behind its enactment. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

The following alternatives for disposition shall be available to any judge exercising jurisdiction, and the judge may combine any of the applicable alternatives when he finds such disposition to be in the best interest of the juvenile:

(1) The judge may dismiss the case, or continue the case in order to allow the juvenile, parent, or others to take appropriate action.

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

a. Require that he be supervised in his own home by the Department of Social Services in his county, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify; or

b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place him in the custody of the Department of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state. Any department of social services in whose custody or physical custody a juvenile is placed shall have the authority to arrange for and provide medical care as needed for such juvenile.

(3) In any case, the judge may order that the juvenile be examined by a physician, psychiatrist, psychologist or other qualified expert as may be needed for the judge to determine the needs of the juvenile. If the judge finds the juvenile to be in need of medical, surgical, psychiatric, psychological or other treatment, he shall allow the parent or other responsible persons to arrange for care. If the parent declines or is unable to make necessary arrangements, the judge may order the needed treatment, surgery or care, and the judge may order the parent to pay the cost of such care pursuant to G.S. 7A-650. If the judge finds the parent is unable to pay the cost of care, the judge may charge the cost to the county. If the judge believes, or if there is evidence presented to the effect that the juvenile is mentally ill or is mentally retarded the judge shall refer him to the area mental health, mental retardation, and substance abuse director or local mental health director for appropriate action. A juvenile shall not be committed directly to a State hospital or mental retardation center; and orders purporting to commit a juvenile directly to a State hospital or mental retardation center except for an examination to determine capacity to proceed shall be void and of no effect. The area mental health, mental retardation, and substance abuse director or local mental health director shall be responsible for arranging an interdisciplinary evaluation of the juvenile and mobilizing resources to meet his needs. If

institutionalization is determined to be the best service for the juvenile, admission shall be with the voluntary consent of the parent or guardian. If the parent, guardian, or custodian refuses to consent to a mental hospital or retardation center admission after such institutionalization is recommended by the area mental health, mental retardation, and substance abuse health director, the signature and consent of the judge may be substituted for that purpose. In all cases in which a regional mental hospital refuses admission to a juvenile referred for admission by a judge and an area mental health, mental retardation, and substance abuse director or discharges a juvenile previously admitted on court referral prior to completion of his treatment, the hospital shall submit to the judge a written report setting out the reasons for denial of admission or discharge and setting out the juvenile's diagnosis, indications of mental illness, indications of need for treatment, and a statement as to the location of any facility known to have a treatment program for the juvenile in question. (1979, c. 815, s. 1; 1981, c. 469, s. 19.)

Cross References. — As to authority of medical professionals in abuse cases, see § 7A-549.

Editor's Note. — Pursuant to Session Laws 1979, c. 358, s. 26, "area mental health, mental retardation, and substance abuse director" has been substituted for "area mental health director" in this section as enacted by Session Laws 1979, c. 815.

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, deleted "two" following "may combine any" near the middle of the introductory paragraph.

CASE NOTES

Editor's Note. — Most of the annotations under this section are from cases and opinions of the Attorney General decided and issued under former § 7A-286.

The legislature intended for the court to consider all information relevant to the disposition of a delinquent child. In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979).

The dispositional alternatives enumerated by § 7A-649 are to be read in tandem with this section. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

The provision in subsection (6) of former § 7A-286 that a juvenile judge may not commit a child directly to a mental institution was clearly designed to prevent conflicts with various statutes under Chapter 122. In re Mikels, 31 N.C. App. 470, 230 S.E.2d 155 (1976).

Chapter 122 was written to provide constitutional defense, procedural, and evidentiary rules. To allow juvenile judges to commit minors to mental institutions with a lesser standard than that set forth in Chapter 122 would subject such commitments to constitutional challenge as a deprivation of liberty without due process of law. In re Mikels, 31 N.C. App. 470, 230 S.E.2d 155 (1976).

A finding of fact that the mother was a fit and proper person to have custody of her child did not compel the conclusion that custody be awarded to her, where the court also found that the best interests of the child required that custody remain in others with whom the child was placed following a finding of dependency. In re Yow, 40 N.C. App. 688, 253 S.E.2d 647; cert. denied, 297 N.C. 610, 257 S.E.2d 223 (1979).

Authority to Consider Privately Operated Facility. — Under former § 7A-286, the trial court was not confined to a consideration only of government-operated resources but had the authority to place an undisciplined child in a privately operated facility for an indefinite stay at the county's expense. In re Lambert, 46 N.C. App. 103, 264 S.E.2d 379 (1980).

OPINIONS OF ATTORNEY GENERAL

Duration of Child Custody by County Social Services Department. — See opinion of Attorney General to Mrs. Margaret H. Coman, 40 N.C.A.G. 311 (1970).

Articles 4 and 5A, Chapter 122, did not revoke the authority which subdivision (6) of former § 7A-286 vested in a district court judge exercising juvenile jurisdiction to secure placement of a juvenile needing residential care and treatment for mental impairment to an appropriate facility. See opinion of Attorney General to Mr. R. Patterson Webb, Division of Mental Health, Department of Human Resources, 43 N.C.A.G. 163 (1973).

Section Does Not Authorize District Court Judge to Commit Juvenile to Center for Mentally Retarded. — See opinion of Attorney General to Dr. Ann F. Wolfe, Division of Mental Health Services, 44 N.C.A.G. 126 (1974).

§ 7A-648. Dispositional alternatives for delinquent or undisciplined juvenile.

In the case of any juvenile who is delinquent or undisciplined, the judge may:

(1) Continue the case for no more than six months in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision, through placement in a private or specialized school or agency, through placement with a relative, or through some other plan approved by the court;

(2) Place the juvenile under the protective supervision of a court counselor for no more than one year so that the court counselor may assist the juvenile in securing social, medical, and educational services and may work with the family as a unit to insure the juvenile is provided proper supervision and care;

(3) Excuse the juvenile from compliance with the compulsory school attendance law when the judge finds that suitable alternative plans can be arranged by the family through other community resources for one of the following: an education related to the needs or abilities of the juvenile including vocational education or special education; a suitable plan of supervision or placement; or some other plan that the judge finds to be in the best interest of the juvenile. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Commitment to the Division of Youth Services is not a statutorily permissible dispositional alternative for "undisciplined" behavior under this section. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

§ 7A-649. Dispositional alternatives for delinquent juvenile.

In the case of any juvenile who is delinquent, the judge may:

(1) Suspend imposition of a more severe, statutorily permissible disposition with the provision that the juvenile meet certain conditions agreed to by him and specified in the dispositional order. The conditions shall not exceed the maximum criminal sanction permissible for the offense;

(2) Require restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile. The judge may determine the amount, terms, and conditions of the restitution. If the juvenile participated with another person or persons, all participants should be jointly and severally responsible for the payment of restitution; however, the judge shall not require the juvenile to make restitution if the juvenile satisfies the court that he does not have, and could not reasonably acquire, the means to make restitution;

(3) Impose a fine related to the seriousness of the juvenile's offense. If the juvenile has the ability to pay the fine, it shall not exceed the maximum fine for the offense if committed by an adult;

(4) Order the juvenile to perform supervised community service consistent with the juvenile's age, skill, and ability, specifying the nature of the work and the number of hours required. The work shall be related to the seriousness of the juvenile's offense and in no event may the obligation to work exceed 12 months;

(5) Order the juvenile to a supervised day program, requiring him to be present at a specified place for all or part of every day or of certain days. The judge also may require the juvenile to comply with any other reasonable conditions specified in the dispositional order that are designed to facilitate supervision;

(6) Order the juvenile to a community-based program of academic or vocational education or to a professional residential or nonresidential treatment program. Participation in the programs shall not exceed 12 months;

(7) Impose confinement on an intermittent basis in an approved detention facility. Confinement shall be limited to:

a. Night custody for no more than a total of five nights; or

b. Weekend custody for no more than a total of two weekends;

Confinement in either case shall be completed within a period of 60 days from the date of disposition;

(8) Place the juvenile on probation under the supervision of a court counselor. In any case where a juvenile is placed on probation, the court counselor shall have the authority to visit the juvenile where he resides. The judge shall specify conditions of probation that are related to the needs of the juvenile including any of the following which apply:

a. That the juvenile shall remain on good behavior and not violate any laws;

b. That the juvenile attend school regularly;

c. That the juvenile not associate with specified persons or be in specified places;

d. That the juvenile report to a court counselor as often as required by a court counselor;

e. That the juvenile make specified financial restitution or pay a fine in accordance with subdivisions (2) and (3);

f. That the juvenile be employed regularly if not attending school.

An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the judge may extend it for an additional period of one year after a hearing if he finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile;

(9) Order that the juvenile shall not be licensed to operate a motor vehicle in the State of North Carolina for as long as the court retains jurisdiction over the juvenile or for any shorter period of time;

(10) Commit the juvenile to the Division of Youth Services in accordance with G.S. 7A-652. (1979, c. 815, s. 1; 1981, c. 469, s. 20.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added the second sentence of the introductory paragraph of subdivision (8).

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Editor's Note. — Some of the annotations under this section are from a case decided under former § 7A-286.

The dispositional alternatives enumerated by this section are to be read in tandem with § 7A-647. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Constitutional Rights of Child. — The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Training schools are established for the training and moral and industrial development of the delinquent children of the State. In re Whichard, 8 N.C. App. 154, 174 S.E.2d 281 (1970), cert. denied, 403 U.S. 940, 91 S. Ct. 2258, 29 L. Ed. 2d 719 (1971).

Community-based Programs. — The court does not have the authority under subdivision (6) of this section to require a county to pay for the treatment of a delinquent juvenile at a facility in another state. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Commitment to Division of Youth Services. — Clearly, the alternative provided for under subdivision (10) of this section ought to be employed only when there is no reasonable alternative open to the court in its disposition of the matter. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Where respondent juvenile was initially placed on probation as an "undisciplined" child for unlawful absence from school, and his probation was continued when he was adjudicated a delinquent for damage to property by shooting out the windows and screens of a home with an air rifle and again when he was adjudicated a delinquent for stealing $60.00 from a purse, his probationary status resulted from delinquent behavior rather than merely from the undisciplined behavior upon which it was initially grounded, and the juvenile court had authority to commit respondent to the custody of the Division of Youth Services for placement in one of its residential facilities upon finding respondent in violation of the conditions of his probation subsequent to the adjudications that he was delinquent. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

§ 7A-650. Authority over parents of juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent.

(a) If the judge orders medical, surgical, psychiatric, psychological, or other treatment pursuant to G.S. 7A-647(3), the judge may order the parent or other responsible parties to pay the cost of the treatment or care ordered.

(b) The judge may order the parent to provide transportation for a juvenile to keep an appointment with a court counselor.

(c) Whenever legal custody of a juvenile is vested in someone other than his parent, after due notice to the parent and after a hearing, the judge may order that the parent pay a reasonable sum that will cover in whole or in part the support of the juvenile after the order is entered. If the judge places a juvenile in the custody of a county department of social services and if the judge finds that the parent is unable to pay the cost of the support required by the juvenile, the cost shall be paid by the county department of social services in whose

custody the juvenile is placed, provided the juvenile is not receiving care in an institution owned or operated by the State or federal government or any subdivision thereof.

(d) Failure of a parent who is personally served to participate in or comply with subsections (a) through (c) may result in a civil proceeding for contempt. (1979, c. 815, s. 1.)

Cross References. — As to authority of medical professionals in abuse cases, see § 7A-549.

§ 7A-651. Dispositional order.

The dispositional order shall be in writing and shall contain appropriate findings of fact and conclusions of law. The judge shall state with particularity, both orally and in the written order of disposition, the precise terms of the disposition including the kind, duration and the person who is responsible for carrying out the disposition and the person or agency in whom custody is vested. (1979, c. 815, s. 1.)

CASE NOTES

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

§ 7A-652. Commitment of delinquent juvenile to Division of Youth Services.

(a) A delinquent juvenile 10 years of age or more may be committed to the Division of Youth Services for placement in one of the residential facilities operated by the Division if the judge finds that the alternatives to commitment as contained in G.S. 7A-649 have been attempted unsuccessfully or are inappropriate and that the juvenile's behavior constitutes a threat to persons or property in the community.

(b) Commitment shall be for:

(1) An indefinite term not to exceed the eighteenth birthday of the juvenile; or

(2) A definite term not to exceed two years if the judge finds that the juvenile is 14 years of age or older, has been previously adjudicated delinquent for two or more felony offenses, and has been previously committed to a residential facility operated by the Division of Youth Services. The Division may reduce the duration of the definite commitment by an amount not to exceed twenty-five percent (25%) if the juvenile has not committed any major infractions of the regulations of any facility to which he is assigned, and the Division of Youth Services may move for a reduction of more than twenty-five percent (25%) pursuant to G.S. 7A-664.

(c) In no event shall commitment be for a period of time in excess of that period for which an adult could be committed.

(d) The Chief Court Counselor shall have the responsibility for transporting the juvenile to the residential facility designated by the Division of Youth Services. The juvenile shall be accompanied to the residential facility by a person of the same sex.

(e) The Division of Youth Services shall accept all juveniles who have been committed for delinquency if the Director finds that the criteria specified in this section have been met. A commitment order accompanied by information requested by the Director shall be forwarded to the Division. The Director shall place the juvenile in the residential facility that would best provide for his needs and shall notify the committing court. The Secretary of the Department of Human Resources may assign a juvenile committed for delinquency to any institution or other program of the Department or licensed by the Department, which program is appropriate to the needs of the juvenile.

(f) When the judge commits a juvenile to the Division of Youth Services, the Director shall prepare a plan for care or treatment within 15 days after assuming custody of the juvenile.

(g) Commitment of a juvenile to the Division of Youth Services does not terminate the court's continuing jurisdiction rights over the juvenile and his parent or guardian. Commitment of a juvenile to the Division of Youth Services transfers only physical custody of the juvenile to the Division. Legal custody remains with the parent, guardian, agency or institution in whom it was vested. (1979, c. 815, s. 1.)

Legal Periodicals. — For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Commitment Warranted. — Where respondent juvenile was initially placed on probation as an "undisciplined" child for unlawful absence from school, and his probation was continued when he was adjudicated a delinquent for damage to property by shooting out the windows and screens of a home with an air rifle and again when he was adjudicated a delinquent for stealing $60.00 from a purse, his probationary status resulted from delinquent behavior rather than merely from the undisciplined behavior upon which it was initially grounded, and the juvenile court had authority to commit respondent to the custody of the Division of Youth Services for placement in one of its residential facilities upon finding respondent in violation of the conditions of his probation subsequent to the adjudications that he was delinquent. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

Quoted in In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979).

Cited in In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

Opinions of Attorney General

Application of Section. — Subsection (c) of this section does not apply to juveniles who were committed to the Division of Youth Services prior to January 1, 1980, and whose cases are not pending on appeal. See opinion of Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 162 (1980).

Determination of Period of Confinement. — When the committing judge in a juvenile proceeding predicates a finding of delinquency upon several actions by the juvenile which would be crimes if perpetrated by an adult, in considering the maximum time that the juvenile may be retained at a treatment facility under subsection (c) of this section, the Division of Youth Services is not automatically bound by the period of confinement that an adult would have received under concurrent sentencing. See opinion of Attorney General to Sarah T. Morrow, M.D., M.P.H., Secretary, Dep't of Human Resources, 49 N.C.A.G. 162 (1980).

Disposition of Minor Who Becomes 16 Prior to Hearing. — Where a minor was under the age of 16 at the time of the commission of a criminal offense but attained the age of 16 prior to the judicial hearing, the minor, if adjudicated delinquent, may be committed to the Department of Human Resources, Division of Youth Services, for institutional confinement "for a definite term or an indefinite term, not to extend beyond the eighteenth birthday of the child," as the Department [of Human Resources] or its administrative personnel may find to be in the best interest of the child. Opinion of Attorney General to the Hon. Larry Thomas Black, District Court Judge, Nov. 8, 1977, issued under former § 7A-286.

The court has the discretion to place such a minor, adjudicated delinquent, on juvenile probation. Adult probation, however, is not an alternative available to the court. If such a minor, adjudicated delinquent, violates the terms of his probation, the court may commit him to the Department of Human Resources, Division of Youth Services, for institutional confinement. Opinion of Attorney General to the Hon. Larry Thomas Black, District Court Judge, Nov. 8, 1977, issued under former § 7A-286.

§ 7A-653. Transfer authority of Governor.

The Governor may order transfer of any person less than 18 years of age from any jail or penal facility of the State to one of the residential facilities operated by the Division of Youth Services in appropriate circumstances, provided the Governor shall consult with the Department of Human Resources concerning the feasibility of the transfer in terms of available space, staff, and suitability of program.

When an inmate, committed to the Department of Correction, is transferred by the Governor to a residential program operated by the Division of Youth Services, the Division of Youth Services may release the juvenile based on the needs of the juvenile and the best interests of the State. Transfer shall not divest the probation-parole officer of his responsibility to supervise the inmate on release. (1979, c. 815, s. 1.)

§ 7A-654. Prerelease planning.

The Director of the Division of Youth Services shall be responsible for evaluation of the progress of each juvenile at least once every six months as long as the juvenile remains in the care of the Division. If the director determines that a juvenile is ready for release, he shall initiate a prerelease planning process. The prerelease planning process shall be defined by rules and regulations of the Division of Youth Services, but shall include the following:

(1) Written notification to the judge who ordered commitment;

(2) A prerelease planning conference shall be held involving as many as possible of the following: the juvenile, his parent, court counselors who have supervised the juvenile on probation or will supervise him on aftercare, and staff of the facility that found the juvenile ready for release. The prerelease planning conference shall include personal contact and evaluation rather than telephonic notification. (1979, c. 815, s. 1.)

§ 7A-655. Conditional release and final discharge.

The Division of Youth Services shall release a juvenile either by conditional release or by final discharge. The decision as to which type of release is appropriate shall be made by the Director based on the needs of the juvenile and the best interests of the State under rules and regulations governing release which shall be promulgated by the Division of Youth Services, according to the following guidelines:

(1) Conditional release is appropriate for a juvenile needing supervision after leaving the institution. As part of the prerelease planning process, the terms of conditional release shall be set out in writing and a copy given to the juvenile, his parent, the committing court, and the court counselor who will provide aftercare supervision.

(2) Final discharge is appropriate when the juvenile does not require supervision or is 18 years of age. (1979, c. 815, s. 1.)

§ 7A-656. Revocation of conditional release.

If a juvenile does not conform to the terms of his conditional release, the court counselor providing aftercare supervision may make a motion for review in the court in the district where the juvenile has been residing during aftercare supervision. The judge shall hold a hearing to determine whether there has been a violation. With respect to any hearing pursuant to this section, the juvenile:

(1) Shall have reasonable notice in writing of the nature and content of the allegations in the petition, including notice that the purpose of the hearing is to determine whether the juvenile has violated the terms of his conditional release to the extent that his conditional release should be revoked;
(2) Shall be permitted to be represented by an attorney at the hearing;
(3) Shall have the right to confront and cross-examine any persons who have made allegations against him;
(4) May admit, deny, or explain the violation alleged and may present proof, including affidavits or other evidence, in support of his contentions. A record of the proceeding shall be made and preserved in the juvenile's record.

If the judge determines that the juvenile has violated the terms of his conditional release, the judge may revoke the conditional release or make any other disposition authorized by this Subchapter.

If the judge revokes the conditional release, the Chief Court Counselor shall have the responsibility for returning the juvenile to the facility specified by the Division of Youth Services. (1979, c. 815, s. 1.)

§ 7A-657. Review of custody order.

In any case where the judge removes custody from a parent or person standing in loco parentis because of dependency, neglect or abuse, the juvenile shall not be returned to the parent or person standing in loco parentis unless the judge finds sufficient facts to show that the juvenile will receive proper care and supervision.

In any case where custody is removed from a parent, the judge shall conduct a review within six months of the date the order was entered, and shall conduct subsequent reviews at least every year thereafter. The Director of Social Services shall make timely requests to the clerk to calendar the case at a session of court scheduled for the hearing of juvenile matters within six months of the date the order was entered. The Director shall make timely requests for calendaring of the yearly reviews thereafter. The clerk shall give 15 days' notice of the review to the parent or the person standing in loco parentis, the juvenile if 12 years of age or more, the guardian, foster-parent, custodian or agency with custody, the guardian ad litem, and any other person the court may specify, indicating the court's impending review.

The court shall consider information from the Department of Social Services; the juvenile court counselor, the custodian, guardian, the parent or the person standing in loco parentis, the foster-parent, the guardian ad litem; and any public or private agency which will aid it in its review.

In each case the court shall consider the following criteria:

(1) Services which have been offered to reunite the family;
(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care;
(3) Goals of the foster care placement and the appropriateness of the foster care plan;
(4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile;

(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent;
(6) When and if termination of parental rights should be considered;
(7) Any other criteria the court deems necessary.

The judge, after making findings of fact, shall enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the juvenile. If at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement. (1979, c. 815, s. 1.)

§ 7A-658. Probation review.

The judge may review the progress of any juvenile on probation at any time during the period of probation or at the end of probation. The conditions or duration of probation may be modified only as provided in this Subchapter and only after there is notice and a hearing. If a juvenile violates the conditions of his probation, he and his parent after notice, may be required to appear before the court and the judge may make any disposition of the matter authorized by this Subchapter. At the end of or at any time during probation, the judge may terminate probation by written order upon finding that there is no further need for supervision. The finding and order terminating probation may be entered in chambers in the absence of the juvenile and may be based on a report from the court counselor or at the election of the judge, it may be entered with the juvenile present after notice and a hearing. (1979, c. 815, s. 1.)

CASE NOTES

Violation of Conditions of Probation. — Where respondent juvenile was initially placed on probation as an "undisciplined" child for unlawful absence from school, and his probation was continued when he was adjudicated a delinquent for damage to property by shooting out the windows and screens of a home with an air rifle and again when he was adjudicated a delinquent for stealing $60.00 from a purse, his probationary status resulted from delinquent behavior rather than merely from the undisciplined behavior upon which it was initially grounded, and the juvenile court had authority to commit respondent to the custody of the Division of Youth Services for placement in one of its residential facilities upon finding respondent in violation of the conditions of his probation subsequent to the adjudications that he was delinquent. In re Hughes, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

§§ 7A-659 to 7A-663: Reserved for future codification purposes.

ARTICLE 53.

Modification and Enforcement of Dispositional Orders; Appeals.

§ 7A-664. Authority to modify or vacate.

(a) Upon motion in the cause or petition, and after notice, the judge may conduct a review hearing to determine whether the order of the court is in the best interest of the juvenile, and the judge may modify or vacate the order in light of changes in circumstances or the needs of the juvenile.

(b) In a case of delinquency, the judge may reduce the nature or the duration of the disposition on the basis that it exceeds the statutory maximum, was imposed in an illegal manner or is unduly severe with reference to the seriousness of the offense, the culpability of the juvenile, or the dispositions given to juveniles convicted of similar offenses.

(c) In any case where the judge finds the juvenile to be delinquent, undisciplined, abused, neglected, or dependent, the jurisdiction of the court to modify any order or disposition made in the case shall continue during the minority of the juvenile or until terminated by order of the court. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

§ 7A-665. Request for modification for lack of suitable services.

If the Director of the Division of Youth Services finds that any juvenile committed to the Division's care is not suitable for its program the Director may make a motion in the cause so that the judge may make an alternative disposition. (1979, c. 815, s. 1.)

§ 7A-666. Right to appeal.

Upon motion of a proper party as defined in G.S. 7A-667, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. Notice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order. However, if no disposition is made within 60 days after entry of the order, written notice of appeal may be given within 70 days after such entry. A final order shall include:

(1) Any order finding absence of jurisdiction;
(2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;
(3) Any order of disposition after an adjudication that a juvenile is delinquent, undisciplined, abused, neglected, or dependent; or
(4) Any order modifying custodial rights. (1979, c. 815, s. 1.)

CASE NOTES

Finding of Probable Cause Not Final Order. — A finding of probable cause in a juvenile proceeding was not an appealable "final order" under this section and evidentiary rulings of the trial court in conducting the probable cause hearing were not properly before the Court of Appeals for review. In re Ford, 49 N.C. App. 674, 272 S.E.2d 157 (1980).

§ 7A-667. Proper parties for appeal.

An appeal may be taken by the juvenile; the juvenile's parent, guardian, or custodian; the State or county agency. The State's appeal is limited to the following:

(1) Any final order in cases other than delinquency or undisciplined cases;
(2) The following orders in delinquency or undisciplined cases:
    a. An order finding a State statute to be unconstitutional;
    b. Any order which terminates the prosecution of a petition by upholding the defense of double jeopardy, by holding that a cause of action is not stated under a statute, or by granting a motion to suppress. (1979, c. 815, s. 1.)

CASE NOTES

County May Not Appeal. — It is manifest that this statute does not empower a county to take an appeal in a juvenile proceeding. In re Brownlee, 301 N.C. 532, 272 S.E.2d 861 (1981).

§ 7A-668. Disposition pending appeal.

Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the judge orders otherwise. For compelling reasons which must be stated in writing, the judge may enter a temporary order affecting the custody or placement of the juvenile as he finds to be in the best interest of the juvenile or the State. (1979, c. 815, s. 1.)

Legal Periodicals. — For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Constitutionality of Former § 7A-289. — Former § 7A-289, permitting the district court to enter a temporary custody order affecting a juvenile who is appealing a commitment order of the court, was not unconstitutional on the ground that the statute deprives the juvenile of the right to bail. In re Martin, 9 N.C. App. 576, 176 S.E.2d 849 (1970), decided under former § 7A-289.

§ 7A-669. Disposition after appeal.

Upon the affirmation of the order of adjudication or disposition of the court by the Court of Appeals or by the Supreme Court in the event of such an appeal, the judge shall have authority to modify or alter his original order of adjudication or disposition as he finds to be in the best interest of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the appeal was pending. If the modifying order is entered ex parte, the court shall give notice to interested parties to show cause within 10 days thereafter as to why the modifying order should be vacated or altered. (1979, c. 815, s. 1.)

§§ 7A-670 to 7A-674: Reserved for future codification purposes.

ARTICLE 54.

Juvenile Records and Social Reports.

§ 7A-675. Confidentiality of records.

(a) The clerk of superior court shall maintain a complete record of all juvenile cases filed in his office to be known as the juvenile record, which shall be withheld from public inspection and may be examined only by order of the judge, except that the juvenile, his parent, guardian, custodian, or other authorized representative of the juvenile shall have a right to examine the juvenile's record. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been filed, the recording of the hearing may be erased or destroyed upon the written order of the judge.

(b) The Chief Court Counselor shall maintain a record of the cases of juveniles under supervision by court counselors which shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or his family; a record of the probation reports of a juvenile; interviews with his family; or other information which the judge finds should be protected from public inspection in the best interest of the juvenile.

(c) The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by his Department or under placement by the court. This file shall include material similar in nature to that described in subsection (b).

(d) The records maintained pursuant to subsections (b) and (c) may be examined only by order of the judge except that the juvenile shall have the right to examine them.

(e) Law-enforcement records and files concerning a juvenile shall be kept separate from the records and files of adults except in proceedings when jurisdiction of a juvenile is transferred to superior court. Law-enforcement records and files concerning juveniles shall be open only to the inspection of the prosecutor, court counselors, the juvenile, his parent, guardian, and custodian.

(f) All records and files maintained by the Division of Youth Services shall be withheld from public inspection and shall be open only to the inspection of the juvenile, professionals in that agency who are directly involved in the juvenile's case, and court counselors. The judge authorizing commitment of a juvenile shall have the right to inspect and order the release of records maintained by the Division of Youth Services on that juvenile.

(g) Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited except that publication of pictures of runaways is permitted with the permission of the parents.

(h) Nothing in this section shall preclude the necessary sharing of information among authorized agencies. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

CASE NOTES

Editor's Note. — The annotations under this section are from a case decided under former § 7A-287.

Cross-Examination of Defendant as to Prior Adjudications of Delinquency. — For purposes of impeachment, it is permissible to cross-examine a juvenile defendant with reference to his prior convictions or adjudications of guilt of prior conduct which, if committed by an adult, would have constituted a conviction of crime. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972).

In a criminal case, the rule, that when a defendant takes the stand he may be impeached by cross-examination with respect to previous convictions of crime, applies to every defendant who takes the stand, regardless of his age at the time of his previous conviction. State v. Miller, 281 N.C. 70, 187 S.E.2d 729 (1972).

§ 7A-676. Expunction of records of juveniles adjudicated delinquent and undisciplined.

(a) Any person who has attained the age of 16 years may file a petition in the court where he was adjudicated undisciplined for expunction of all records of that adjudication.

(b) Any person who has attained the age of 16 years may file a petition in the court where he was adjudicated delinquent for expunction of all records of that adjudication provided:

(1) The offense for which he was adjudicated would have been a crime if committed by an adult.

(2) The person has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the United States or the laws of this State or any other state.

(c) The petition shall contain, but not be limited to, the following:

(1) An affidavit by the petitioner that he has been of good behavior since the adjudication and, in the case of a petition based on a delinquency adjudication, that he has not subsequently been adjudicated delinquent or convicted as an adult of any felony or misdemeanor other than a traffic violation under the laws of the United States, or the laws of this State or any other state;

(2) Verified affidavits of two persons, who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good;

(3) A statement that the petition is a motion in the cause in the case wherein the petitioner was adjudicated delinquent or undisciplined.

The petition shall be served upon the district attorney in the district wherein adjudication occurred. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing on the petition.

(d) If the judge, after hearing, finds that the petitioner satisfies the conditions set out in subsections (a) or (b), he shall order and direct the clerk of superior court and all law-enforcement agencies to expunge their records of the adjudication including all references to arrests, complaints, referrals, petitions, and orders.

(e) The clerk of superior court shall forward a certified copy of the order to the sheriff, chief of police, or other law-enforcement agency.

(f) Records of a juvenile adjudicated delinquent or undisciplined being maintained by the Chief Court Counselor, an intake counselor or a court counselor shall be retained or disposed of as provided by the Juvenile Services Division.

(g) Records of a juvenile adjudicated delinquent or undisciplined being maintained by personnel at a residential facility operated by the Division of Youth Services, shall be retained or disposed of as provided by the Department of Human Resources. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

§ 7A-677. Effect of expunction.

(a) Whenever a juvenile's record is expunged, with respect to the matter in which the record was expunged, the juvenile who is the subject of the record and his parent may inform any person or organization including employers, banks, credit companies, insurance companies, and schools that he was not arrested, he did not appear before the court, and he was not adjudicated delinquent or undisciplined.

(b) Notwithstanding subsection (a), in any criminal or delinquency case if the juvenile is the defendant and chooses to testify or if he is not the defendant and is called as a witness, the juvenile may be ordered to testify with respect to whether he was adjudicated delinquent. (1979, c. 815, s. 1.)

§ 7A-678. Notice of expunction.

Upon expunction of a juvenile's record, the clerk of superior court shall send a written notice to the juvenile at his last known address informing him that the record has been expunged and with respect to the matter involved, the juvenile may inform any person that he has no record. The notice shall inform the juvenile further that if the matter involved is a delinquency record, the juvenile may inform any person that he was not arrested or adjudicated delinquent except that upon testifying in a criminal or delinquency proceeding, he may be required by a judge to disclose that he was adjudicated delinquent. (1979, c. 815, s. 1.)

§§ 7A-679 to 7A-683: Reserved for future codification purposes.

Article 55.

Interstate Compact on Juveniles.

§ 7A-684. Execution of Compact.

The Governor is hereby authorized and directed to execute a Compact on behalf of this State with any other state or states legally joining therein in the form substantially as follows: The contracting states solemnly agree:. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

§ 7A-685. Findings and purposes.

That juveniles who are not under proper supervision and control, or who have absconded, escaped or run away, are likely to endanger their own health, morals and welfare, and the health, morals and welfare of others. The cooperation of the states party to this Compact is therefore necessary to provide for the welfare and protection of juveniles and of the public with respect to

(1) Cooperative supervision of delinquent juveniles on probation or parole;
(2) The return, from one state to another, of delinquent juveniles who have escaped or absconded;

(3) The return, from one state to another, of nondelinquent juveniles who have run away from home; and

(4) Additional measures for the protection of juveniles and of the public, which any two or more of the party states may find desirable to undertake cooperatively.

In carrying out the provisons of this Compact the party states shall be guided by the noncriminal, reformative, and protective policies which guide their laws concerning delinquent, neglected, or dependent juveniles generally. It shall be the policy of the states party to this Compact to cooperate and observe their respective responsibilities for the prompt return and acceptance of juveniles and delinquent juveniles who become subject to the provisions of this Compact. The provisions of this Compact shall be reasonably and liberally construed to accomplish the foregoing purposes. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-686. Existing rights and remedies.

That all remedies and procedures provided by this Compact shall be in addition to and not in substitution for other rights, remedies, and procedures, and shall not be in derogation of parental rights and responsibilities. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-687. Definitions.

That, for the purposes of this Compact, "delinquent juvenile" means any juvenile who has been adjudged delinquent and who, at the time the provisions of this Compact are invoked, is still subject to the jurisdiction of the court that has made such adjudication or to the jurisdiction or supervision of an agency or institution pursuant to an order of such court; "probation or parole" means any kind of conditional release of juveniles authorized under the laws of the states party hereto; "court" means any court having jurisdiction over delinquent, neglected, or dependent children; "state" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico; and "residence" or any variant thereof means a place at which a home or regular place of abode is maintained. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-688. Return of runaways.

(a) That the parent, guardian, person, or agency entitled to legal custody of a juvenile who has not been adjudged delinquent but who has run away without the consent of such parent, guardian, person, or agency may petition the appropriate court in the demanding state for the issuance of a requisition for his return. The petition shall state the name and age of the juvenile, the name of the petitioner and the basis of entitlement to the juvenile's custody, the circumstances of his running away, his location if known at the time application is made, and such other facts as may tend to show that the juvenile who has run away is endangering his own welfare or the welfare of others and is not an emancipated minor. The petition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the document or documents on which the petitioner's entitlement to the juvenile's custody is based, such as birth certificates, letters of guardianship, or custody decrees. Such further affidavits and other documents as may be deemed proper may be submitted with such petition. The judge of the court to which this application is made may hold a hearing thereon to determine whether for the purposes of this Compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not he is an emancipated minor, and whether or not it is in the best interest of the juvenile to compel his return to the state. If the judge determines, either with or without a hearing, that the juvenile should be returned, he shall present to the appropriate court or to the executive authority of the state where the juvenile is alleged to be located a written requisition for the return of such juvenile. Such requisition shall set forth the name and age of the juvenile, the determination of the court that the juvenile has run away without the consent of a parent, guardian, person, or agency entitled to his legal custody, and that it is in the best interest and for the protection of such juvenile that he be returned. In the event that a proceeding for the adjudication of the juvenile as a delinquent, neglected, or dependent juvenile is pending in the court at the time when such juvenile runs away, the court may issue a requisition for the return of such juvenile upon its own motion, regardless of the consent of the parent, guardian, person, or agency entitled to legal custody, reciting therein the nature and circumstances

of the pending proceeding. The requisition shall in every case be executed in duplicate and shall be signed by the judge. One copy of the requisition shall be filed with the Compact Administrator of the demanding state, there to remain on file subject to the provisions of law governing records of such court. Upon the receipt of a requisition demanding the return of a juvenile who has run away, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into custody and detain such juvenile. Such detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No juvenile detained upon such order shall be delivered over to the officer whom the court demanding him, shall have appointed to receive him, unless he shall first be taken forthwith before a judge of a court in the state, who shall inform him of the demand made for his return, and who may appoint counsel or guardian ad litem for him. If the judge of such court shall find that the requisition is in order, he shall deliver such juvenile over to the officer to whom the court demanding him shall have appointed to receive him. The judge however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a juvenile who has run away from another state party to this Compact without the consent of a parent, guardian, person, or agency entitled to his legal custody, such juvenile may be taken into custody without a requisition and brought forthwith before a judge of the appropriate court who may appoint counsel or guardian ad litem for such juvenile and who shall determine after a hearing whether sufficient cause exists to hold the person, subject to the order of the court, for his own protection and welfare, for such a time not exceeding 90 days as will enable his return to another state party to this Compact pursuant to a requisition for his return from a court of that state. If, at the time when a state seeks the return of a juvenile who has run away, there is pending in the state wherein he is found any criminal charge, or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state, or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other form of proceeding, imprisonment, detention or supervision for such offense or juvenile delinquency. The duly accredited officers of any state party to this Compact, upon the establishment of their authority and the identity of the juvenile being returned, shall be permitted to transport such juvenile through any and all states party to this Compact, without interference. Upon his return to the state from which he ran away, the juvenile shall be subject to such further proceedings as may be appropriate under the laws of that state.

(b) That the state to which the juvenile is returned under this Article shall be responsible for payment of the transportation costs of such return.

(c) That "juvenile" as used in this Article means any person who is a minor under the law of the state of residence of the parent, guardian, person, or agency entitled to the legal custody of such minor. (1963, c. 910, s. 1; c. 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-689. Return of escapees and absconders.

(a) That the appropriate person or authority from whose probation or parole supervision a delinquent juvenile has absconded or from whose institutional custody he has escaped shall present to the appropriate court or to the executive authority of the state where the delinquent juvenile is alleged to be located a written requisition for the return of such delinquent juvenile. Such requisition shall state the name and age of the delinquent juvenile, the particulars of his adjudication as a delinquent juvenile, the circumstances of the

breach of the terms of his probation or parole or of his escape from an institution or agency vested with his legal custody or supervision, and the location of such delinquent juvenile, if known, at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the judgment, formal adjudication, or order of commitment which subjects such delinquent juvenile to probation or parole or to the legal custody of the institution or agency concerned. Such further affidavits and documents as may be deemed proper may be submitted with such requisition. One copy of the requisition shall be filed with the Compact Administrator of the demanding state, there to remain on file subject to the provisions of the law governing records of the appropriate court. Upon the receipt of a requisition demanding the return of a delinquent juvenile who has absconded or escaped, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into custody and detain such delinquent juvenile. Such detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No delinquent juvenile detained upon such order shall be delivered over to the officer whom the appropriate person or authority demanding him shall have appointed to receive him, unless he shall first be taken forthwith before a judge of an appropriate court in the state, who shall inform him of the demand made for his return and who may appoint counsel or guardian ad litem for him. If the judge of such court shall find that the requisition is in order, he shall deliver such delinquent juvenile over to the officer whom the appropriate person or authority demanding him shall have appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

Upon reasonable information that a person is a delinquent juvenile who has absconded while on probation or parole, or escaped from an institution or agency vested with his legal custody or supervision in any state party to this Compact, such person may be taken into custody in any other state party to this Compact without a requisition. But in such event, he must be taken forthwith before a judge of the appropriate court, who may appoint counsel or guardian ad litem for such person and who shall determine after a hearing, whether sufficient cause exists to hold the person subject to the order of the court for such a time, not exceeding 90 days, as will enable his detention under a detention order issued on a requisition pursuant to this Article. If, at the time when a state seeks the return of a delinquent who has either absconded while on probation or parole or escaped from an institution or agency vested with his legal custody or supervision, there is pending in the state wherein he is detained any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state, or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for such offense or juvenile delinquency. The duly accredited officers of any state party to this Compact, upon the establishment of their authority and the identity of the delinquent juvenile being returned, shall be permitted to transport such delinquent juvenile through any and all states party to this Compact, without interference. Upon his return to the state from which he escaped or absconded, the delinquent juvenile shall be subject to such further proceedings as may be appropriate under the laws of that state.

(b) That the state to which a delinquent juvenile is returned under this Article shall be responsible for the payment of transportation costs of such return. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-690. Voluntary return procedure.

That any delinquent juvenile who has absconded while on probation or parole, or escaped from an institution or agency vested with his legal custody or supervision in any state party to this Compact, and any juvenile who has run away from any state party to this Compact, who is taken into custody without a requisition in another state party to this Compact under the provisions of G.S. 7A-688(a) or 7A-689(a), may consent to his immediate return to the state from which he absconded, escaped or ran away. Such consent shall be given by the juvenile or delinquent juvenile and his counsel or guardian ad litem, if any, by executing or subscribing a writing in the presence of a judge of the appropriate court, which states that the juvenile or delinquent juvenile and his counsel or guardian ad litem, if any, consent to his return to the demanding state. Before such consent shall be executed or subscribed, however, the judge, in the presence of counsel or guardian ad litem, if any, shall inform the juvenile or delinquent juvenile of his rights under this Compact. When the consent has been duly executed, it shall be forwarded to and filed with the Compact Administrator of the state in which the court is located and the judge shall direct the officer having the juvenile or delinquent juvenile in custody to deliver him to the duly accredited officer or officers [of the state demanding his return, and shall cause to be delivered to such officer or officers] a copy of the consent. The court may, however, upon the request of the state to which the juvenile or delinquent juvenile is being returned, order him to return unaccompanied to such state and shall provide him with a copy of such court order, in such event a copy of the consent shall be forwarded to the Compact Administrator of the state to which said juvenile or delinquent juvenile is ordered to return. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

Editor's Note. — The words in brackets in the fourth sentence of this section as set out above were included in the Compact as set out in Session Laws 1963, c. 910, s. 1, but omitted, apparently through inadvertence, in the Compact as set out in Session Laws 1979, c. 815, s. 1.

§ 7A-691. Cooperative supervision of probationers and parolees.

(a) That the duly constituted judicial and administrative authorities of a state party to this Compact (herein called "sending state") may permit any delinquent juvenile within such state, placed on probation or parole, to reside in any other state party to this Compact (herein called "receiving state") while on probation or parole, and the receiving state shall accept such delinquent juvenile, if the parent, guardian, or person entitled to the legal custody of such delinquent juvenile is residing or undertakes to reside within the receiving state. Before granting such permission, opportunity shall be given to the receiving state to make such investigations as it deems necessary. The authorities of the sending state shall send to the authorities of the receiving state copies of pertinent court orders, social case studies and all other available information which may be of value to and assist the receiving state in supervising a probationer or parolee under this Compact. A receiving state, in its discretion, may agree to accept supervision of a probationer or parolee in cases where the parent, guardian, or person entitled to the legal custody of the delinquent juvenile is not a resident of the receiving state, and if so accepted, the sending state may transfer the supervision accordingly.

(b) That each receiving state will assume the duties of visitation and of supervision over any such delinquent juvenile and in the exercise of those duties will be governed by the same standards of visitation and supervision

that prevail for its own delinquent juveniles released on probation or parole.

(c) That, after consultation between the appropriate authorities of the sending state and of the receiving state as to the desirability and necessity of returning such a delinquent juvenile, the duly accredited officers of a sending state may enter a receiving state and there apprehend and retake any such delinquent juvenile on probation or parole. For that purpose, no formalities will be required, other than establishing the authority of the officer and the identity of the delinquent juvenile to be retaken and returned. The decision of the sending state to retake a delinquent juvenile on probation or parole shall be conclusive upon and not reviewable within the receiving state, but if, at the time the sending state seeks to retake a delinquent juvenile on probation or parole, there is pending against him within the receiving state any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for any act committed in such state or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for such offense or juvenile delinquency. The duly accredited officers of the sending state shall be permitted to transport delinquent juveniles being so returned through any and all states party to this Compact, without interference.

(d) That the sending state shall be responsible under this Article for paying the costs of transporting any delinquent juvenile to the receiving state or of returning any delinquent juvenile to the sending state. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-692. Responsibility for costs.

(a) That the provisions of G.S. 7A-688(b), 7A-689(b), and 7A-609(4) [7A-691(d)] of this Compact shall not be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

(b) That nothing in this Compact shall be construed to prevent any party state or subdivision thereof from asserting any right against any person, agency, or other entity in regard to costs for which such party state or subdivision thereof may be responsible pursuant to G.S. 7A-688(b), 7A-689(b), or 7A-609(4) [7A-691(d)] of this Compact. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-693. Detention practices.

That, to every extent possible, it shall be the policy of states party to this Compact that no juvenile or delinquent juvenile shall be placed or detained in any prison, jail, or lockup nor be detained or transported in association with criminal, vicious or dissolute persons. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-694. Supplementary agreements.

That the duly constituted administrative authorities of a state party to this Compact may enter into supplementary agreements with any other state or states party hereto for the cooperative care, treatment, and rehabilitation of delinquent juveniles whenever they shall find that such agreements will improve the facilities or programs available for such care, treatment, and rehabilitation. Such care, treatment, and rehabilitation may be provided, in an institution located within any state entering into such supplementary agreement. Such supplementary agreements shall:

(1) Provide the rates to be paid for the care, treatment, and custody of such delinquent juveniles taking into consideration the character of facilities, services, and subsistence furnished;
(2) Provide that the delinquent juvenile shall be given a court hearing prior to his being sent to another state for care, treatment, and custody;
(3) Provide that the state receiving such a delinquent juvenile in one of its institutions shall act solely as agent for the state sending such delinquent juvenile;
(4) Provide that the sending state shall at all times retain jurisdiction over delinquent juveniles sent to an institution in another state;
(5) Provide for reasonable inspection of such institutions by the sending state;
(6) Provide that the consent of the parent, guardian, person, or agency entitled to the legal custody of said delinquent juvenile shall be secured prior to his being sent to another state; and
(7) Make provisions for such other matters and details as shall be necessary to protect the rights and equities of such delinquent juveniles and of the cooperating states. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-695. Acceptance of federal and other aid.

That any state party to this Compact may accept any and all donations, gifts, and grants of money, equipment, and services from the federal or any local government, or any agency thereof and from any person, firm, or corporation, for any of the purposes and functions of this Compact, and may receive and utilize, the same subject to the terms, conditions, and regulations governing such donations, gifts, and grants. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-696. Compact administrators.

That the governor of each state party to this Compact shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more efficiently the terms and provisions of this Compact. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-697. Execution of Compact.

That this Compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form or (of) execution to be in accordance with the laws of the executing state. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-698. Renunciation.

That this Compact shall continue in force and remain binding upon each executing state until renounced by it. Renunciation of this Compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the Compact to the other states party hereto. The duties and obligations of a renouncing state under G.S. 7A-691 hereof shall continue as to parolees and probationers residing therein at the time of withdrawal until retaken or finally discharged. Supplementary agreements entered into under G.S. 7A-694 hereof shall be subject to renunciation as provided by such supplementary agreements, and shall not be

subject to the six months' renunciation notice of the present section. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-699. Severability.

That the provisions of this Compact shall be severable and if any phrase, clause, sentence, or provision of this Compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstances is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person, or circumstances shall not be affected thereby. If this Compact shall be held contrary to the constitution of any state participating therein, the Compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (1963, c. 910, s. 1; 1965, c. 925, s. 1; 1979, c. 815, s. 1.)

§ 7A-700. Authority of Governor to designate Compact Administrator.

Pursuant to said Compact, the Governor is hereby authorized and empowered to designate an officer who shall be the Compact Administrator and who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms of the Compact. Said Compact Administrator shall serve subject to the pleasure of the Governor. The Compact Administrator is hereby authorized, empowered, and directed to cooperate with all departments, agencies, and officers of and in the government of this State and its subdivisions in facilitating the proper administration of the Compact or of any supplementary agreement or agreements entered into by this State hereunder. (1963, c. 910, s. 2; 1979, c. 815, s. 1.)

§ 7A-701. Authority of Compact Administrator to enter into supplementary agreements.

The Compact Administrator is hereby authorized and empowered to enter into supplementary agreements with appropriate officials of other states pursuant to the Compact. In the event that such supplementary agreement shall require or contemplate the use of any institution or facility of this State or require or contemplate the provision of any serivce by this State, said supplementary agreement shall have no force or effect until approved by the head of the department or agency under whose jurisdiction said institution or facility is operated or whose department or agency will be charged with the rendering of such service. (1963, c. 910, s. 3; 1979, c. 815, s. 1.)

§ 7A-702. Discharging financial obligations imposed by Compact or agreement.

The Compact Administrator, subject to the approval of the Director of the Budget, may make or arrange for any payments necessary to discharge any financial obligations imposed upon this State by the Compact or by any supplementary agreement entered into thereunder. (1963, c. 910, s. 4; 1979, c. 815, s. 1.)

§ 7A-703. Enforcement of Compact.

The courts, departments, agencies, and officers of this State and subdivisions shall enforce this Compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions. (1963, c. 910, s. 5; 1979, c. 815, s. 1.)

§ 7A-704. Additional procedure for returning runaways not precluded.

In addition to any procedure provided in G.S. 7A-688 and 7A-690 of the Compact for the return of any runaway juvenile, the particular states, the juvenile or his parents, the courts, or other legal custodian involved may agree upon and adopt any other plan or procedure legally authorized under the laws of this State and the other respective party states for the return of any such runaway juvenile. (1963, c. 910, s. 6; 1979, c. 815, s. 1.)

§ 7A-705. Proceedings for return of runaways under § 7A-688 of Compact; "juvenile" construed.

The judge of any court in North Carolina to which an application is made for the return of a runaway under the provisions of G.S. 7A-688 of the Interstate Compact on Juveniles shall hold a hearing thereon to determine whether for the purposes of the Compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not he is an emancipated minor and whether or not it is in the best interest of the juvenile to compel his return to the state. The judge of any court in North Carolina finding that a requisition for the return of a juvenile under the provisions of G.S. 7A-688 of the Compact is in order shall upon request fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding. The period of time for holding a juvenile in custody under the provisions of G.S. 7A-688 of the Compact for his own protection and welfare, subject to the order of a court of this State, to enable his return to another state party to the Compact pursuant to a requisition for his return from a court of that state, shall not exceed 30 days. In applying the provisions of G.S. 7A-688 of the Compact to secure the return of a runaway from North Carolina, the courts of this State shall construe the word "juvenile" as used in this Article to mean any person who has not reached his or her eighteenth birthday. (1965, c. 925, s. 2; 1971, c. 1231, s. 2; 1977, c. 552; 1979, c. 815, s. 1.)

§ 7A-706. Interstate parole and probation hearing procedures for juveniles.

Where supervision of a parolee or probationer is being administered pursuant to the Interstate Compact on Juveniles, the appropriate judicial or administrative authorities in this State shall notify the Compact Administrator of the sending state whenever, in their view, consideration should be given to retaking or reincarceration for a parole or a probation violation. Prior to the giving of any such notification, a hearing shall be held in accordance with this Article within a reasonable time, unless such hearing is waived by the parolee or probationer. The appropriate officer or officers of this State shall as soon as practicable, following termination of any such hearing, report to the sending state, furnish a copy of the hearing record, and make recommendations regarding the disposition to be made of the parolee or probationer by the sending state. Pending any proceeding pursuant to this section, the appropri-

ate officers of this State may take custody of and detain the parolee or probationer involved for a period not to exceed 10 days prior to the hearing and, if it appears to the hearing officer or officers that retaking or reincarceration is likely to follow, for such reasonable period after the hearing or waiver as may be necessary to arrange for retaking or the reincarceration. (1979, c. 815, s. 1.)

§ 7A-707. Hearing officers.

Any hearing pursuant to this Article may be before the Administrator of the Interstate Compact on Juveniles, a deputy of such Administrator, or any other person authorized pursuant to the juvenile laws of this State to hear cases of alleged juvenile parole or probation violations, except that no hearing officer shall be the person making the allegation of violation. (1979, c. 815, s. 1.)

§ 7A-708. Due process at parole or probation violation hearing.

With respect to any hearing pursuant to this Article, the parolee or probationer:

(1) Shall have reasonable notice in writing of the nature and content of the allegations to be made, including notice that the purpose of the hearing is to determine whether there is probable cause to believe that he has committed a violation that may lead to a revocation of parole or probation;

(2) Shall be permitted to advise with any persons whose assistance he reasonably desires, prior to the hearing;

(3) Shall have the right to confront and examine any persons who have made allegations against him, unless the hearing officer determines that such confrontation would present a substantial present or subsequent danger of harm to such person or persons;

(4) May admit, deny, or explain the violation alleged and may present proof, including affidavits and other evidence, in support of his contentions.

A record of the proceedings shall be made and preserved. (1979, c. 815, s. 1.)

§ 7A-709. Effect of parole or probation violation hearing outside State.

In any case of alleged parole or probation violation by a person being supervised in another state pursuant to the Interstate Compact on Juveniles, any appropriate judicial or administrative officer or agency in another state is authorized to hold a hearing on the alleged violation. Upon receipt of the record of a parole or probation violation hearing held in another state pursuant to a statute substantially similar to this Article, such record shall have the same standing and effect as though the proceeding of which it is a record was had before the appropriate officer or officers in this State, and any recommendations contained in or accompanying the record shall be fully considered by the appropriate officer or officers of this State in making disposition of the matter. (1979, c. 815, s. 1.)

§ 7A-710. Amendment to Interstate Compact on Juveniles concerning interstate rendition of juveniles alleged to be delinquent.

(a) This amendment shall provide additional remedies, and shall be binding only as among and between those party states which specifically execute the same.

(b) All provisions and procedures of G.S. 7A-689 and 7A-690 of the Interstate Compact on Juveniles shall be construed to apply to any juvenile charged with being a delinquent by reason of a violation of any criminal law. Any juvenile, charged with being a delinquent by reason of violating any criminal law, shall be returned to the requesting state upon a requisition to the state where the juvenile may be found. A petition in such case shall be filed in a court of competent jurisdiction in the requesting state where the violation of criminal law is alleged to have been committed. The petition may be filed regardless of whether the juvenile has left the state before or after the filing of the petition. The requisition described in G.S. 7A-689 of the Compact shall be forwarded by the judge of the court in which the petition has been filed. (1979, c. 815, s. 1.)

§ 7A-711. Out-of-State Confinement Amendment.

(a) The Out-of-State Confinement Amendment to the Interstate Compact on Juveniles is hereby enacted into law and entered into by this State with all other states legally joining therein in the form substantially as follows:

(1) Whenever the fully constituted judicial or administrative authorities in a sending state shall determine that confinement of a probationer or reconfinement of a parolee is necessary or desirable, said officials may direct that the confinement or reconfinement be in an appropriate institution for delinquent juveniles within the territory of the receiving state, such receiving state to act in that regard solely as agent for the sending state.

(2) Escapees and absconders who would otherwise be returned pursuant to G.S. 7A-689 of the Compact may be confined or reconfined in the receiving state pursuant to this amendment. In any such case the information and allegations required to be made and furnished in a requisition pursuant to G.S. 7A-689, the sending state shall request confinement or reconfinement in the receiving state. Whenever applicable, detention orders as provided in G.S. 7A-689 may be employed pursuant to this paragraph preliminary to disposition of the escapee or absconder.

(3) The confinement or reconfinement of a parolee, probationer, escapee, or absconder pursuant to this amendment shall require the concurrence of the appropriate judicial or administrative authorities of the receiving state.

(4) As used in this amendment: (i) "sending state" means sending state as that term is used in G.S. 7A-691 of the Compact or the state from which a delinquent juvenile has escaped or absconded within the meaning of G.S. 7A-689 of the Compact; (ii) "receiving state" means any state, other than the sending state, in which a parolee, probationer, escapee, or absconder may be found, provided that said state is a party to this amendment.

(5) Every state which adopts this amendment shall designate at least one of its institutions for delinquent juveniles as a "Compact Institution" and shall confine persons therein as provided in Paragraph (1) hereof unless the sending and receiving state in question shall make specific contractual arrangements to the contrary. All states party to this amendment shall have access to "Compact Institutions" at all reasonable hours for the purpose of inspecting the facilities thereof and for the purpose of visiting such of said State's delinquents as may be confined in the institution.

(6) Persons confined in "Compact Institutions" pursuant to the terms of this Compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed from said "Compact Institution" for transfer to an appropriate institution within the

sending state, for return to probation or parole, for discharge, or for any purpose permitted by the laws of the sending state.

(7) All persons who may be confined in a "Compact Institution" pursuant to the provisions of this amendment shall be treated in a reasonable and humane manner. The fact of confinement or reconfinement in a receiving state shall not deprive any person so confined or reconfined of any rights which said person would have had if confined or reconfined in an appropriate institution of the sending state; nor shall any agreement to submit to confinement or reconfinement pursuant to the terms of this amendment be construed as a waiver of any rights which the delinquent would have had if he had been confined or reconfined in any appropriate institution of the sending state except that the hearing or hearings, if any, to which a parolee, probationer, escapee, or absconder may be entitled (prior to confinement or reconfinement) by the laws of the sending state may be had before the appropriate judicial or administrative officers of the receiving state. In this event, said judicial and administrative officers shall act as agents of the sending state after consultation with appropriate officers of the sending state.

(8) Any receiving state incurring costs or other expenses under this amendment shall be reimbursed in the amount of such costs or other expenses by the sending state unless the states concerned shall specifically otherwise agree. Any two or more states party to this amendment may enter into supplementary agreements determining a different allocation of costs as among themselves.

(9) This amendment shall take initial effect when entered into by any two or more states party to the Compact and shall be effective as to those states which have specifically enacted this amendment. Rules and regulations necessary to effectuate the terms of this amendment may be promulgated by the appropriate officers of those states which have enacted this amendment.

(b) In addition to any institution in which the authorities of this State may otherwise confine or order the confinement of a delinquent juvenile, such authorities may, pursuant to the Out-of-State Confinement Amendment to the Interstate Compact on Juveniles, confine or order the confinement of a delinquent juvenile in a Compact Institution within another party state. (1979, c. 815, s. 1.)

§§ 7A-712 to 7A-716: Reserved for future codification purposes.

Article 56.

Emancipation.

§ 7A-717. Who may petition.

Any juvenile who is 16 years of age or older and who has resided in the same county in North Carolina or on federal territory within the boundaries of North Carolina for six months next preceding the filing of the petition may petition the court in that county for a judicial decree of emancipation. (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-718. Petition.

The petition shall be signed and verified by the petitioner and shall contain the following information:

(1) The full name of the petitioner, his birth date, and state and county of birth;
(2) A certified copy of the petitioner's birth certificate;
(3) The name and last known address of the parent, guardian, or custodian;
(4) The petitioner's address and length of residence at that address;
(5) The petitioner's reasons for requesting emancipation; and
(6) The petitioner's plan for meeting his own needs and living expenses which plan may include a statement of employment and wages earned that is verified by his employer. (1979, c. 815, s. 1.)

§ 7A-719. Summons.

A copy of the filed petition along with a summons shall be served upon the petitioner's parent, guardian, or custodian who shall be named as respondents. The summons shall include the time and place of the hearing and shall notify the respondents to file written answer within 30 days after service of the summons and petition. In the event that personal service cannot be obtained, service shall be in accordance with G.S. 1A-1, Rule 4(j). (1979, c. 815, s. 1.)

§ 7A-720. Hearing.

The judge, sitting without a jury, shall permit all parties to present evidence and to cross-examine witnesses. The petitioner shall have the burden of showing by a preponderance of the evidence that emancipation is in his best interest. Upon finding that reasonable cause exists, the judge may order the juvenile to be examined by a psychiatrist, a licensed clinical psychologist, a physician, or any other expert to evaluate the juvenile's mental or physical condition. The judge may continue the hearing and order investigation by a court counselor or by the county Department of Social Services to substantiate allegations of the petitioner or respondents.

No husband-wife or physician-patient privilege shall be grounds for excluding any evidence in the hearing. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-721. Considerations for emancipation.

In determining the best interest of the petitioner and the need for emancipation, the judge shall review the following considerations:

(1) The parental need for the earnings of the petitioner;
(2) The petitioner's ability to function as an adult;
(3) The petitioner's need to contract as an adult or to marry;
(4) The employment status of the petitioner and the stability of his living arrangements;
(5) The extent of family discord which may threaten reconciliation of the petitioner with his family;
(6) The petitioner's rejection of parental supervision or support; and
(7) The quality of parental supervision or support. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-722. Final decree of emancipation.

After reviewing the considerations for emancipation, the judge may enter a decree of emancipation if he determines:

(1) That all parties are properly before the court or were duly served and failed to appear and that time for filing an answer has expired; and

(2) That the petitioner has shown a proper and lawful plan for adequately providing for his own needs and living expenses; and

(3) That the petitioner is knowingly seeking emancipation and fully understands the ramifications of his act; and

(4) That emancipation is in the best interest of the petitioner.

The decree shall set out the court's findings.

If the judge determines that the criteria in subdivisions (1) through (4) are not met, he shall order the proceeding dismissed. (1979, c. 815, s. 1.)

§ 7A-723. Costs of court.

The judge may tax the costs of the proceeding to any party or may, for good cause, order the costs remitted.

The clerk of superior court may collect costs for furnishing to the petitioner a certificate of emancipation which shall recite the name of the petitioner and the fact of the petitioner's emancipation by court decree and shall have the seal of the clerk of superior court affixed thereon. (1979, c. 815, s. 1.)

§ 7A-724. Legal effect of final decree.

As of entry of the final decree of emancipation:

(1) The petitioner has the same right to make contracts and conveyances, to sue and to be sued, and to transact business as if he were an adult.

(2) The parent or guardian is relieved of all legal duties and obligations owed to the petitioner and is divested of all rights with respect to the petitioner.

(3) The decree is irrevocable.

Notwithstanding any other provision of this section, a decree of emancipation shall not alter the application of G.S. 14-322.2, 14-326.1, or the petitioner's right to inherit property by intestate succession. (1979, c. 815, s. 1.)

Editor's Note. — Section 14-322.2, referred to in this section, was repealed by Session Laws 1979, c. 838, s. 28.

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 7A-725. Appeals.

Any petitioner, parent, or guardian who is a party to a proceeding under this Article may appeal from any order of disposition to the Court of Appeals provided that notice of appeal is given in open court at the time of the hearing or in writing within 10 days after the hearing. Pending disposition of an appeal, the judge may enter a temporary order affecting the custody or placement of the petitioner as he finds to be in the best interest of the petitioner or the State. (1979, c. 815, s. 1.)

§ 7A-726. Application of common law.

A married juvenile is emancipated by this Article. All other common law provisions for emancipation are superseded by this Article. (1979, c. 815, s. 1.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§§ 7A-727 to 7A-731: Reserved for future codification purposes.

Article 57.

Judicial Consent for Emergency Surgical or Medical Treatment.

§ 7A-732. Judicial authorization of emergency treatment; procedure.

A juvenile in need of emergency treatment under Article 1A of Chapter 90 of the North Carolina General Statutes, whose physician is barred from rendering necessary treatment by reason of parental refusal to consent to treatment, may receive such treatment with court authorization under the following procedure:

(1) The physician shall sign a written statement setting out:
   a. The treatment to be rendered and the emergency need for treatment; and
   b. The refusal of the parent, guardian, or person standing in loco parentis to consent to the treatment; and
   c. The impossibility of contacting a second physician for a concurring opinion on the need for treatment in time to prevent immediate harm to the juvenile.

(2) Upon examining the physician's written statement prescribed in subsection (1) and finding:
   a. That the statement is in accordance with this Article, and
   b. That the proposed treatment is necessary to prevent immediate harm to the juvenile.

A judge may issue a written authorization for the proposed treatment to be rendered.

(3) In acute emergencies in which time may not permit implementation of the written procedure set out in subsections (1) and (2), a judge may, in his discretion, authorize treatment in person or by telephone upon receiving the oral statement of a physician satisfying the requirements of subsection (1) and upon finding that the proposed treatment is necessary to prevent immediate harm to the juvenile.

(4) A judge's authorization for treatment overriding parental refusal to consent should not be given without attempting to offer the parent an opportunity to state his reasons for refusal; however, failure of the judge to hear the parent's objections shall not invalidate judicial authorization under this Article.

(5) A judge's authorization for treatment under subsections (1) and (2) shall be issued in duplicate. One copy shall be given to the treating physician and the other copy shall be attached to the physician's written statement and filed as a juvenile proceeding in the office of the clerk of superior court.

(6) A judge's authorization for treatment under subsection (3) shall be reduced to writing as soon as possible, supported by the physician's written statement as prescribed in subsection (1) and shall be filed as prescribed in subsection (5).

A judge's authorization for treatment under this Article, shall have the same effect as parental consent for treatment.

Following a judge's authorization for treatment and after giving notice to the juvenile's parent, the judge shall conduct a hearing in order to provide for payment for the treatment rendered. The judge may order the parent or other responsible parties to pay the cost of such treatment. If the judge finds the parent is unable to pay the cost of treatment, such cost shall be a charge upon the county when so ordered.

This Article shall operate as a remedy in addition to the provisions in G.S. 7A-647(3). (1979, c. 815, s. 1.)

Editor's Note. — Session Laws 1979, c. 815, s. 5, makes the act effective Jan. 1, 1980.

Session Laws 1979, c. 815, s. 4, contains a severability clause.

§§ 7A-733 to 7A-739: Reserved for future codification purposes.

Article 58.

Juvenile Law Study Commission.

§ 7A-740. Creation; members; terms; qualifications; vacancies.

The Juvenile Law Study Commission is hereby created. It shall consist of 15 voting members, 11 to be appointed by the Governor, two by the President of the Senate, and two by the Speaker of the House of Representatives. Of the members appointed by the Governor, two shall be district court judges, one from an urban district, one from a rural. Three shall be a chief court counselor and two court counselors representing the Intake Division, one from an urban district, one from a rural. Two shall be from Social Services, one from the State level and one from the county. One shall be from the Division of Youth Services. One shall be from a local facility of Community Based Alternatives. One shall be from Law Enforcement. One shall be from the North Carolina Juvenile Detention Association. The district court judges and the Social Services members shall serve for three years. The chief court counselor and the court counselors shall serve for two years. The representatives from the Division of Youth Services, Law Enforcement, Community Based Alternatives, and the Juvenile Detention Association shall serve for one year. Two of the legislative members shall serve for four-year terms; two shall serve for two years. All initial terms shall begin July 1, 1980. A vacancy in membership shall be filled by the appointing authority who made the initial appointment. When the members' terms expire, their successors shall serve for the same length of time their predecessors served. A member whose term expires may be reappointed. (1979, 2nd Sess., c. 1283, s. 1.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1283, s. 3, makes the act effective July 1, 1980.

§ 7A-741. Duties.

It shall be the duty of the Commission to make continuing studies of the law, both statutory and judicial, as it pertains to juveniles, of agency services available to juveniles and their families, and of any other matters the Commission identifies as being of importance to State consideration of juveniles. The Commission shall report to the Governor and the General Assembly on or before the first day of each full session. The report shall be in writing and shall set forth the Commission's findings, conclusions, and recommendations including any proposed legislation. (1979, 2nd Sess., c. 1283, s. 1.)

§ 7A-742. Chairman; meetings; compensation of members.

The Governor shall appoint a chairman. The term of the chairman is two years and he may be reappointed. The Commission shall meet at such times and places as the chairman shall designate. The facilities of the State Legislative Building shall be available to the Commission, subject to approval of the Legislative Services Commission. Legislative members of the Commission shall be reimbursed for subsistence and travel expenses at the rates set out in G.S. 120-3.1. Members of the Commission who are not officers or employees of the State shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the Commission who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rate set out in G.S. 138-6. (1979, 2nd Sess., c. 1283, s. 1.)

§ 7A-743: Reserved for future codification purposes.

§ 7A-744. Supporting services.

The Commission may solicit, employ, or contract for technical assistance and clerical assistance, and may purchase or contract for the materials and services it needs. Subject to the approval of the Legislative Services Commission, the staff resources of the Legislative Services Commission shall be available to this Commission without cost except for travel, subsistence, supplies, and materials. (1979, 2nd Sess., c. 1283, s. 1.)

Chapter 8.

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ARTICLE 1.

Statutes.

§ 8-1. Printed statutes and certified copies evidence.

All statutes, or joint resolutions, passed by the General Assembly may be read in evidence from the printed statute book; or a copy of any act of the General Assembly certified by the Secretary of State shall be received in evidence in every court. (1826, c. 7; R. C., c. 44, ss. 4, 5; Code, ss. 1339, 1340; Rev., ss. 1592, 1593; C. S., s. 1747.)

Legal Periodicals. — For case law survey on evidence, see 41 N.C.L. Rev. 476 (1963); 44 N.C.L. Rev. 1005 (1966); 45 N.C.L. Rev. 934 (1967).

For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

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Public Statute Admissible. — Where the public printer has published a certain act with other public acts of the General Assembly, it is made, presumptively at least, a part of the public laws of the State and every person having occasion to do so has the right to read it in evidence in any court of the State as the law. Wrought Iron Range Co. v. Carver, 118 N.C. 328, 24 S.E. 352 (1896).

Private Statute Not Admissible. — The statute incorporating the North Carolina Railroad Company is a private act; and it is error to permit it to be read and commented on to the court or jury until it has been properly introduced as evidence. Town of Durham v. Richmond & D.R.R., 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891).

Same — Question of Law. — Whether the statute, or some enactment in it, is public or private, is a question of law, which the court must determine, in the absence of statutory enactment declaring and settling its nature. Town of Durham v. Richmond & D.R.R., 108 N.C. 399, 12 S.E. 1040, 13 S.E. 1 (1891).

Journal of Legislature. — A copy of the journal of the legislature deposited with the Secretary of State is not evidence for any purpose. Wilson v. Markley, 133 N.C. 616, 45 S.E. 1023 (1903), wherein the court said: "It is the journal, which we understand to be the original, which is to be filed in the office of the Secretary of State, and it is this original or an exemplification made therefrom by him which, when competent, is to be used in evidence."

Applied in C.C.T. Equip. Co. v. Hertz Corp., 256 N.C. 277, 123 S.E.2d 802 (1962).

§ 8-2. Martin's collection of private acts.

Any private act published by Francis X. Martin, in his collection of private acts, shall be received in evidence in every court. (1826, c. 7, s. 2; R. C., c. 44, s. 5; Code, s. 1340; Rev., s. 1593; C. S., s. 1748.)

§ 8-3. Laws of other states or foreign countries.

(a) A printed copy of a statute, or other written law, of another state, or of a territory, or of a foreign country, or a printed copy of a proclamation, edict, decree or ordinance, by the executive thereof, contained in a book or publication purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the judicial tribunals thereof, shall be evidence of the statute law, proclamation, edict, decree, or ordinance. The unwritten or common law of another state, or of a territory, or of a foreign country, may be proved as a fact by oral evidence. The books of the reports of cases, adjudged in the courts thereof, shall also be admitted as evidence of the unwritten or common law thereof.

(b) Any party may exhibit a copy of the law of another state, territory, or foreign country copied from a printed volume of the laws of such state, territory, or country on file in

(1) The offices of the Governor or the Secretary of State, and duly certified by the Secretary of State, or

(2) The State Library and certified as provided in G.S. 125-6, or

(3) The Supreme Court Library and certified as provided in G.S. 7A-13 (f).

(1823, c. 1193, ss. 1, 3, P. R.; R. C., c. 44, s. 3; C. C. P., s. 360; Code, s. 1338; Rev., s. 1594; C. S., s. 1749; 1967, c. 565.)

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Editor's Note. — The cases cited in this annotation were decided prior to the enactment of § 8-4.

Prior to the enactment of § 8-4, when any question arose as to the law of any other state or territory, or of the United States, or of any foreign country, the parties were required to prove such law. Gooch v. Faucett, 122 N.C. 270, 29 S.E. 362 (1898); Miller v. Atlantic Coast Line R.R., 154 N.C. 441, 70 S.E. 838 (1911); Kelly Springfield Tire Co. v. Lester, 192 N.C. 642, 135 S.E. 728 (1926).

Presumption as Regards Common Law. — In the absence of proof to the contrary, the common law will generally be presumed to be in force in a sister state, except in those states whose jurisprudence is not founded on the common law. Miller v. Atlantic Coast Line R.R., 154 N.C. 441, 70 S.E. 838 (1911).

Same — Question for Jury. — Where the common law of another state is proved, the court must leave the evidence of what that law is to the jury and cannot inform them what the law is. Moore v. Gwynn, 27 N.C. 187 (1844).

Certificate of Secretary of State as Evidence. — The certificate of the Secretary of State, in relation to the statutes of another state, given in pursuance of this section is evidence in criminal and civil cases. State v. Patterson, 24 N.C. 346 (1842).

A transcript of a statute duly certified by the Secretary of State is evidence at all times of its being in force according to its terms unless a repeal is shown. State v. Cheek, 35 N.C. 114 (1851).

Publication of Foreign Laws Admissible. — A book purporting to be the publication of the statute laws of another state, and to be published by the authority of such state, is admissible as evidence of such laws. Copeland v. Collins, 122 N.C. 619, 30 S.E. 315 (1898).

Same — Printed Copy Admissible. — By the terms of this section, a printed copy of the acts of the legislature of another state, is admissible in the courts of this State to prove the statute law of such other state. Under the law as it stood prior to the enactment of this section, a printed copy of the acts of the legislature of a foreign state was not admissible in evidence. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894).

United States Agricultural Regulations Judicially Noticed. — The regulations of the United States Department of Agriculture concerning the transportation of cattle are not foreign laws within the meaning of this section, and the courts are required to take judicial notice of them. State v. Railroad, 141 N.C. 846, 54 S.E. 294 (1906).

Witnesses. — Any person who claims to know the provisions of the common or unwritten laws of a foreign country may, under this section, testify to and explain them before courts and juries. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894).

The law of another state may be proven in transitory actions brought in the courts of this State by witnesses learned in the law of such other state, and by its authorized statutes and reports of decisions of its courts of last resort, and when properly offered in evidence they must be interpreted by our courts as matters of law. Howard v. Howard, 200 N.C. 574, 158 S.E. 101 (1931).

Necessity of Instructions to Jury. — Where the foreign law has been proved it is the duty of the court to instruct the jury as to the meaning of the law, its applicability to the case at hand, and its effect on the case, and it is error to refer the whole case to the jury without instructions. Hooper v. Moore, 50 N.C. 130 (1857).

§ 8-4. Judicial notice of laws of United States, other states and foreign countries.

When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State. (1931, c. 30.)

Cross References. — As to judicial notice of private statutes, see § 1A-1, Rule 9 (h).

Legal Periodicals. — For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

For article, "Recognition of Foreign Judgments," see 50 N.C.L. Rev. 21 (1971).

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Survival of Action under Law of Another State. — In an action to recover for the alleged tortious conversion of personalty by a nonresident, instituted in this State after the death of the nonresident, against his personal representative, the failure of the complaint to allege that the cause of action survived under the laws of the state in which it arose does not render the complaint demurrable. Suskin v. Hodges, 216 N.C. 333, 4 S.E.2d 891 (1939).

Negligent Injury Occurring in Another State. — In an action instituted in this State to recover for negligent injury occurring in another state, liability must be determined according to the substantive law of such other state, of which the North Carolina courts must take notice. Thames v. Nello L. Teer Co., 267 N.C. 565, 148 S.E.2d 527 (1966).

Collision in Virginia. — In an action brought in this State under the Tort Claims Act for a collision which occurred in Virginia, the substantive law of Virginia and the procedural law of North Carolina apply. Parsons v. Alleghany County Bd. of Educ., 4 N.C. App. 36, 165 S.E.2d 776 (1969).

Applied in Suskin v. Hodges, 216 N.C. 333, 4 S.E.2d 891 (1939); Charnock v. Taylor, 223 N.C. 360, 26 S.E.2d 911, 148 A.L.R. 1126 (1943); Lewis v. Furr, 228 N.C. 89, 44 S.E.2d 604 (1947); Caldwell v. Abernathy, 231 N.C. 692, 58 S.E.2d 763 (1950); Johnson v. Salsbury, 232 N.C. 432, 61 S.E.2d 327 (1950); Handley Motor Co. v. Wood, 238 N.C. 468, 78 S.E.2d 391 (1953); Johnson v. Catlett, 246 N.C. 341, 98 S.E.2d 458 (1957); Kirby v. Fulbright, 262 N.C. 144, 136 S.E.2d 652 (1964); Arnold v. Ray Charles Enterprises, Inc., 264 N.C. 92, 141 S.E.2d 14 (1965); American Inst. of Marketing Sys., Inc. v. Willard Realty Co., 277 N.C. 230, 176 S.E.2d 775 (1970); Tennessee Carolina Transp., Inc. v. Strick Corp., 283 N.C. 423, 196 S.E.2d 711 (1973).

Cited in Tennessee-Carolina Transp., Inc. v. Strick Corp., 286 N.C. 235, 210 S.E.2d 181 (1974); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 252 S.E.2d 546 (1979).

§ 8-5. Town ordinances certified.

In a trial in which the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, proven as provided in G.S. 160A-79, shall be prima facie evidence of the existence of such ordinance. (1899, c. 277, s. 2; Rev., s. 1595; C.S., s. 1750; 1971, c. 381, s. 3; 1973, c. 1446, s. 17.)

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When Certification Unnecessary. — The certification of a town ordinance as required by this section, was only prima facie evidence of its existence, and this was unnecessary when the ordinance had been proven by the production of the official records of the town by the proper officer, which showed its passage. State v. Razook, 179 N.C. 708, 103 S.E. 67 (1929).

Evidence Insufficient to Rebut Prima Facie Case. — When the defendant, convicted of the violation of a city ordinance, on appeal introduced in evidence the minutes of the

meeting of the governing authorities of the town held on the date when the purported ordinance was alleged to have been adopted, which did not show its passage on that date, it was not conclusive that the ordinance had not been passed at some other time, against the statutory certificate of the mayor that it was in existence at the time of the defendant's conviction. State v. Gill, 195 N.C. 425, 142 S.E. 328 (1928).

No Evidence of Certification or Publication. — The refusal to permit police officer to testify on cross-examination as to existence and contents of a paper-writing which purported to be an ordinance of the city, was not error where there was no evidence that purported ordinance had been certified, as required by this section, or that it had been printed and published by the city as provided in § 160-272 (now repealed). Toler v. Savage, 226 N.C. 208, 37 S.E.2d 485 (1946).

Cited in State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958); Black v. Penland, 255 N.C. 691, 122 S.E.2d 504 (1961).

ARTICLE 2.

Grants, Deeds and Wills.

§ 8-6. Copies certified by Secretary of State or State Archivist.

Copies of the plats and certificates of survey, or their accompanying warrants, and all abstracts of grants, which may be filed in the office of the Secretary of State, or in the Department of Cultural Resources, which copies, upon certification by the Secretary of State as to those records in his office, or the State Archivist as to those records in the Department of Cultural Resources, as true copies, shall be as good evidence, in any court, as the original. (1822, c. 1154, P. R.; R. C., c. 44, s. 6; Code, s. 1341; Rev., s. 1596; C. S., s. 1751; 1961, c. 740, s. 1; 1973, c. 476, s. 48.)

Cross References. — As to certification by clerk of Secretary of State, see § 8-9.

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Material Discrepancy from Original. — This section does not make the copies better evidence than the original; and where there is a material discrepancy, it is for the jury to find as a fact which one is correct. Richards v. W.M. Ritter Lumber Co., 158 N.C. 54, 73 S.E. 485 (1911), modified on other grounds, 159 N.C. 455, 74 S.E. 1016 (1912).

Certified Abstract Competent to Show Title. — Abstracts of grants in the usual form, duly certified as correct copies by the Secretary of State and recorded in the office of the register of deeds, are competent to show title out of the state. Marshall v. Corbett, 137 N.C. 555, 50 S.E. 210 (1905).

Applied in Meekins v. Miller, 245 N.C. 567, 96 S.E.2d 715 (1957).

§ 8-7. Certified copies of grants and abstracts.

For the purpose of showing title from the State of North Carolina to the grantee or grantees therein named and for the lands therein described, duly certified copies of all grants and of all memoranda and abstracts of grants on record in the office of the Secretary of State, or in the Department of Cultural Resources, given in abstract or in full, and with or without the signature of the Governor and the great seal of the State appearing upon such record, shall be competent evidence in the courts of this State or of the United States or of any territory of the United States, and in the absence of the production of the original grant shall be conclusive evidence of a grant from the State to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 1; C. S., s. 1752; 1961, c. 740, s. 2; 1973, c. 476, s. 48.)

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Section Constitutional. — This section is constitutional and valid. Howell v. Hurley, 170 N.C. 401, 87 S.E. 107 (1915).

Copy Conclusive as to Regularity of Original. — An abstract of a grant of the State's land by the Secretary of State imports the regularity of its issuance, and that the constitutional mandate of affixing the seal of the original had been legally complied with, though the abstract gives no indication thereof, the regularity of the official conduct in granting the original being presumed; and the abstract may be introduced as competent evidence on the trial of an action involving the title to the lands described in the grant, by one claiming under it. Howell v. Hurley, 170 N.C. 401, 87 S.E. 107 (1915).

§ 8-8. Certified copies of grants and abstracts recorded.

Duly certified copies of such grants and of such memoranda and abstracts of grants may be recorded in the county where the lands therein described are situated, and the records thereof in such counties, or certified copies thereof, shall likewise be competent evidence for the purpose of showing title from the State of North Carolina to the grantee or grantees named and for the lands described therein. (1915, c. 249, s. 2; C. S., s. 1753.)

Cross References. — As to registration of certified copies of any deeds or writings, and their use in evidence, see § 47-31.

§ 8-9. Copies of grants certified by clerk of Secretary of State validated.

All copies of grants heretofore issued from the office of the Secretary of State, duly certified under the great seal of the State, and to which the name of the Secretary has been written or affixed by the clerk of the said Secretary of State, are hereby ratified and approved and declared to be good and valid copies of the original grants and admissible in evidence in all courts of this State when duly registered in the counties in which the land lies; all such copies heretofore registered in said counties are hereby declared to be lawful and regular in all respects as if the same had been signed by the Secretary of State in person and duly registered. (1901, c. 613; Rev., s. 1597; C. S., s. 1754.)

Editor's Note. — Prior to the enactment of this section it was consistently held that the clerk of the Secretary of State had no power to certify and affix the great seal of the State to copies of grants and other papers from the Secretary of State's office. Beam v. Jennings, 96 N.C. 82, 2 S.E. 245 (1887), but such acts on the part of the clerk are now validated by the provisions of this section.

Cross References. — As to copies of destroyed record as evidence generally, see § 98-1 et seq.

§ 8-10. Copies of grants in Burke.

Copies of grants issued by the State within the County of Burke prior to the destruction of the records of said county by General Stoneman in the year 1865, shall be admitted in evidence in all actions when the same are duly registered; and when the original grants are lost, destroyed or cannot be found after due search, it shall be presumed that the same were duly registered within the time prescribed by law, as provided upon the face of original grant. (1901, c. 513; Rev., s. 1610; C. S., s. 1755.)

§ 8-11. Copies of grants in Moore.

Copies of grants for land situated in Moore County and the counties of which Moore was a part, entered in a book, and the book being certified under the seal of the Secretary of State, shall have the force and effect of the originals and be evidence in all courts. (1903, c. 214; Rev., s. 1613; C. S., s. 1756.)

§ 8-12. Copies of grants in Onslow.

The copies of grants made by the register of deeds of Onslow County under laws of 1907, chapter 434, of grants, abstracts of grants, and other documents pertaining to titles of land in Onslow County issued prior to the year 1800, and contained in a book called Book of Transcribed Grants Issued Prior to One Thousand Eight Hundred, duly authenticated as prescribed in said Chapter 434 of the laws of 1907, shall be received as evidence in all courts of the State, and certified copies therefrom shall be received as evidence. (1907, c. 434; C.S., s. 1757.)

§ 8-13. Certain deeds dated before 1835 evidence of due execution.

In all actions hereafter instituted in which the title or ownership of any lands situated in North Carolina is at issue or in dispute, any deed or release, or a duly certified copy thereof, in which the people of the State of North Carolina are grantees and bearing date prior to the year 1835 and purporting to have been filed and recorded in the office of the Secretary of State of North Carolina prior to said year and now on file and of record in said office, and executed or purporting to have been executed by any person or persons as the representatives or agents or for or on behalf of any society, tribe, nation or aggregation of persons, whether signed or executed individually or in their representative capacity, and any such deed or release having been authorized to be executed by an act of the General Assembly of North Carolina by the properly authorized agents of such society, tribe, nation or aggregation of persons, shall be prima facie evidence that the person or persons signing or executing any such deed or release were the properly authorized agent or agents of such society, tribe, nation or aggregation of persons. Any recitals or statements of fact in any such deed or release shall be prima facie evidence of the truth thereof in any such actions. (1915, c. 75; C. S., s. 1758.)

§ 8-14. Certified copies of maps of Cherokee lands.

Certified copies by the Secretary of State of the copies, or parts thereof, of the maps of the Cherokee lands and of the Cherokee Country, as provided for and described in Chapter 175 of the laws of 1911, shall have the same force and effect and be entitled to the same force and effect as evidence as certified copies of the whole or parts of the original maps. (1911, c. 175; C. S., s. 1759.)

§ 8-15. Certified copies of certain surveys and maps obtained from the State of Tennessee.

A certified copy of the report of the survey made by the North Carolina commissioners, McDowell, Vance and Matthews, of that portion of the State of Tennessee extending from a point on the Virginia line to a point on the Smoky Mountain west of the Pigeon River, as obtained and filed by the Secretary of State under the provisions of Chapter 162 of the laws of 1913, shall, when certified under the hand and seal of the Secretary of State, be competent evidence in the trial of any action in the courts of the State. (1913, c. 162; C. S., s. 1760.)

§ 8-16. Evidence of title under H.E. McCulloch grants.

In all actions or suits, wherein it may be necessary for either party to prove title, by virtue of a grant or grants made by the king of Great Britain or Earl Granville to Henry McCulloch, or Henry Eustace McCulloch, it shall be sufficient for such party, in the usual manner, to give evidence of the grant or conveyance from the king of Great Britain or Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, and the mesne conveyances thereafter, without giving any evidence of the deed or deeds of release, relinquishment or confirmation of Earl Granville to the said Henry McCulloch, or Henry Eustace McCulloch, or the power or powers of attorney by which the conveyances from the said Henry McCulloch, or Henry Eustace McCulloch, purport to have been made. (1819, c. 1021, P. R.; R. C., c. 44, s. 1; Code, s. 1336; Rev., s. 1600; C. S., s. 1761.)

§ 8-17. Conveyances or certified copies evidence of title under McCulloch.

In all trials where the title of either plaintiff or defendant shall be derived from Henry Eustace McCulloch, or Henry McCulloch, out of their tracts numbers one and three, it shall not be required of such party to produce, in support of his title, either the original grant from the crown to the proprietors, or a registered copy thereof; but in all such cases the grant or deed executed by such reputed proprietors, or by his or their lawful attorney, or a certified copy thereof, shall be deemed and held sufficient proof of the title of such proprietors, in the same manner as though the original grants were produced in evidence. (1807, c. 724, P. R.; R. C., c. 44, s. 2; Code, s. 1337; Rev., s. 1601; C. S., s. 1762.)

§ 8-18. Certified copies of registered instruments evidence.

A copy of the record of any deed, mortgage, power of attorney, or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of the county where the original or duly certified copy has been registered, may be given in evidence in any of the courts of the State where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (1846, c. 68, s. 1; R. C., c. 37, s. 16; Code, s. 1251; 1893, c. 119, s. 2; Rev., s. 1598; C. S., s. 1763.)

Cross References. — As to recordation and use in evidence of certified copies generally, see § 47-31.

CASE NOTES

This section is not applicable when the original instrument is offered in evidence with the certificate of the register of deeds appearing thereon with respect to the time filed for registration and the book and page where it has been registered and the date of such registration. State v. Dunn, 264 N.C. 391, 141 S.E.2d 630 (1965).

Signature of Clerk Essential. — The failure of the clerk to sign his name to the certif-

icate for registration, a requirement found in the provisions of § 47-14, renders the instrument inadmissible as evidence under this section. Woodlieff v. Woodlieff, 192 N.C. 634, 135 S.E. 612 (1926).

Certified Copy as Evidence. — The record of a registered deed is competent evidence without producing the original where no rule of court for the production of the original has been issued. Ratliff v. Ratliff, 131 N.C. 425, 42 S.E. 887 (1902).

Copy of Registered Bond. — The "registry" or copy of the record of a bond to make title to land made by a deceased person, under which a deed has been made by the administrator of said obligor, is within the spirit and meaning of this section, and is admissible without accounting for the absence of the original. Doe v. Shelton, 46 N.C. 370 (1854).

Same — Official Bond. — Inasmuch as the duly certified copy of the record of any instrument required to be registered is admissible as full and sufficient evidence of such instrument, and as the register of deeds is required to register and keep the bond of the superior court clerk, a duly certified copy of the record of such bond is competent evidence of its provisions. State ex rel. Battle v. Baird, 118 N.C. 854, 24 S.E. 668 (1896).

Lack of Seal No Effect. — A copy of a grant from the register's office, which affirmatively shows that it was issued under the great seal of the State, is admissible in evidence, though the registry does not show the impress of the seal, or scroll to indicate it. And while the seal may be necessary to authenticate the grant, it will be presumed to have been affixed as required by law. Aycock v. Raleigh & A. Air-Line R.R., 89 N.C. 321 (1883).

Production of Original to Correct Mistakes. — The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. Brown v. Hutchinson, 155 N.C. 205, 71 S.E. 302 (1911).

Parol Evidence to Explain Variance. — Where the original deed was lost, and it was contended that there was a material variance between the certified copy and the original deed, parol evidence to prove the correct description contained in the original instrument was rejected, this section being construed as to have no application to such a case. Hooper v. Justice, 111 N.C. 418, 16 S.E. 626 (1892).

Time and Manner of Objecting. — A party against whom the registry of a deed (or other instrument), or a copy thereof has been introduced in evidence, cannot then raise the objection that there is a variance between such registry, or copy, and the original instrument; if he desired to avail himself of such objection he should have required the production of the original in the way provided by this section. Devereux v. McMahon, 108 N.C. 134, 12 S.E. 902 (1891).

Cited in Merchants & Farmers Bank v. Sherrill, 231 N.C. 731, 58 S.E.2d 741 (1950); Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

§ 8-19. Common survey of contiguous tracts evidence.

Whenever any person owns several tracts of land which are contiguous or adjoining, but held under different deeds and different surveys, it may be lawful for any such person to have all such bodies of land included in one common survey by running around the lines of the outer tracts, and thereupon the possession of any part of said land covered by such common survey shall be deemed and held in law as a possession of the whole and every part thereof: Provided, that nothing in this section shall be construed to affect the rights or claims of persons which have already accrued to any part of said land. In all cases where such common surveys are made as directed by this section, the same may be recorded and registered as in cases of deeds, and shall be evidence in like manner. (1869-70, c. 34, ss. 1, 2; Code, s. 1277; Rev., s. 1505; C. S., s. 1764.)

CASE NOTES

When Possession of Part Equivalent to Whole. — Under the provisions of this section, by recording and registering a survey of the outer lines of several contiguous tracts, so as to exhibit their outer boundaries, as if the whole territory had been covered by one tract, a possession at any one point on either of the separate tracts will become equivalent to a possession of "the whole and every part." McNamee v. Alexander, 109 N.C. 242, 13 S.E. 777 (1891).

Sufficiency of Proof. — The surveyor's tes-

timony that the map is correct is sufficient to make it competent. Greenleaf v. Bartlett, 146 N.C. 495, 60 S.E. 419 (1908).

§ 8-20. Certified copies registered in another county and used in evidence.

A copy from the office of the register of deeds of any county of the record of any deed, mortgage, power of attorney or other instrument required or allowed to be registered, duly authenticated by the certificate and official seal of the register of deeds of such county, may, upon presentation to the register of deeds of any other county, be registered without further proof, and the record thereof, or a duly certified copy of the same, may be given in evidence in any court in the State where the original of such copy would be admitted as evidence, although the party offering the same shall be entitled to the possession of the original, and shall not account for the nonproduction thereof, unless by a rule or order of the court, made upon affidavit suggesting some material variance from the original in such registry or other sufficient grounds, such party shall have been previously required to produce the original, in which case the same shall be produced or its absence duly accounted for according to the course and practice of the court. (1846, c. 68; R. C., c. 37, s. 16; Code, s. 1253; 1893, c. 119, s. 3; Rev., s. 1599; C. S., s. 1765.)

CASE NOTES

Cited in Universal Fin. Co. v. Clary, 227 N.C. 247, 41 S.E.2d 760 (1947).

§ 8-21. Deeds and records thereof lost, presumed to be in due form.

Whenever it is shown in any judicial proceeding that a deed or conveyance of real estate has been lost or destroyed, and that the same had been registered, and that the register's book containing the copy has been destroyed by fire or other accident, so that a copy thereof cannot be had, it shall be presumed and held, unless the contents be shown to have been otherwise, that such deed or conveyance transferred an estate in fee simple, if the grantor was entitled to such an estate at the time of conveyance, and that it was made upon sufficient consideration. (1854, c. 17; R. C., c. 44, s. 14; Code, s. 1348; Rev., s. 1602; C. S., s. 1766.)

Cross References. — As to burnt and lost records, see § 98-1 et seq.

CASE NOTES

Presumption of Regularity. — The registration of a deed is presumed to be correct. Cochran v. Linville Imp. Co., 127 N.C. 386, 37 S.E. 496 (1900).

§ 8-22. Local: recitals in tax deeds in Haywood and Henderson.

In all legal controversies touching lands in the Counties of Haywood and Henderson, in which either party shall claim title under any sale for taxes alleged to have been due and laid, in and for the year one thousand seven hundred and ninety-six, or any preceding year, the recital contained in the deed or assurance, made by the sheriff or other officer conveying or assuring the same, of the taxes having been laid and assessed, and of the same having remained due and unpaid, shall be held and taken to be prima facie evidence of the truth of each and every of the matters so recited. (R. C., c. 44, s. 11; Code, s. 1346; Rev., s. 1606, C. S., s. 1767.)

§ 8-22.1. Local: tax deeds in Richmond.

Proof of execution and delivery of a deed recorded before 1971 to a grantee by the sheriff of Richmond County pursuant to sale under execution in a tax foreclosure proceeding brought by Richmond County under G.S. 105-375 establishes a presumption that all notices required by G.S. 105-375 and Article 29B of Chapter 1 of the General Statutes were duly given and served, as required by law, to all persons entitled to receive the notices. (1981, c. 517.)

§ 8-23. Local: copies of records from Tyrrell.

Copies of records of the County of Tyrrell between the years one thousand seven hundred and thirty-five and one thousand seven hundred and ninety-nine, when copied in a book and certified to by the clerk of the Superior Court of Tyrrell County as to the records of his office and by the register of deeds as to the records of his office, and deposited in their respective offices in Washington County, shall be treated in all respects as original records and received as evidence in all courts of Washington County. (1903, c. 199; Rev., s. 1612, C. S., s. 1768.)

§ 8-24. Local: records of partition in Duplin.

The transcripts made by the clerk of the Superior Court of Duplin County, in accordance with Chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of the reports of committees relating to the partition of real estate on file in his office prior and up to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, A, and the reports of committees beginning with and subsequent to the year one thousand eight hundred and fifty-six, entered and indexed in a book entitled Reports of Committees, B, shall be as competent evidence as are the original reports of the committees. (1907, c. 395, ss. 3, 4; C. S., s. 1769.)

§ 8-25. Local: records of wills in Duplin.

The transcripts made by the clerk of the Superior Court of Duplin County, in accordance with Chapter three hundred and ninety-five of the laws of one thousand nine hundred and seven, of all wills and entries of probate and dates of registration appearing on the same, on file in his office prior and up to the January term of the County Court of Duplin County, one thousand eight hundred and thirty, and entered in a book designated as Records of Wills, A, and duly indexed as provided by law, shall be as competent evidence in any court as are the originals of such wills. (1907, c. 395, ss. 1, 2; C. S., s. 1770.)

§ 8-26. Local: records of deeds and wills in Anson.

The copies of the deeds and deed books and of the wills and will books made in Anson County under the act of March second, one thousand nine hundred and five, shall have the same force and effect as the original deeds and deed books copied and as the original wills and will books copied, and shall take the place of said original deeds and deed books and wills and will books as evidence in all court procedure; and wherever said deed books or will books are ordered or directed to be produced in court by subpoena or other order of court, the copies made under such act shall be produced, unless the court shall specially order the production of the original books, and the copies so produced in court shall have the same validity and effect and be used for the same purposes, with the same effect, as the original books. (1905, c. 663, s. 3; Rev., s. 1615; C. S., s. 1771.)

§ 8-27. Local: records of wills in Brunswick.

Under the provisions of Chapter one hundred and six of the laws of one thousand nine hundred and eight, authorizing and directing that all unrecorded wills, dated prior to January first, one thousand eight hundred and seventy-five, on file in the office of the clerk of the Superior Court of Brunswick County, and which have been duly proved in the form required by law, and bearing the adjudication certificate of the proper officer, shall be recorded in the books of wills in the said office and properly indexed; that all wills recorded in the minutes of the court of pleas and quarter sessions or other books of record in said office shall be transcribed and indexed in the book of wills in said office; and that all wills recorded in the office of the register of deeds of said county shall be properly indexed in the book kept for the purpose in the office of the clerk of the superior court of the county; the record of any instrument or certified copy thereof, recorded under the provisions of this Article, shall be admitted in evidence in the trial of any cause, subject to the same rules upon which other wills are admitted. (1908, s. 106; C. S., s. 1772.)

§ 8-28. Copies of wills.

Copies of wills, duly certified by the proper officer, may be given in evidence in any proceeding wherein the contents of the will may be competent evidence. (1784, c. 225, s. 6, P. R.; R. C., c. 119, s. 21; Code, s. 2175; Rev., s. 1603; C. S., s. 1773.)

Cross References. — As to probate of copy of lost will, see §§ 98-4, 98-5.

CASE NOTES

Certified Copy as Evidence. — Under this section a certified copy of a will is competent evidence in any case wherein the contents of the will would be competent evidence. Hampton v. Hardin, 88 N.C. 592 (1883); overruled on other grounds, McEwan v. Brown, 176 N.C. 249, 97 S.E. 20 (1918).

§ 8-29. Copies of wills in Secretary of State's office.

Copies of wills filed or recorded in the office of the Secretary of State, attested by the Secretary, may be given in evidence in any court, and shall be taken as sufficient proof of the devise of real estate, and are declared good and effectual to pass the estate therein devised: Provided, that no such will may be given in

evidence in any court nor taken as sufficient proof of the devise unless a certificate of probate appear thereon. (1852, c. 172; R. C., c. 44, s. 12; 1856-7, c. 22; Code, s. 2181; Rev., s. 1607; C. S., s. 1774.)

§ 8-30. Copies of wills recorded in wrong county.

Whereas, by reason of the uncertainty of the boundary lines of many of the counties of the State, wills have been proved, recorded and registered in the wrong county, whereby titles are insecure; for remedy whereof: The registry or duly certified copy of the record of any will, duly recorded, may be given in evidence in any of the courts of this State. (1858-9, c. 18; Code, s. 2182; Rev., s. 1608; C. S., s. 1775.)

§ 8-31. Copy of will proved and lost before recorded.

When any will which has been proved and ordered to be recorded was destroyed during the war between the states, before it was recorded, a copy of such will, so entitled to be admitted to record, though not certified by any officer, shall, when the court shall be satisfied of the genuineness thereof, be ordered to be recorded, and shall be received in evidence whenever the original or duly certified exemplification would be; and such copies may be proved and admitted to record under the same rules, regulations and restrictions as are prescribed in Chapter 98 entitled Burnt and Lost Records. (1866-7, c. 127; Code, s. 2183; Rev., s. 1609; C. S., s. 1776.)

§ 8-32. Certified copies of deeds and wills from other states.

In cases where inhabitants of other states or territories, by will or deed, devise or convey property situated in this State, and the original will or deed cannot be obtained for registration in the county where the land lies, or where the property shall be in dispute, a copy of said will or deed (after the same has been proved and registered or deposited, agreeable to the laws of the state where the person died or made the same) being properly certified, either according to the act of Congress or by the proper officer of the said state or territory, shall be read as evidence. (1802, c. 623, P. R.; R. C., c. 44, s. 9; Code, s. 1344; Rev., s. 1619; C. S., s. 1777.)

CASE NOTES

Records of other states, to be used in evidence in this State, must have the attestation of the clerk of the court whose record is offered, and the seal of the court, if it has one. If there be no seal, this must appear in the certificate of the clerk, and the judge, chief justice, or presiding magistrate of such court must certify that the record is properly attested. Hunter v. Kelly, 92 N.C. 285 (1885); Kinseley v. Rumbough, 96 N.C. 193, 2 S.E. 174 (1887); Riley v. Carter, 158 N.C. 484, 74 S.E. 463 (1912).

Properly Authenticated Copy Admissible. — A copy of a will made in another state, with its probate certified by the judge of the court in which it was proved, and accompanied by the testimonial of the governor of that state, that the person who gave that certificate was the proper officer to take such probate, and to certify the same, is a sufficient authentication of the will to authorize its reception as evidence in the courts of this State. Knight v. Wall, 19 N.C. 125 (1836).

Test for Admission under Section. — The copy, to be admissible in evidence, must be of such a will as would be admitted to record in North Carolina; hence where a will was executed in Tennessee and from the certificate of probate on the exemplified copy produced here, it appeared that but one witness swore that he subscribed the will as witness in the presence of the testator and other witness to the will did not appear to have been sworn at all, it was held that such a will should not be read in evidence. Blount v. Patton, 9 N.C. 237 (1822).

Incomplete Authentication. — Where a

will, proved in another state, bore the certificate of the clerk of the court wherein the probate was had, to the oath of the attesting witnesses, but had no other authentication, it was held inadmissible in evidence. Hunter v. Kelly, 92 N.C. 285 (1885).

§ 8-33. Copies of lost records in Bladen.

The clerk of the Superior Court of Bladen County shall transcribe the judgment docket and index books and the will books in his office, and all other books in said office containing records made since the year one thousand eight hundred and sixty-eight, and the records so transcribed shall have the same force and effect as the original records would have, and shall be received in evidence as the original records and be prima facie evidence of their correctness and of the sufficiency of their probate, though the probates are lost and are not transcribed. (1895, c. 415; 1903, c. 65; Rev., s. 1611; C. S., s. 1778.)

Article 3.

Public Records.

§ 8-34. Copies of official writings.

Copies of all official bonds, writings, papers, or documents, recorded or filed as records in any court, or public office, or lodged in the office of the Governor, Treasurer, Auditor, Secretary of State, Attorney General, Adjutant General, or the State Department of Cultural Resources, shall be as competent evidence as the originals, when certified by the keeper of such records or writings under the seal of his office when there is such seal, or under his hand when there is no such seal, unless the court shall order the production of the original. Copies of the records of the board of county commissioners shall be evidence when certified by the clerk of the board under his hand and seal of the county. (1792, c. 368, s. 11, P. R.; R. C., c. 44, s. 8; 1868-9, c. 20, s. 21; 1871-2, c. 91; Code, ss. 715, 1342; Rev., s. 1616; C. S., s. 1779; 1961, c. 739; 1973, c. 476, s. 48.)

CASE NOTES

"Copy" Defined. — A copy, within the meaning of this section, is a transcript of the original — a writing exactly like another writing. State v. Champion, 116 N. C. 987, 21 S.E. 700 (1895); Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

Certification of Copy. — The power of an officer, who is the keeper of certain public records, to certify copies is confined to a certification of their contents as they appear by the records themselves, and the records must, therefore, be so certified, for he has no authority to certify to the substance of them, nor that any particular fact, as a date, appears on them. Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

Original Record Is Admissible. — This section does not prevent the admission in evidence of the original record itself. State v. Voight, 90 N.C. 741 (1884); State ex rel. Carolina Iron Co. v. Abernathy, 94 N.C. 545 (1886). See State v. Hunter, 94 N.C. 829 (1886); Charles S. Riley & Co. v. Carter, 165 N.C. 334, 81 S.E. 414 (1914); Blalock v. Whisnant, 216 N.C. 417, 5 S.E.2d 130 (1939).

While certified copies of records are admitted in evidence, the originals are not thereby made incompetent. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

And Copy Is Admissible Where Original Lost. — Where a superior court record is lost, a certified copy of the transcript of the same in the appellate court is sufficient evidence of the record. Aiken v. Lyon, 127 N.C. 171, 37 S.E. 199 (1900).

A certified copy of a petition in a suit is admissible in evidence upon proof of the loss of the original records. Weeks v. McPhail, 128 N.C. 130, 38 S.E. 472, rehearing denied, 129 N.C. 73, 39 S.E. 732 (1901).

But Certified Statement Not Admissible. — This section makes competent only the

"copies" of official records, etc., and a mere certified statement from the register's office is only evidence of the correctness of the record, and cannot be admitted in evidence in place of the original record. State v. Champion, 116 N.C. 987, 21 S.E. 700 (1895); Wiggins v. Rogers, 175 N.C. 67, 94 S.E. 685 (1917).

Incriminating Evidence Contained in Document. — Where the document admitted under the provisions of this section contains incriminating evidence, the defense often interposed by the accused is that to admit such paper would be in violation of the constitutional right of the defendant on trial for crime to have opportunity to confront his accusers and the witnesses offered to sustain the charge. It is settled, however, that this section is not violative of this constitutional right, since these provisions constitute a well-recognized exception to the privilege given by the Constitution. State v. Behrman, 114 N.C. 797, 19 S.E. 220 (1894); State v. Dowdy, 145 N.C. 432, 58 S.E. 1002 (1907).

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Applied in Moye v. Thrifty Gas Co., 40 N.C. App. 310, 252 S.E.2d 837 (1979).

Cited in State v. Beamon, 2 N.C. App. 583, 163 S.E.2d 544 (1968); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

§ 8-35. Authenticated copies of public records.

All copies of bonds, contracts, notes, mortgages, or other papers relating to or connected with any loan, account, settlement of any account or any part thereof, or other transaction, between the United States or any state thereof or any corporation all of whose stock is beneficially owned by the United States or any state thereof, either directly or indirectly, and any person, natural or artificial; or extracts therefrom when complete on any one subject, or copies from the books or papers on file, or records of any public office of the State or the United States or of any corporation all of whose stock is beneficially owned by the United States or by any state thereof, directly or indirectly, shall be received in evidence and entitled to full faith and credit in any of the courts of this State when certified to by the chief officer or agent in charge of such public office or of such office of such corporation, or by the secretary or an assistant secretary of such corporation, to be true copies, and authenticated under the seal of the office, department, or corporation concerned. Any such certificate shall be prima facie evidence of the genuineness of such certificate and seal, the truth of the statements made in such certificate, and the official character of the person by which it purports to have been executed. (1891, c. 501; Rev., s. 1617; C. S., s. 1780; 1939, c. 149.)

Cross References. — As to judicial notice of laws of other states and foreign countries, see §§ 8-3 and 8-4.

Legal Periodicals. — For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

The purpose of authentication and certification of records is to avoid the inconvenience and sometimes the impossibility of producing original public documents in court, and admission of certified records tends to expedite trial of cases. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Authentication Essential. — Proper authentication is essential to the admission in evidence of the copies of the original records, and papers purporting to be exemplification from the Treasury Department of the United States, not authenticated, will not be admitted. Mott v. Ramsay, 92 N.C. 152 (1885).

In order for this section to apply it must affirmatively appear that the evidence was offered as a properly authenticated copy of a public record in accordance with this section. State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951).

Parol Evidence Inadmissible. — The contents of the original record may not be proved by parol evidence under this section, but must be shown by a certified copy. National Sur. Co. v. Brock, 176 N.C. 507, 97 S.E. 417 (1918).

Reading of Record by District Attorney. — There is no error in allowing a properly certified copy of a record to be read into evidence by the district attorney, as opposed to having the document passed among the jurors. State v. Miller, 288 N.C. 582, 220 S.E.2d 326 (1975).

Public documents may be authenticated by mechanical reproduction of signature of authorized officer when he intends to adopt the mechanical reproduction as his signature. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

This section does not impose the restriction upon the general rule that for a stamped, printed or typewritten signature to be a good signature, the signature must be made under the hand of the person making it. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

Same — Presumption. — When the authorized officer of the Division of Motor Vehicles provides records of the Division pursuant to statute, it may be presumed that he intends to authenticate the documents and to adopt the mechanical reproduction of his name as his own signature. State v. Watts, 289 N.C. 445, 222 S.E.2d 389 (1976).

This section has no application to an uncertified copy of a coroner's report but only to a duly certified copy. Robinson v. Life & Cas. Ins. Co., 255 N.C. 669, 122 S.E.2d 801 (1961).

Initialed certificate lacking notary's authentication meets all the requirements of § 20-48 and provides prima facie evidence of the genuineness of such certificate, the truth of the statements made in such certificate, and the official character of the person who purportedly initialed and executed it. State v. Johnson, 25 N.C. App. 630, 214 S.E.2d 278, cert. denied, 288 N.C. 247, 217 S.E.2d 671 (1975).

The matters appearing in transcript of any paper on file or records of any public office of the State or United States, being relevant to an account which a referee was directed to take, are admissible in evidence by virtue of the provisions of this section. Wallace Bros. v. Douglas, 114 N.C. 450, 19 S.E. 668 (1894). See Hinton v. Lake Drummond Canal Co., 166 N.C. 484, 82 S.E. 844 (1914).

A record of the Division of Motor Vehicles, disclosing that defendant's license was in a state of revocation under official Division action during the period defendant was charged with driving on a highway of this State, is competent under this section when the record is certified under seal of the Division. State v. Mercer, 249 N.C. 371, 106 S.E.2d 866 (1959).

The records of the Department, properly authenticated, are competent for the purpose of establishing the status of a person's operator's license and driving privilege. State v. Teasley, 9 N.C. App. 477, 176 S.E.2d 838, appeal dismissed, 277 N.C. 459, 177 S.E.2d 900 (1970); State v. Rhodes, 10 N.C. App. 154, 177 S.E.2d 754 (1970).

Same — Employee's Certification of Original Renders Copy Admissible. — Certification by an employee of the Department of Motor Vehicles that the original of an order of security requirement or suspension of driving privilege was mailed to defendant on a specified date at his address shown on the records of the Department of Motor Vehicles was sufficient to render admissible a copy of the document in a prosecution of a defendant for driving while his license was suspended. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Same — Certified Copy of Driver's License Record Admissible to Show Revocation. — In a prosecution of a defendant for driving while his license was suspended, a properly certified copy of the driver's license record of defendant on file with the Department of Motor Vehicles is admissible as evidence that the defendant's license was in a state of revocation for a period covering the date of the offense for which he was charged. State v. Herald, 10 N.C. App. 263, 178 S.E.2d 120 (1970).

Applied in Dunes Club, Inc. v. Cherokee Ins. Co., 259 N.C. 293, 130 S.E.2d 625 (1963); State v. Williams, 17 N.C. App. 39, 193 S.E.2d 452 (1972).

Stated in State v. Parker, 20 N.C. App. 146, 201 S.E.2d 35 (1973).

Cited in Taylor v. Garrett, 7 N.C. App. 473, 173 S.E.2d 31 (1970); In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

§ 8-35.1. Division of Motor Vehicles' record admissible as prima facie evidence of convictions under §§ 20-138 and 20-139.

Notwithstanding the provisions of G.S. 15A-924(d), a properly certified copy under G.S. 8-35 of the license records of a defendant kept by the Division of

Motor Vehicles under G.S. 20-26(a) is admissible as prima facie evidence of any prior convictions of a defendant under G.S. 20-138 and 20-139. (1975, c. 642, s. 1; c. 716, s. 5.)

§ 8-36. Authenticated copy of record of administration.

When letters testamentary or of administration on the goods and chattels of any person deceased, being an inhabitant in another state or territory, have been granted, or a return or inventory of the estate has been made, a copy of the record of administration or of the letters testamentary, and a copy of an inventory or return of the effects of the deceased, after the same has been granted or made, agreeable to the laws of the state where the same has been done, being properly certified, either according to the act of Congress or by the proper officer of such state or territory, shall be allowed as evidence. (1834, c. 4; R. C., c. 44, s. 7; Code, s. 1343; Rev., s. 1618; C. S., s. 1781.)

§ 8-37. Certificate of Commissioner of Motor Vehicles as to ownership of automobile.

In any civil or criminal action in which the ownership of a motor vehicle is relevant, evidence as to the letters and numbers appearing upon the registration plate attached to such vehicle or of the motor vehicle identification number, together with certified copies of records furnished pursuant to G.S. 20-42 by the Commissioner of Motor Vehicles showing the name of the owner of the vehicle to which such registration plate or vehicle identification number is assigned, or a certified copy of the certificate of title for such motor vehicle on file with the Commissioner of Motor Vehicles, is prima facie evidence of the ownership of such motor vehicle. (1931, c. 88, s. 1; 1943, c. 650; 1979, c. 980.)

Cross References. — As to registration and certificate of title for motor vehicles generally, see § 20-50 et seq.

CASE NOTES

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Applied in Woodruff v. Holbrook, 255 N.C. 740, 122 S.E.2d 709 (1961).

Cited in In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977).

ARTICLE 3A.

Findings, Records and Reports of Federal Officers and Employees.

§ 8-37.1. Finding of presumed death.

A written finding of presumed death, made by the Secretary of War, the Secretary of the Navy, or other officer or employee of the United States authorized to made such finding, pursuant to the Federal Missing Persons Act (56 Stat. 143, 1092, and P.L. 408, ch. 371, 2d Sess. 78th Cong.; 50 U.S.C. App. Supp. 1001-17), as now or hereafter amended, or a duly certified copy of such finding, shall be received in any court, office or other place in this State as prima facie evidence of the death of the person therein found to be dead, and the date, circumstances and place of his disappearance. (1945, c. 731, s. 1.)

§ 8-37.2. Report or record that person missing, interned, captured, etc.

An official written report or record, or duly certified copy thereof, that a person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, made by any officer or employee of the United States authorized by the act referred to in § 8-37.1, or by any other law of the United States to make same, shall be received in any court, office or other place in this State as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged or captured by an enemy, or is dead, or is alive, as the case may be. (1945, c. 731, s. 2.)

§ 8-37.3. Deemed signed and issued pursuant to law; evidence of authority to certify.

For the purposes of §§ 8-37.1 and 8-37.2 any finding, report or record, or duly certified copy thereof, purporting to have been signed by such an officer or employee of the United States as is described in said sections, shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify. (1945, c. 731, s. 3.)

ARTICLE 4.

Other Writings in Evidence.

§ 8-38. Proof by attesting witness not required.

It is not necessary to prove by the attesting witness instruments to the validity of which the attestation is not requisite, and such instruments may be proved by admission or otherwise as if there had been no attesting witness thereto: Provided, that this section shall not affect the method and manner of proving instruments for registration. (1905, c. 204; Rev., s. 1604; C. S., s. 1782.)

Cross References. — As to essentials of registration, see § 47-1 et seq.

Legal Periodicals. — For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

§ 8-39. Parol evidence to identify land described.

In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such land as it purports to pass: Provided, that such paper-writing is in all other respects sufficient to pass such title or interest. (1891, c. 465, s. 1; Rev., s. 1605; C. S., s. 1783.)

Cross References. — As to vagueness of description in deeds, see § 39-2 and note thereto.

CASE NOTES

Section Not Retroactive in Operation. — There is a general presumption against the retroactive operation of a statute where it would impair vested rights, therefore this section cannot be held to operate retrospectively so as to allow parol testimony to locate land referred to and ambiguously described in a contract made before the passage of this section. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893).

Deed Must Contain Some Description. — This section applies only where there is a description which can be aided by parol, but not when there is no description. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893); Hemphill v. Annis, 119 N.C. 514, 26 S.E. 152 (1896); Harris v. Woodward, 130 N.C. 580, 41 S.E. 790 (1902).

A deed which fails to describe any land is as void now as it was before the passage of this section, but a description by name, where lands have a known name, is sufficient. Moore v. Fowle, 139 N.C. 51, 51 S.E. 796 (1905).

And Description Must Identify Land or Refer to Source of Identification. — The statute applies only when there is a description which can be aided by parol, and cannot be held to validate a deed where the description is too vague and indefinite to identify the land claimed and to fit it to the description. At all events, the description as it may be explained by oral testimony must identify and make certain the land intended to be conveyed. Failing in this, the deed is void. Holloman v. Davis, 238 N.C. 386, 78 S.E.2d 143 (1953).

The statutory rule permitting the use of parol testimony to fit the description in the deed to the land intended to be conveyed does not relieve the invalidity due to vagueness, indefiniteness and uncertainty unless there are elements of description which are either certain in themselves or are capable of being reduced to certainty by reference to something extrinsic, to which the deed refers. The liberal rule of construction does not permit the passing of title to land by parol. Such evidence cannot be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence aliunde to make the description complete is to be sought. Holloman v. Davis, 238 N.C. 386, 78 S.E.2d 143 (1953).

The description must identify the land, or it must refer to something that will identify it with certainty. Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968).

A deed purporting to convey an interest in land is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which the land may be identified with certainty. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

And Parol Evidence Alone Cannot Establish Boundary. — While parol evidence is competent to "fit the description to the thing," it is not competent to establish a line or corner when the instrument by its terms wholly fails to identify such line or corner; in other words, it is competent to find but not to make a corner. Holmes v. Sapphire Valley Co., 121 N.C. 410, 28 S.E. 545 (1897).

Description in Deeds Must Be Fitted to Earth's Surface. — In an action to recover for the wrongful cutting and removal of timber from land claimed by plaintiffs, plaintiffs must locate the land by fitting the description in their deeds to the earth's surface, regardless of whether they rely upon their deeds as proof of title or color of title, or, in the absence of title or color of title, they are required to establsih the known and visible lines and boundaries of the land actually occupied by them for the statutory period. Andrews v. Bruton, 242 N.C. 93, 86 S.E.2d 786 (1955).

Those having the burden of proof must locate the land they claim title to by fitting the description contained in the paper-writing offered as evidence of title to the land's surface. State v. Brooks, 275 N.C. 175, 166 S.E.2d 70 (1969).

Allegations as to title having been denied, it was incumbent upon plaintiffs in ejectment action to establish both ownership and trespass. Whether relying upon their deeds as proof of title or of color of title, they were required to locate the land by fitting the description in the deeds to the earth's surface and showing that such deeds embraced the land in controversy. In the absence of title or color of title, they were required to establish the known and visible lines and boundaries of the land actually occupied for the statutory period. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

But Scope of Descriptive Words in Deed May Not Be Enlarged by Parol Evidence. — Parol evidence is admissible to fit the description in a deed showing color of title to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

The purpose of parol evidence is to fit the description to the property, not to create a description. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965); Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968); Builders Supplies Co. v. Gainey, 282 N.C. 261, 192 S.E.2d 449 (1972).

Evidence dehors the deed is admissible to "fit the description to the thing" only when it tends to explain, locate, or make certain some call or descriptive term used in the deed. It is the deed

that must speak. The oral evidence must only interpret what has been said therein. McDaris v. Breit Bar "T" Corp., 265 N.C. 298, 144 S.E.2d 59 (1965).

Parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence aliunde to make the description complete is to be sought. State v. Brooks, 279 N.C. 45, 181 S.E.2d 553 (1971); Builders Supplies Co. v. Gainey, 282 N.C. 261, 192 S.E.2d 449 (1972).

Parol evidence is not admissible to enlarge the scope of the description in the deed, but when the deed itself, including the references to extrinsic things, describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

Ambiguous or Indefinite Terms Generally. — Where the written terms contained in the contract are sufficient to pass the property, but are ambiguous or indefinite, then parol evidence of the expressions of the parties and attendant facts and circumstances may be heard to aid in ascertaining the correct meaning of the terms used, but not to alter or add to what has been written. Ward v. Gay, 137 N.C. 397, 49 S.E. 884 (1905).

Patently Ambiguous Description. — When it is apparent upon the face of the deed, itself, that there is uncertainty as to the land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved, the description is said to be patently ambiguous. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

A patent ambiguity in the description of the land is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

A patent ambiguity in the description of the land cannot be removed by parol evidence. Cummings v. Dosam, Inc., 273 N.C. 28, 159 S.E.2d 513 (1968).

Parol evidence may not be introduced to remove a patent ambiguity in the description of the land since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

And Deed Containing Such Description Is Void. — Where the description of land in a deed under which plaintiffs claimed was patently ambiguous, the deed was void and could not be the basis for a valid claim of title in the plaintiffs to the land claimed by them. Overton v. Boyce, 289 N.C. 291, 221 S.E.2d 347 (1976).

The identity or location of the land may be shown by documentary evidence, such as plats, surveys, and field notes. A map made by a surveyor of the premises sued for and of other tracts adjacent thereto, when proved to be correct, is admissible to illustrate other testimony in the case and throw light on the location of the land in controversy; and a draft of a survey, proved to be correct, is admissible in evidence as explanatory of what the surveyor testified he had done in making the survey. Midgett v. Midgett, 5 N.C. App. 74, 168 S.E.2d 53 (1969).

When Description Sufficient. — A description of land in a deed as all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Buckhorn Land & Timber Co. v. Yarbrough, 179 N.C. 335, 102 S.E. 630 (1920).

Applied in McKay v. Bullard, 219 N.C. 589, 14 S.E.2d 657 (1941); Taylor v. Tri-County Elec. Membership Corp., 10 N.C. App. 277, 178 S.E.2d 130 (1970).

Quoted in Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961).

Stated in Peel v. Calais, 224 N.C. 421, 31 S.E.2d 440 (1944); Brown v. Hurley, 243 N.C. 138, 90 S.E.2d 324 (1955); Baldwin v. Hinton, 243 N.C. 113, 90 S.E.2d 316 (1955).

Cited in Garrison v. Blakeney, 37 N.C. App. 73, 246 S.E.2d 144 (1978).

§ 8-40. Proof of handwriting by comparison.

In all trials in this State, when it may otherwise be competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute: Provided, this shall not apply to actions pending on March 5, 1913. (1913, c. 52; C. S., s. 1784.)

Legal Periodicals. — For article on the taking of handwriting exemplars, see 4 Wake Forest Intra. L. Rev. 1 (1968).

For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

In General. — The principle, formerly recognized in this State, that confined the proof of handwriting to the testimony of a competent witness in comparing that sought to be established with handwriting either admitted or proven to be that of the party, has been changed by this section, and where the disputed writing has been rendered competent under this principle, it may, in actions instituted after March 5, 1913, be submitted to the jury, together with that admitted or proven. Newton v. Newton, 182 N.C. 54, 108 S.E. 336 (1921).

Rule under Prior Law. — Before the passage of this section it was incompetent for a handwriting expert to testify to the genuineness of the signature of a party to a writing, his testimony being based upon a comparison with another signature, not admitted to be genuine or requiring proof that it is so. Boyd v. Leatherwood, 165 N.C. 614, 81 S.E. 1025 (1914); In re McGowan, 235 N.C. 404, 70 S.E.2d 189 (1952).

Prior to the enactment of this section it seems to have been settled law in North Carolina that an expert witness in the presence of the jury, might be allowed to compare a disputed paper with other papers in the case, whose genuineness was not denied, and that the jury must pass upon its genuineness upon the testimony of witnesses, and that no comparison by the jury was permitted. In re Will of Gatling, 234 N.C. 561, 68 S.E.2d 301 (1951).

As to prior law, see also Pope v. Askew, 23 N.C. 16 (1840); Outlaw v. Hurdle, 46 N.C. 150 (1853); Tuttle v. Rainey, 98 N.C. 513, 4 S.E. 475 (1887); Fuller v. Fox, 101 N.C. 119, 7 S.E. 589 (1888); Martin v. Knight, 147 N.C. 564, 61 S.E. 447 (1908); Nicholson v. Eureka Lumber Co., 156 N.C. 59, 72 S.E. 86, 36 L.R.A. (n.s.) 162 (1911); Boyd v. Leatherwood, 165 N.C. 614, 81 S.E. 1025 (1914).

This section provides for the proof of handwriting by comparison. Clayton v. Prudential Ins. Co. of America, 4 N.C. App. 43, 165 S.E.2d 763 (1969).

Genuine Writing Not Required to Be Introduced in Evidence to Permit Comparison. — Prior to the enactment of this section, in those cases where the comparison of handwriting was permissible under the law, a paper containing the admitted genuine signature was not required to be introduced in evidence to authorize its comparison by a qualified witness with a signature the genuineness of which was in issue. This section did not change the rule in this respect. However, it did change the rule of evidence so as to permit the comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, and to permit such writing and the evidence of witnesses respecting the same to be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. But the section does not prevent a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, unless such genuine writing is introduced in evidence. In re McGowan, 235 N.C. 404, 70 S.E.2d 189 (1952).

Not Essential to See Person Write. — When the contents of letters written by a party to an action are relevant to the inquiry, it is not required that the witness should have seen the person write before he is permitted to identify the letter by the handwriting, for it is sufficient if he can do so from correspondence formerly had between them. Universal Oil & Fertilizer Co. v. Burney, 174 N.C. 382, 93 S.E. 912 (1917).

Expert Testimony. — Where a witness, found by the court to be a handwriting expert, testifies that the signature on the release offered in evidence is identical with the signature on the last will and testament of plaintiffs' predecessor in title, the admission in evidence of a duly authenticated copy of the release is proper. Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Comparison by Jury. — Where payment of a note sued on was pleaded and the genuineness of the signature of the payee to a receipt for the amount was in dispute, and an expert in handwriting gave his opinion upon comparing with a magnifying glass the disputed signature with the genuine one, it was not error for the trial judge to permit the jury, while deliberating upon their verdict, to make the comparison with the magnifying glass for themselves, when it did not appear that it could have been to the prejudice of the appellant. Gooding v. Pope, 194 N.C. 403, 140 S.E. 21 (1927).

The enactment of this section in 1913 changed the rule existing theretofore, and comparison of writings by the jury has been approved. If the genuineness of a signature or wirting is established to the satisfaction of the judge, a witness may compare the established writing with the disputed writing; and then the testimony of the witness and the writings themselves may be submitted to the jury. State v. Simmons, 8 N.C. App. 561, 174 S.E.2d 627 (1970).

Neither this section nor North Carolina rules of evidence permit the jury, unaided by competent opinion testimony, to compare writings to determine genuineness. State v. Simmons, 8 N.C. App. 561, 174 S.E.2d 627 (1970); State v. LeDuc, 48 N.C. App. 227, 269 S.E.2d 220 (1980).

Same — Analogy to Proof of Agency. — In Newton v. Newton, 182 N.C. 54, 108 S.E. 336 (1921), the court said: "As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The court determines whether there is prima facie evidence of agency or of the genuineness of the writing admitted as a basis of comparison, and then the testimony of the witnesses and 'the writings' (in the plural) themselves are submitted to the jury." See In re Will of Gatling, 234 N.C. 561, 68 S.E.2d 301 (1951).

Exclusion of Writing as Harmless Error. — Where the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, the action of the court in refusing to let the writing be submitted to the jury, to determine its genuineness, under the statute, was a harmless error. Newton v. Newton, 182 N.C. 54, 108 S.E. 336 (1921).

Cited in In re Will of Shemwell, 197 N.C. 332, 148 S.E. 469 (1929); In re Will of William, 215 N.C. 259, 1 S.E.2d 857 (1939); In re Will of Bartlett, 235 N.C. 489, 70 S.E.2d 482 (1952).

§ 8-40.1. Statements in published treatises, periodicals, or pamphlets.

In all actions in the district and superior courts to the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, the hearsay rule shall not exclude statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, even though the declarant is available as a witness. If admitted, the statements may be read into evidence but may not be received as exhibits unless agreed to by counsel for the parties. (1977, c. 1116; 1979, c. 8.)

Legal Periodicals. — For a comment on the statutory standard of care for North Carolina Health Care Providers, see 1 Campbell L. Rev. 111 (1979).

§ 8-41. Bills of lading in evidence.

In all actions by or against common carriers or in the trial of any criminal action in which it shall be thought necessary to introduce in evidence any bills of lading issued by said common carrier or by a connecting carrier, it shall be competent to introduce in evidence any paper-writing purporting to be the original bill of lading, or a duplicate thereof, upon proof that such paper purporting to be such bill of lading or duplicate was received in due course of mail from consignor or agent of said carrier or connecting carrier, or delivered by said common carrier to the consignee or other person entitled to the possession of the property for which said paper purports to be the bill of lading: Provided, that such purported bill of lading shall not be declared to be the bill of lading unless the said purported bill of lading is first exhibited by the plaintiff or his agent or attorney to the defendant or its attorney, or its agent upon whom process may be served, ten days before the trial where the point of shipment is in the State, and twenty days when the point of shipment is without the State. Upon such proof and introduction of the bill of lading, the due execution thereof shall be prima facie established. (1915, c. 287; C. S., s. 1785; 1945, c. 97.)

§ 8-42. Book accounts under sixty dollars.

When any person shall bring an action upon a contract, or shall plead, or give notice of, a setoff or counterclaim for goods, wares and merchandise by him sold and delivered, or for work done and performed, he shall file his account with his complaint, or with his plea or notice of setoff or counterclaim, and if upon the trial of the issue, or executing a writ of inquiry of damages in such action, he shall declare upon his oath that the matter in dispute is a book account, and that he hath no means to prove the delivery of any of the articles which he then shall propose to prove by himself but by this book, in that case such book may be given in evidence, if he shall make out by his own oath that it doth contain a true account of all the dealings, or the last settlement of accounts between himself and the opposing party, and that all the articles therein contained, and by him so proved, were bona fide delivered, and that he hath given the opposing party all just credits; and such book and oath shall be received as evidence for the several articles so proved to be delivered within two years next before the commencement of the action, but not for any article of a longer standing, nor for any greater amount than sixty dollars ($60.00). (1756, c. 57, ss. 2, 6, 7, P. R.; R. C., c. 15, s. 1; Code, s. 591; Rev., s. 1622; C. S., s. 1786.)

CASE NOTES

Terms Construed. — In an early case, the words "to make out on his oath" and "to prove," used in the former statute, were construed to be synonymous terms. Kitchen v. Tyson, 7 N.C. 314 (1819).

Construction with § 8-51. — Notwithstanding the restrictions contained in § 8-51, in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may, as heretofore, be permitted to testify under this section. Leggett v. Glover, 71 N.C. 211 (1874). See Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Applicability of Section. — This section is applicable only to actions brought under the "book-debt law," hence in an action on a contract for sawing timber, it is not necessary to set out the items in the pleadings. McPhail Bros. v. Johnson, 115 N.C. 298, 20 S.E. 373 (1894).

Where Original Account Exceeds Sixty Dollars. — Under this section, a plaintiff may prove by his own oath a balance of sixty dollars, due to him, although his account produced appears to have been originally for more than sixty dollars ($60.00), but is reduced by credits below that amount. McWilliams v. Cosby, 26 N.C. 110 (1843).

Same — Dismissal of Part for Jurisdictional Purposes. — Where divers dealings are included in an account, the aggregate of which exceeds sixty dollars ($60.00), the plaintiff can omit or give credit for any item he may choose, so as to bring the case within the jurisdiction of a single magistrate. But after thus obtaining jurisdiction the plaintiff cannot prove the account under this section for he is required to swear that the account rendered contains a true account of all the dealings. Joseph Waldo & Co. v. Jolly, 49 N.C. 173 (1856).

Proof of Setoff Allowed. — The defendant may, under this section, prove a setoff. Webber v. Webber, 79 N.C. 572 (1878).

Same — Book and Oath Not Exclusive Evidence. — The book and the oath under this section are not evidence that the book contains all the credits and a full and true account of all the dealings between the parties, so as to show that nothing is due to the other party. Alexander v. Smoot, 35 N.C. 461 (1852).

Swearing as to Price of Goods. — It is competent for a party under this section to swear to the price, as well as to the delivery of the articles stated in his account. Colbert v. Piercy, 25 N.C. 77 (1842).

Same — Cross-Examination. — It is competent for the opposite party to cross-examine the party, taking his oath as required by this section, both as to the article and the prices charged, with a view to contradict or discredit him, as he might do in regard to any other witness swearing to the account, the party so swearing being considered as a witness in his own cause. Colbert v. Piercy, 25 N.C. 77 (1842).

Books of Decedent Admissible. — Under this section it is admissible to the amount of sixty dollars ($60.00) to offer the book accounts of a decedent, containing charges against third persons, and made by him. Bland v. Warren, 65 N.C. 372 (1871).

Unverified Entries on Own Book. — A party to an action may not show unverified entries of credit in his behalf on his own books

involved in a disputed account, the same not falling within the intent and meaning of this section and §§ 8-43 and 8-44, especially when it has not been made to appear that the person having made them is dead or cannot be had to give his sworn statement of the transaction. Branch v. Ayscue, 186 N.C. 219, 119 S.E. 201 (1923).

Cited in Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

§ 8-43. Book accounts proved by personal representative.

In all actions where executors and administrators are parties, such book account for all articles delivered within two years previous to the death of the deceased may be proved under the like circumstances, rules and conditions; and in such case, the executor or administrator may prove by himself that he found the account so stated on the books of the deceased; that there are no witnesses, to his knowledge, capable of proving the delivery of the articles which he shall propose to prove by said book, and that he believes the same to be just, and doth not know of any other or further credit to be given than what is therein mentioned: Provided, that if two years shall not have elapsed previous to the death of the deceased, the executor or administrator may prove the said book account, if the suit shall be commenced within three years from the delivery of the articles: Provided further, that whenever by the aforesaid proviso the time of proving a book account in manner aforesaid is enlarged as to the one party, to the same extent shall be enlarged the time as to the other party. (1756, c. 57, s. 2, P. R.; 1796, c. 465, P. R.; R. C., c. 15, s. 2; Code, s. 592; Rev., s. 1623; C. S., s. 1787.)

CASE NOTES

An administrator may, under this section, offer in evidence the book accounts of a decedent, containing charges against third persons, and made by him. Bland v. Warren, 65 N.C. 372 (1871).

Cited in Perry v. First-Citizens Bank & Trust Co., 223 N.C. 642, 27 S.E.2d 636 (1943).

§ 8-44. Copies of book accounts in evidence.

A copy from the book of accounts proved in manner above directed may be given in evidence in any such action or setoff as aforesaid, and shall be as available as if such book had been produced, unless the party opposing such proof shall give notice to the adverse party or his attorney, at the joining of the issue, or 10 days before the trial, that he will require the book to be produced at the trials; and in that case no such copy shall be admitted as evidence. (1756, c. 57, s. 33, P. R.; R. C., c. 15, s. 3; C. C. P., s. 343c; Code, s. 593; Rev., s. 1624; C. S., s. 1788.)

CASE NOTES

Production of Original after Notice. — In all cases under this section and §§ 8-42 and 8-43, it is the duty of the party, who wishes to prove his debt by his own oath, to produce the original account when notice to that effect has been given to him by the other party. Coxe v. Skeen, 25 N.C. 443 (1843).

A voluntary destruction of the original will not authorize the introduction of a copy. Coxe v. Skeen, 25 N.C. 443 (1843).

§ 8-44.1. Copies of medical records.

Copies of hospital records in connection with the treatment of any patient or the charges therefor shall be received as evidence, if otherwise admissible, in any court or quasi-judicial proceeding if testified to be authentic by a person in the hospital whose duty it is to have charge or custody of such records. (1973, c. 1332, s. 1.)

CASE NOTES

Applied in State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976).

§ 8-45. Itemized and verified accounts.

In any actions instituted in any court of this State upon an account for goods sold and delivered, for rents, for services rendered, or labor performed, or upon any oral contract for money loaned, a verified itemized statement of such account shall be received in evidence, and shall be deemed prima facie evidence of its correctness. (1897, c. 480; Rev., s. 1625; 1917, c. 32; C. S., s. 1789; 1941, c. 104.)

Legal Periodicals. — For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

CASE NOTES

Purpose. — This section was designed to facilitate the collection of such accounts where there was no bona fide dispute, and to relieve the plaintiff in such instances of the expense and delay of formally taking depositions. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

This section was designed to facilitate the collection of accounts about which there is no bona fide dispute. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Construction of Section. — This section must be strictly construed. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Since many states have statutes similar to this section it is appropriate to review decisions from those states for guidance in construing this section. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Same — Subordinate to § 8-51. — In William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923), the court said: "We have held that this section, appearing as a section on the law of evidence, should be construed in subordination to C. S., 1795, [§ 8-51] under the principle announced in Cecil v. City of High Point, 165 N.C. 431, 81 S.E. 616 (1914)." See Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Use Not Limited to Absence of Witness. — Nothing in this section or case law limits the use of a verified statement of the account to only those situations where the witness is unavailable to testify. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

Verification Essential. — An itemized account to be prima facie evidence of its correctness must be properly verified and stated so as to show an indebtedness. Knight v. Taylor, 131 N.C. 84, 42 S.E. 537 (1902).

Sufficiency of Verification. — Verification of the itemized account is sufficient if the affiant has personal knowledge of the account or is familiar with the books and records of the business and is in a position to testify as to the correctness of the records. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

Competency of Witness Required. — Under the terms of this section, as now drawn, an affiant, verifying an account so as to make the same prima facie evidence, must be a competent witness to the facts, and, when it appears on the face of the account that he has no personal knowledge of these facts, or it is established that he is otherwise an incompetent witness, the ex parte account so verified should not be received in evidence. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915). And it must appear that he is not excluded under the provision of

§ 8-51. See William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923).

An itemized, verified statement of an account is an ex parte statement and this section, governing its admission, must be strictly complied with, and the person who verifies the account, being treated as a witness pro tanto, must be competent to testify as a witness in respect to the account if called upon at the trial, but where an itemized statement of account offered at the trial is verified by the treasurer of the plaintiff corporation who declares in his affidavit that "he is familiar with the books and business" of the plaintiff, it cannot be held as a matter of law that the affiant had no personal knowledge of the transaction, and the exclusion of the statement by the trial court will be held for reversible error. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915), cited and distinguished, Endicott-Johnson Corp. v. Schochet, 198 N.C. 769, 153 S.E. 403 (1930).

The account must be sworn to by some person who would be a competent witness to testify to the correctness of the account. Johnson Serv. Co. v. Richard J. Curry & Co., 29 N.C. App. 166, 223 S.E.2d 565 (1976).

An affiant who verifies an account of goods sold and delivered, which is to be received into evidence and taken as prima facie evidence of its correctness pursuant to this section, shall be regarded and dealt with as a witness pro tanto, and to such extent must meet the requirements and is subject to the qualifications and restrictions as other witnesses. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Where plaintiff's purported itemized statement was verified by a woman who is identified in the verification as the president of plaintiff corporation, the verification contained no statement to the effect, and there was no other showing, that affiant had any personal knowledge of the matters set forth in the affidavit or that she was familiar with the books and records of plaintiff corporation, and the burden was on plaintiff to establish a prima facie case, it failed to show that the affiant would have been competent to testify if called as a witness at trial. Bramco Elec. Corp. v. Shell, 31 N.C. App. 717, 230 S.E.2d 576 (1976).

Prima Facie Case. — In an action to recover for goods sold and delivered, where a verified statement of the account shows that it is for goods sold by the plaintiff to the defendant and sets out the number and kind of articles, the catalogue numbers, price per dozen and discounts allowed, and there are trade terms and abbreviations well understood in the trade, which show more fully the kind of articles, it is properly itemized to make out a prima facie case under this section. Claus v. Lee, 140 N.C. 552, 53 S.E. 433 (1906); Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914).

To make out a prima facie case under this section, the account not only must be properly verified and itemized, it must also be stated so as to show an indebtedness. Kight v. Harris, 33 N.C. App. 200, 234 S.E.2d 637 (1977).

Same — Nonsuit. — Where a verified account or affidavit to a statement for goods sold and delivered is insufficient to establish a prima facie case, under the provision of this section, and this is the only evidence offered, a judgment of nonsuit upon the evidence is properly allowed. Nall v. Kelly, 169 N.C. 717, 86 S.E. 627 (1915).

Same — Burden of Proof. — Where a prima facie case has been made out by the plaintiff, in his action to recover the purchase price of goods sold and delivered to the defendant, and the latter contends that he, as the agent for the former, was to sell upon commission, and that he had accounted for such sales, except a small balance which he tendered, or offered to submit to judgment for that amount, the burden is upon the defendant to show the fact of agency, and of accounting thereon, which is for the determination of the jury upon the question of indebtedness. Carr v. Alexander & Garsed, 169 N.C. 665, 86 S.E. 613 (1915).

Husband as Agent of Wife. — Itemized statement of goods held insufficient to establish agency of husband in purchasing goods for use on wife's farm. Pitt v. Speight, 222 N.C. 585, 24 S.E.2d 350 (1943).

Applied in Wright Co. v. Green, 196 N.C. 197, 145 S.E. 16 (1928); United States Leasing Corp. v. Hall, 264 N.C. 110, 141 S.E.2d 30 (1965); Planters Indus., Inc. v. Wiggins, 17 N.C. App. 132, 193 S.E.2d 303 (1972); Harrell v. W.B. Lloyd Constr. Co., 300 N.C. 353, 266 S.E.2d 626 (1980).

Stated in Haines v. Clark, 230 N.C. 751, 55 S.E.2d 693 (1949).

ARTICLE 4A.

Photographic Copies of Business and Public Records.

§ 8-45.1. Photographic reproductions admissible; destruction of originals.

If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation, X ray or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless held in a custodial or fiduciary capacity or unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original. (1951, ch. 262, s. 1; 1977, ch. 569.)

Legal Periodicals. — For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

"Written Hearsay" Admissible. — North Carolina countenances the introduction of test results, certified copies of official documents and records, as well as other writings, which, but for statute or decisional authority, would be written hearsay. In re Arthur, 27 N.C. App. 227, 218 S.E.2d 869 (1975), rev'd on other grounds, 291 N.C. 640, 231 S.E.2d 614 (1977).

Reproductions Are Primary Evidence. — Reproductions are made and kept among the records of many banks in due course of business. Their accuracy is not questioned. As proof of payment they constitute not secondary but primary evidence. State v. Shumaker, 251 N.C. 678, 111 S.E.2d 878 (1960).

Photostatic copies of deposit slips and checks made by an employee of a bank in the usual course of business and identified by such employee are competent as primary evidence without proof of the loss or destruction of the originals. Jones v. Metropolitan Life Ins. Co., 5 N.C. App. 570, 169 S.E.2d 6 (1969).

Failure to Show That Copy Was Made in Regular Course of Business or by Whom It Was Made. — A photostatic copy of a purported written designation of plaintiff by deceased as the beneficiary of deceased's governmental life insurance benefits should not be admitted as evidence where plaintiff failed to show that the copy was made in the regular course of business or activity of any federal agency or by whom it was made. Jones v. Metropolitan Life Ins. Co., 5 N.C. App. 570, 169 S.E.2d 6 (1969).

A photostatic copy of a computerized report from the operations center of a bank was admissible in a prosecution for the issuance of checks with knowledge of insufficient funds to pay the checks upon presentation. State v. Passmore, 37 N.C. App. 5, 245 S.E.2d 107, cert. denied, 295 N.C. 556, 248 S.E.2d 734 (1978).

Cited in In re Arthur, 291 N.C. 640, 231 S.E.2d 614 (1977); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978).

§ 8-45.2. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose of making uniform the law of those states which enact it. (1951, c. 262, s. 2.)

§ 8-45.3. Photographic reproduction of records of Department of Revenue.

The State Department of Revenue is hereby specifically authorized to have photographed, photocopied, or microphotocopied all records of the Department, including tax returns required by law to be made to the Department, and said photographs, photocopies, or microphotocopies, when certified by the Department as true and correct photographs, photocopies, or microphotocopies, shall be as admissible in evidence in all actions, proceedings and matters as the originals thereof would have been. (1951, c. 262, s. 3.)

§ 8-45.4. Title of Article.

This Article may be cited as the "Uniform Photographic Copies of Business and Public Records as Evidence Act." (1951, c. 262, s. 4.)

Article 4B.

Evidence of Fraud, Duress, Undue Influence.

§ 8-45.5. Statements, releases, etc., obtained from persons in shock or under the influence of drugs; fraud presumed.

Any oral or written statement, waiver, release, receipt, or other representation of any kind by any person made or executed while a patient in any hospital and taken by any person in connection with any type of insurance coverage on or for the benefit of said patient which shall have been taken while such patient was in shock or appreciably under the influence of any drug, including drugs given primarily for sedation, shall be deemed to have been obtained by means of fraud, duress or undue influence on the part of the person or persons taking same, and the same shall be incompetent and inadmissible in evidence to prove or disprove any fact or circumstance relating to any claim for which any insurance company may be liable under any policy of insurance issued to, or which may indemnify or provide coverage or protection for the person making or executing any such statement or other instrument while a patient in a hospital, nor may any such person making or executing the same be examined or cross-examined in regard thereto. (1967, c. 928.)

Legal Periodicals. — For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra. L. Rev. 359 (1969).

CASE NOTES

Cited in Tate v. Golding, 1 N.C. App. 38, 159 S.E.2d 276 (1968).

ARTICLE 5.

Life Tables.

§ 8-46. Mortuary tables as evidence.

Whenever it is necessary to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the table hereto appended shall be received in all courts and by all persons having power to determine litigation, as evidence, with other evidence as to the health, constitution and habits of such person, of such expectancy represented by the figures in the columns headed by the words "completed age" and "expectation" respectively:

Completed Age	*Expectation*
0	68.40
1	69.64
2	68.78
3	67.86
4	66.92
5	65.98
6	65.02
7	64.06
8	63.09
9	62.12
10	61.15
11	60.18
12	59.20
13	58.22
14	57.25
15	56.29
16	55.34
17	54.39
18	53.45
19	52.52
20	51.58
21	50.65
22	49.72
23	48.80
24	47.87
25	46.94
26	46.02
27	45.09
28	44.17
29	43.25
30	42.33
31	41.41
32	40.49
33	39.58
34	38.67
35	37.76

Completed Age	*Expectation*
36	36.85
37	35.95
38	35.06
39	34.17
40	33.29
41	32.42
42	31.57
43	30.72
44	29.87
45	29.04
46	28.21
47	27.38
48	26.56
49	25.76
50	24.96
51	24.18
52	23.40
53	22.64
54	21.89
55	21.15
56	20.42
57	19.70
58	18.99
59	18.29
60	17.61
61	16.94
62	16.29
63	15.65
64	15.02
65	14.40
66	13.79
67	13.20
68	12.61
69	12.04
70	11.48
71	10.93
72	10.39
73	9.86
74	9.35
75	8.84
76	8.35
77	7.87
78	7.40
79	6.96
80	6.53
81	6.12
82	5.75
83	5.39
84	5.05
85	4.70
86	4.38
87	4.08
88	3.79

Completed Age	*Expectation*
89	3.54
90	3.30
91	3.08
92	2.89
93	2.72
94	2.56
95	2.43
96	2.32
97	2.21
98	2.10
99	2.01
100	1.91
101	1.83
102	1.75
103	1.67
104	1.60
105	1.53
106	1.46
107	1.40
108	1.35
109	1.29

(1883, c. 225; Code, s. 1352; Rev., s. 1626; C. S., s. 1790; 1955, c. 870; 1971, c. 968.)

CASE NOTES

Tables Need Not Be Specially Put in Evidence. — This section being a public act, the tables herein contained are competent as evidence without being specially put in evidence. Coley v. City of Statesville, 121 N.C. 301, 28 S.E. 482 (1897).

The mortuary table in this section is one of the prevailing mortality tables put into statutory form so as to permit its use without formal proof. Rea v. Simowitz, 225 N.C. 575, 35 S.E.2d 871, 162 A.L.R. 999 (1945).

The mortuary table is statutory and need not be introduced in evidence, but may receive judicial notice when facts are in evidence requiring or permitting its application. Chandler v. Moreland Chem. Co., 270 N.C. 395, 154 S.E.2d 502 (1967).

The table, being statutory, need not be introduced in evidence in order to make use of it upon the question of damages when other facts are in evidence permitting its application. Johnson v. Lamb, 273 N.C. 701, 161 S.E.2d 131 (1968).

Mortuary table is competent evidence bearing upon life expectancy and future earning capacity of the injured person in actions for personal injuries resulting in permanent disability. Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965).

But it is not admissible unless there is evidence of permanent injury. Gillikin v. Burbage, 263 N.C. 317, 139 S.E.2d 753 (1965); McCoy v. Dowdy, 16 N.C. App. 242, 192 S.E.2d 81 (1972).

Where testimony tended to show that plaintiff's injuries were permanent in character, it was proper for the presiding judge to permit plaintiff to introduce and the jury to consider the mortuary tables formerly embodied in this section. Hunt v. Wooten, 238 N.C. 42, 76 S.E.2d 326 (1953).

The mortuary tables were properly introduced into evidence on the issue of damages over defendant's objection where plaintiff introduced evidence that he received permanently disfiguring scars from sulphuric acid burns as a result of defendant's negligence. Chandler v. Moreland Chem. Co., 270 N.C. 395, 154 S.E.2d 502 (1967).

Tables Not Conclusive. — In an action to recover damages for a personal injury, the expectation of life tables contained in this section are not conclusive but merely evidential on the issue as to damages. Sledge v. Lumber Co., 140 N.C. 459, 53 S.E. 295 (1906); Odom v. Canfield Lumber Co., 173 N.C. 134, 91 S.E. 716 (1917); Young v. E.A. Wood & Co., 196 N.C. 435, 146 S.E. 70 (1929). The tables must be considered in connection with the "other evidence as to the health, constitution and habits" of the deceased. Russell v. Windsor Steamboat Co., 126 N.C. 961, 36 S.E. 191 (1900). See Wachovia Bank & Trust Co. v. Atlantic Greyhound Lines,

210 N.C. 293, 186 S.E. 320 (1936); Hancock v. Wilson, 211 N.C. 129, 189 S.E. 631 (1937).

The mortuary table is merely evidence of life expectancy to be considered with other evidence as to the health, constitution and habits of the deceased, and an instruction making the expectancy set out in this section definitive and conclusive not only violates the evidence rule, but also § 1-180 (now repealed) prohibiting the expression of an opinion "whether a fact is fully or sufficiently proven." Starnes v. Tyson, 226 N.C. 395, 38 S.E.2d 211 (1946).

This section does not, like § 8-47, give a mathematical result which the court can apply. The table given is merely evidentiary. Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957).

Value of Life Tenancy. — When a life tenant and the remainderman sell the lands, the life tenant is entitled to the present cash value of her life estate in the purchase price, computed according to her life expectancy at the date of the execution of the deed, and the remainderman is entitled to the balance of the purchase price. Thompson v. Avery County, 216 N.C. 405, 5 S.E.2d 146 (1939).

Value of Dower. — Because the mortuary table is only evidentiary, it has been decided that the cash value of dower inchoate depends on the ages of husband and wife, and on their health, habits and all other circumstances tending to show the probabilities as to the length of life. And there is no reason for differing rules for determining life expectancy as between married women entitled to dower inchoate and widows entitled to dower consummate. Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957).

Failure to Instruct Jury as to Life Expectancy of Plaintiff. — In the absence of a request, the judge did not commit reversible error in failing to instruct the jury in an action for personal injury that the plaintiff had a life expectancy of 15.27 years according to the mortuary table, which he had introduced in evidence, where, although the charge did not contain a direct reference to the plaintiff's life expectancy, the court did instruct the jury to take into consideration all the evidence bearing on the issue, including the plaintiff's age. Derby v. Owens, 245 N.C. 591, 96 S.E.2d 851 (1957).

Erroneous Instruction. — Where the element of future damages figured largely in consideration of the issue, an instruction to the effect that the jury could take into consideration the mortuary tables as to the life expectancy of plaintiff, without reference to the evidence as to plaintiff's health prior and subsequent to the accident and without charging that the mortuary tables could be considered only as evidence together with other evidence as to the health, constitution and habits of plaintiff, was incomplete and erroneous. Harris v. Atlantic Greyhound Corp., 243 N.C. 346, 90 S.E.2d 710 (1956).

Applied in Brenkworth v. Lanier, 260 N.C. 279, 132 S.E.2d 623 (1963); Kinsey v. Town of Kenly, 263 N.C. 376, 139 S.E.2d 686 (1965); Knight v. Seymour, 263 N.C. 790, 140 S.E.2d 410 (1965); Dolan v. Simpson, 269 N.C. 438, 152 S.E.2d 523 (1967); Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903 (1972).

Stated in Petition of United States, 303 F. Supp. 1282 (E.D.N.C. 1969).

Cited in Waddell v. United Cigar Stores of America, 195 N.C. 434, 142 S.E. 585 (1928); Farris v. Hendricks, 196 N.C. 439, 146 S.E. 77 (1929); White v. North Carolina R.R., 216 N.C. 79, 3 S.E.2d 310 (1939); McClamroch v. Colonial Ice Co., 217 N.C. 106, 6 S.E.2d 850 (1940); Queen City Coach Co. v. Lee, 218 N.C. 320, 11 S.E.2d 341 (1940); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); Bryant v. Woodlief, 252 N.C. 488, 114 S.E.2d 241 (1960); Skidmore v. Austin, 261 N.C. 713, 136 S.E.2d 99 (1964); Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966); Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966); Mattox v. Huneycutt, 3 N.C. App. 63, 164 S.E.2d 28 (1968); Vanhoy v. Phillips, 15 N.C. App. 102, 189 S.E.2d 557 (1972).

§ 8-47. Present worth of annuities.

Whenever it is necessary to establish the present worth or cash value of an annuity to a person, payable annually during his life, such present worth or cash value may be ascertained by the use of the following table in connection with the mortuary tables established by law, the first column representing the number of years the annuity is to run and the second column representing the present cash value of an annuity of one dollar for such number of years, respectively:

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
1	$ 0.943
2	1.833

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
3	$ 2.673
4	3.465
5	4.212
6	4.917
7	5.582
8	6.210
9	6.802
10	7.360
11	7.887
12	8.384
13	8.853
14	9.295
15	9.712
16	10.106
17	10.477
18	10.828
19	11.158
20	11.470
21	11.764
22	12.042
23	12.303
24	12.550
25	12.783
26	13.003
27	13.211
28	13.406
29	13.591
30	13.765
31	13.929
32	14.084
33	14.230
34	14.368
35	14.498
36	14.621
37	14.737
38	14.846
39	14.949
40	15.046
41	15.138
42	15.225
43	15.306
44	15.383
45	15.456
46	15.524
47	15.589
48	15.650
49	15.708
50	15.762
51	15.813
52	15.861
53	15.907
54	15.950
55	15.991
56	16.029

No. of Years Annuity is to Run	Cash Value of the Annuity of $1
57	$ 16.065
58	16.099
59	16.131
60	16.161
61	16.190
62	16.217
63	16.242
64	16.266
65	16.289
66	16.310
67	16.331

The present cash value of the annuity for a fraction of a year may be ascertained as follows: Multiply the difference between the cash value of the annuities for the preceding and succeeding full years by the fraction of the year in decimals and add the sum to the present cash value for the preceding full year. When a person is entitled to the use of a sum of money for life, or for a given time, the interest thereon for one year, computed at four and one half percent ($4^1/_2$%), may be considered as an annuity and the present cash value be ascertained as herein provided: Provided, the interest rate in computing the present cash value of a life interest in land shall be six percent (6%).

Whenever the mortuary tables set out in G.S. 8-46 are admissible in evidence in any action or proceeding to establish the expectancy of continued life of any person from any period of such person's life, whether he be living at the time or not, the annuity tables herein set forth shall be evidence, but not conclusive, of the loss of income during the period of life expectancy of such person. (1905, c. 347; Rev., s. 1627; C. S., s. 1791; 1927, c. 215; 1943, c. 543; 1957, c. 497; 1959, c. 879, s. 3; 1965, c. 991.)

CASE NOTES

Applicable Only to Annuities. — This section is intended to apply strictly to annuities, and therefore, in an action to recover damages for injuries causing death, it was error to permit the jury to consider the provisions thereof for the purpose of ascertaining the present value of the intestate's life. Poe v. Railroad, 141 N.C. 525, 54 S.E. 466 (1906). See Brown v. Lipe, 210 N.C. 199, 185 S.E. 681 (1936).

Interest Rate. — Annuities, under this section, must be computed at 4.5% and not at 6%. Smith v. Smith, 223 N.C. 433, 27 S.E.2d 137 (1943).

Value of Widow's Annuity. — By the specific language of the proviso in this section a widow is entitled to have her annuity computed at 6% when her dower (now life interest in lieu of an intestate share) is sold. Brenkworth v. Lanier, 260 N.C. 279, 132 S.E.2d 623 (1963).

Cited in American Blower Co. v. MacKenzie, 197 N.C. 152, 147 S.E. 829 (1929); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); Hunt v. Wooten, 238 N.C. 42, 76 S.E.2d 326 (1953); Waggoner v. Waggoner, 246 N.C. 210, 97 S.E.2d 887 (1957); Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966).

ARTICLE 6.

Calendars.

§ 8-48. Clark's Calendar; proof of dates.

In any controversy or inquiry in any court or before any fact finding board, commission, administrative agency or other body, where it becomes necessary or pertinent to determine any information which may be established by reference to a calendar for any year between the years one thousand seven hundred and fifty-three and two thousand and two, anno domini, inclusive, it is permissible to introduce in evidence "Clark's Calendar, a Calendar Covering

250 Years, 1753 A.D. to 2002 A.D.," as supplemented, copyrighted, 1940, by E. D. Clark, Entry: Class AA, Number three hundred and twenty-eight thousand five hundred and seventy-three, Copyright Office of the United States of America, Washington, or any reprint of said one thousand nine hundred and forty edition certified by the Secretary of State to be an accurate copy thereof; and such calendar or reprint, when so introduced, shall be prima facie evidence that the information disclosed by said calendar or reprint thereof is true and correct. (1941, c. 312.)

Article 7.

Competency of Witnesses.

§ 8-49. Witness not excluded by interest or crime.

No person offered as a witness shall be excluded, by reason of incapacity from interest or crime, from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit or proceeding, civil or criminal, in any court, or before any judge, justice, jury or other person having, by law, authority to hear, receive and examine evidence; and every person so offered shall be admitted to give evidence, notwithstanding such person may or shall have an interest in the matter in question, or in the event of the trial of the issue, or of the suit or other proceeding in which he is offered as a witness. This section shall not be construed to apply to attesting witnesses to wills. (1866, c. 43, ss. 1, 4; C. C. P., c. 342; 1869-70, c. 177; 1871-2, c. 4; Code, ss. 589, 1350; Rev., ss. 1628, 1629; C. S., s. 1792.)

CASE NOTES

This section abolishes the common-law rule which prevented a party who was interested in the result of the verdict and judgment from appearing as a witness. A similar enactment will be found in the statutes of practically all the states. The trend of the development of the rules of evidence has been to remove personal disqualification to testify. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Section construed with § 8-51. — The provisions of this section must be considered in the light of those contained in § 8-51 which place certain restrictions on the general rule embodied in this section. In other words, the provisions of § 8-51 form exceptions to this section, and take them from the operation of its principle, leaving the parties falling within these exceptions to stand upon the same footing as they did prior to the enactment of this section. See Charlotte Oil & Fertilizer Co. v. Rippy, 124 N.C. 643, 32 S.E. 980 (1899).

And with §§ 8-50 and 8-56. — The construction of this section should also be in connection with the provisions of §§ 8-50 and 8-56, since they all relate to the same subject — the competency of the witnesses. Powell v. Strickland, 163 N.C. 393, 79 S.E. 872 (1913).

Burden on Challenger to Show Disqualification. — The general rule established by this section and § 8-50 is that no person offered as a witness shall be excluded on account of interest or because a party to the action, except as otherwise provided. Hence, it is incumbent upon one who challenges the competency of the witness to show disqualification. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

Party Testifying in Own Behalf. — The provisions of this section make it permissible for a party to testify in his own behalf. State v. McIntosh, 64 N.C. 607 (1870); Autry v. Floyd, 127 N.C. 186, 37 S.E. 208 (1900).

Legatee under Will as Witness. — Under this section removing the disqualification on account of interest, the widow of the testator, who was named as a legatee and devisee in a will, was a competent witness to prove the fact that the script propounded was found among the papers of the deceased. Nor would the last provision of the section prevent the widow from testifying, since this provision applies only to attesting witnesses to the execution of a will. Cornelius v. Brawley, 109 N.C. 542, 14 S.E. 78 (1891).

Beneficiary under Holograph Will. — Under this section and § 8-50, one who is a beneficiary under a holograph will may testify to such competent relevant and material facts as tend to establish it as a valid will without rendering void the benefits he is to receive thereunder. It is otherwise as to an attesting witness of a will that the statute requires to be attested by witness thereto. In re Will of Westfeldt, 188 N.C. 702, 125 S.E. 531 (1924).

Executor as Witness. — An executor, named in a will, is a competent witness to testify as to the existence, probate and registration of a will, he being rendered competent by this section, and he is not disqualified by § 8-51, as to transactions occurring after the death of the testator, as they can in no sense be considered as transactions between the witness and the testator. Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899).

The widow of a deceased vendor, who was present at the sale of a mule by her husband to the plaintiff, was a competent witness under this section, and was not excluded under § 8-51, as she was not a party to the action and had no interest in the same. Little v. Ratliff, 126 N.C. 262, 35 S.E. 469 (1900).

Mortgagee. — Where he is not excluded under the provisions of § 8-51, the mortgagee in a chattel mortgage is competent, as a subscribing witness thereto, to prove its execution for admission to probate, inasmuch as this section removes the disqualification formerly attaching to witnesses having an interest. Clark v. Hodge, 116 N.C. 761, 21 S.E. 562 (1895).

Fornication and Adultery. — In a trial for fornication and adultery a former defendant as to whom a nolle prosequi had been entered was a competent witness against the other defendant. State v. Phipps, 76 N.C. 203 (1877).

§ 8-50. Parties competent as witnesses.

(a) On the trial of any issue, or of any matter or question, or on any inquiry arising in any action, suit or other proceeding in court, or before any judge, justice, jury or other person having, by law, authority to hear and examine evidence, the parties themselves and the person in whose behalf any suit or other proceeding may be brought or defended, shall, except as otherwise provided, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, in behalf of either or any of the parties to said action, suit or other proceeding. Nothing in this section shall be construed to apply to any action or other proceeding in any court instituted in consequence of adultery, or to any action for criminal conversation.

(b), (c): Repealed by Session Laws 1967, c. 954, s. 4. (1866, c. 43, ss. 2, 3; Code, s. 1351; Rev., s. 1630; C. S., s. 1793; 1953, c. 885, s. 1; 1967, c. 954, s. 4.)

CASE NOTES

Evidence of Spouse's Conduct. This section and §§ 8-49 and 8-51 should be construed together, and thus construed, they do not prohibit the evidence of the husband as to the conduct of his wife, where she is not a party, in his action against another for damages for criminal conversation with his wife and the alienation of her affections. Powell v. Strickland, 163 N.C. 393, 79 S.E. 872 (1913).

Same — Introduction Prohibited by Common Law. — At common law, neither the husband nor the wife is allowed to prove the fact of access or nonaccess; and as such rule is founded "upon decency, morality and public policy," it is not changed by this section, allowing parties to testify in their own behalf. Boykin v. Boykin, 70 N.C. 262 (1874).

Testifying against Codefendant. — A defendant in a criminal case is, under this section, competent and compellable to testify for or against a codefendant, provided his testimony does not incriminate himself. State v. Smith, 86 N.C. 705 (1882); State v. Medley, 178 N.C. 710, 100 S.E. 591 (1919).

Same — Practice Not Commendable. — The practice of sending codefendants to the grand jury to testify against each other, while allowable, is not commended. State v. Frizell, 111 N.C. 722, 16 S.E. 409 (1892).

Consolidation and Testimony of Codefendant. — Where the testimony of codefendant would have carried equal force if it had been received without an order of consolidation, there was no abuse of discretion in the trial judge's order consolidating cases for trial. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Defendant's contention that consolidation of cases resulted in prejudicial error to him because he was deprived of his right to open and

close the jury arguments when his codefendant elected to testify was without merit. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Testimony of an Accomplice. — An accomplice may not testify on direct examination to facts tending to incriminate defendant and at the same time refuse to answer questions on cross-examination relating to matters embraced in his examination-in-chief, and where he refuses to answer relevant questions on cross-examination on the ground that his answers might tend to incriminate him, it is error for the court to refuse defendant's motion that his testimony-in-chief be stricken from the record, the refusal to answer the questions on cross-examination rendering the testimony-in-chief incompetent. State v. Perry, 210 N.C. 796, 188 S.E. 639 (1936).

It is well established that an accomplice is always a competent witness. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Fact that accomplice's testimony is usually induced by promise of or hope for leniency goes only to his credibility as a witness, and not to his competency as a witness. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Instructing Witness Not to Incriminate Himself. — In an indictment for an affray, it was not error for the presiding judge to caution the witness (a defendant) before the counsel for the other defendant cross-examined him, that he need not tell anything to incriminate himself. State v. Weaver, 93 N.C. 595 (1885).

Applied in Powell v. Cross, 263 N.C. 764, 140 S.E.2d 393 (1965).

Cited in State v. Wright, 274 N.C. 380, 163 S.E.2d 897 (1968).

§ 8-50.1. Competency of blood tests; jury charge; taxing of expenses as costs.

(a) In the trial of any criminal action or proceeding in any court in which the question of parentage arises, regardless of any presumptions with respect to parentage, the court before whom the matter may be brought, upon motion of the State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged-parent defendant cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results, and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged-parent is not the natural parent; whereupon, the court shall enter the special verdict of not guilty; and

(2) By requiring the State or defendant, as the case may be, requesting the blood tests and comparisons pursuant to this subsection to initially be responsible for any of the expenses thereof and upon the entry of a special verdict incorporating a finding of parentage or non-parentage, by taxing the expenses for blood tests and comparisons, in addition to any fees for expert witnesses allowed per G.S. 7A-314 whose testimonies supported the admissibility thereof, as costs in accordance with G.S. 7A-304; G.S. Chapter 6, Article 7; or G.S. 7A-315, as applicable.

(b) In the trial of any civil action in which the question of parentage arises, the court before whom the matter may be brought, upon motion of the plaintiff, alleged-parent defendant, or other interested party, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged-parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged-parent defendant cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results, and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged-parent defendant is not the natural parent; and

(2) By requiring the plaintiff, alleged-parent defendant or other interested party requesting blood tests and comparisons pursuant to this subsection to initially be responsible for any of the expenses thereof and upon the entry of a verdict of parentage or non-parentage, by taxing the expenses for blood tests and comparisons, in addition to any fees for expert witnesses allowed per G.S. 7A-314 whose testimonies supported the admissibility thereof, as costs in accordance with the provisions of G.S. 6-21. (1949, c. 51; 1965, c. 618; 1975, c. 449, ss. 1, 2; 1979, c. 576, s. 1.)

Legal Periodicals. — For a brief discussion of this section, see 27 N.C.L. Rev. 456.

For note discussing the admissibility of blood-grouping tests to rebut the presumption that a child born during a valid marriage is legitimate, see 50 N.C.L. Rev. 163 (1971).

For survey of 1974 case law on the use of blood-grouping tests, see 53 N.C.L. Rev. 1057 (1975).

For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

For comment on "The Use of Blood Tests in Actions to Determine Paternity," see 16 Wake Forest L. Rev. 591 (1980).

CASE NOTES

Editor's Note. — Most of the cases cited in the following annotations were decided under this section as it stood before the 1975 amendment, which made the results of a blood test, not in conflict with other blood tests, conclusive rather than merely competent evidence that defendant could not be the father of the child.

The provisions of this section were intended to apply alike in civil and criminal actions except in those particulars involving procedural differences. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

But Only in Actions in Which Question of Paternity Arises. — This section requires blood-grouping tests only in actions in which the question of paternity arises. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Before a court is required to order a blood-grouping test in a civil action, the question of paternity must arise. Williams v. Holland, 39 N.C. App. 141, 249 S.E.2d 821 (1978).

Weight Given Tests Is Legislative Question. — It is for the General Assembly to decide the question of the weight to be given blood-grouping tests. State v. Camp, 286 N.C. 148, 209 S.E.2d 754 (1974).

Results of Tests Are Competent to Rebut Any Presumption of Paternity. — In both criminal and civil actions in which the question

of paternity arises, the results of blood-grouping tests must be admitted in evidence when offered by a duly licensed practicing physician or other qualified person, regardless of any presumptions with respect to paternity, and such evidence shall be competent to rebut any presumptions of paternity. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Including Common-Law Presumption of Legitimacy. — Assuming blood-grouping tests are made and offered in evidence by qualified persons, the results thereof, if they tend to exclude defendant as the father of the child, may be offered in evidence to rebut the common-law presumption of legitimacy. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Tests Cannot Prove Paternity. — The value of serological blood tests, when made and interpreted by specifically qualified technicians, using approved testing procedures and reagents of standard strength, is now generally recognized. Such tests, however, can never prove the paternity of any individual, and they cannot always exclude the possibility. Nevertheless, in a significant number of cases, they can disprove it. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests Conclusive Only in Excluding Putative Father. — The blood-grouping test results are conclusive only in excluding the putative father. The results might show him to have a blood type which the father of the child must have had; but this only indicates that of all the people of that blood type or group, he, as well as anyone else with that blood type or group, could have been the father of the child. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Effect Where Principle of Res Judicata Bars Issue of Paternity. — Where the defendant in an action to recover arrearages for child support was barred by principles of res judicata from putting paternity in issue as the result of a prior adjudication of paternity in a Nevada divorce action in which the Nevada court had in personam jurisdiction over the defendant, the trial court erred in allowing the defendant's motion for blood-grouping tests. Williams v. Holland, 39 N.C. App. 141, 249 S.E.2d 821 (1978).

Defendant Has Right to Blood Test. — There can be no doubt that a defendant's right to a blood test to determine parentage is a substantial right and that, upon defendant's motion, the court must order the test when it is possible to do so. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

A defendant is entitled in a proceeding under the Uniform Reciprocal Enforcement of Support Act to a blood-grouping test pursuant to this section where the issue of paternity is raised and, upon timely motion, is entitled to have the jury pass on the issue of paternity. Brondum v. Cox, 230 N.C. App. 35, 226 S.E.2d 193, aff'd, 30 N.C. App. 35, 232 S.E.2d 687 (1976).

The 1975 amendment to this section amplifies the importance of the right to a blood-grouping test under § 49-7. State v. Morgan, 31 N.C. App. 128, 228 S.E.2d 523 (1976).

The only areas in which the results of blood grouping tests should be open to attack are in the method of testing or in the qualifications of the persons performing the tests. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests May Not Be Accurate until Infant Six Months Old. — In a few cases it has been found that an infant's blood group cannot be established immediately after birth. However, by the age of six months, an accurate determination can always be had. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

When the death of the child makes a blood test impossible the situation is analogous to that which occurs when an eyewitness to events constituting the basis for an indictment dies before the accused has interviewed him or taken his deposition. It would hardly be suggested that to try the defendant after the death of that witness would deprive him of due process and that therefore the prosecution must be dismissed. State v. Fowler, 277 N.C. 305, 177 S.E.2d 385 (1970).

Tests May Be Ordered in Action for Alimony and Child Support Where Husband Denies Paternity. — In plaintiff-wife's action for alimony, alimony pendente lite and child support, defendant-husband was entitled under the section to an order for a blood grouping test where plaintiff alleged and defendant denied that he was the father of a child born to plaintiff during the subsistence of the marriage. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

And Results of Test May Also Be Evidence of Adultery. — While there is no authority for blood-grouping tests unless an issue of paternity is raised, in a case in which the issue of paternity is raised, the results of the blood-grouping tests, if they exclude defendant as the father of a child admittedly born during the subsistence of the marriage, also would be evidence of adultery. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Applied in Johnson v. Johnson, 7 N.C. App. 310, 172 S.E.2d 264 (1970); State v. White, 42 N.C. App. 320, 256 S.E.2d 505 (1979); Bunting v. Beacham, 45 N.C. App. 304, 262 S.E.2d 672 (1980).

Quoted in State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980).

Cited in State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967); State v. Camp, 299 N.C. 524, 263 S.E.2d 592 (1980).

§ 8-50.2. Results of speed-measuring instruments; admissibility.

(a) The results of the use of radio microwave or other speed-measuring instruments shall be admissible as evidence of the speed of an object in any criminal or civil proceeding for the purpose of corroborating the opinion of a person as to the speed of an object based upon the visual observation of the object by such person.

(b) Notwithstanding the provisions of subsection (a) of this section, the results of a radio microwave or other electronic speed-measuring instrument are not admissible in any proceeding unless it is found that:

(1) The operator of the instrument held, at the time the results of the speed-measuring instrument were obtained, a certificate from the North Carolina Criminal Justice Education and Training Standards Commission (hereinafter referred to as the Commission) authorizing him to operate the speed-measuring instrument from which the results were obtained.

(2) The operator of the instrument operated the speed-measuring instrument in accordance with the procedures established by the Commission for the operation of such instrument.

(3) The instrument employed was approved for use by the Commission and the Secretary of Crime Control and Public Safety pursuant to G.S. 17C-6.

(4) The speed-measuring instrument had been calibrated and tested for accuracy in accordance with the standards established by the Commission for that particular instrument.

(c) All radio microwave and other electronic speed-measuring instruments shall be tested for accuracy by a technician possessing at least a second-class radiotelephone license from the Federal Communications Commission within a period of six months prior to the alleged violation. A written certificate by such technician showing that the test was made within the required period and that the instrument was accurate shall be competent and prima facie evidence of those facts in any proceeding referred to in subsection (a) of this section.

(d) In every proceeding where the results of a radio microwave or other speed-measuring instrument is sought to be admitted, judicial notice shall be taken of the rules approving the use of the models and types of radio microwave and other speed-measuring instruments and the procedures for operation and calibration or measuring accuracy of such instruments, when such rules are filed with the Attorney General in accordance with General Statutes Chapter 150A. (1979, 2nd Sess., c. 1184, s. 3.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1184, s. 4, makes the act effective July 1, 1982.

§ 8-51. A party to a transaction excluded, when the other party is dead.

Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise,

concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication. Nothing in this section shall preclude testimony as to the identity of the operator of a motor vehicle in any case. (C. C. P., s. 343; Code, s. 590; Rev., s. 1631; C. S., s. 1795; 1967, c. 896, s. 1; 1977, c. 74, s. 2.)

Legal Periodicals. — For note on personal transactions under this section, see 34 N.C.L. Rev. 362 (1956).

For case law survey on dead man's statute, see 41 N.C.L. Rev. 477 (1963).

For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

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I. GENERAL CONSIDERATION.

Summary and Analysis of Section. — Mr. Justice Clark in Bunn v. Todd, 107 N.C. 266, 11 S.E. 1043 (1890), gives the following analytical treatment to this section, which has been cited and approved in many of the cases coming within the principales of this section. See Seals v. Seals, 165 N.C. 409, 81 S.E. 613 (1914); Fidelity Bank v. Wysong & Miles Co., 177 N.C. 284, 98 S.E. 769 (1919).

"It [this section] disqualifies —

"WHOM — 1. Parties to the action.

2. Persons interested in the event of the action.

3. Persons through or under whom the persons in the first two classes derive their title or interest.

"A witness, although belonging to one of these three classes, is incompetent only in the following cases:

"WHEN — To testify in behalf of himself, or the person succeeding to his title or interest, against the representative or a deceased person, or committee of a lunatic, or any one deriving his title or interest through them.

"And the disqualification of such person, and in even such cases, is restricted to the following:

"SUBJECT MATTER. — As to a personal transaction or communication between the witness and the person since deceased or a lunatic.

"And even as to those persons and in those cases there are the following:

"EXCEPTIONS. — When the representative of, or person claiming through or under, the deceased person or lunatic is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction. Burnett v. Savage, 92 N.C. 10 (1885); Sumner v. Candler, 92 N.C. 634 (1885)."

This summary is the basis of the analysis of the section in the following annotation. — Ed. note.

Purpose of Section. — The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event, as to a personal transaction or communication between the witness and the deceased person whose lips are sealed in death. Abernathy v. Skidmore, 190 N.C. 66, 128 S.E. 475 (1925).

The purpose of this section is to exclude evidence of a personal transaction or communication between the witness and a person who by

reason of death or lunacy cannot be heard. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

The reasoning behind this section is succinctly stated: Death having closed the mouth of one of the parties (with respect to a personal transaction or communication), it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the legislature, in its wisdom, has declared that an ex parte statement of such matters shall not be received in evidence. Carswell v. Greene, 253 N.C. 266, 166 S.E.2d 801 (1960); Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

The law that an interested survivor to a personal transaction or communication cannot testify with respect thereto against the dead man's estate is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack the survivor. Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966); Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

The rule that evidence offered is admissible if it is competent for any purpose ought not to be used as a sword with which to attack a decedent's estate by destroying the express provisions of this section. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

When Testimony Is Incompetent under This Section. — This section does not render the testimony of a witness incompetent in any case unless these four questions require an affirmative answer: 1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title? 2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest? 3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic, or (c) a person deriving his title or interest from, through or under a deceased person or lunatic? 4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic? Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969); Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969); Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 735 (1979).

Even in instances where these four things concur, the testimony of the witness is nevertheless admissible under an exception specified in the statute itself if the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony of the deceased person or lunatic is given in evidence concerning the same transaction or communication. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

The testimony of a witness is incompetent under the provisions of this statute when it appears (1) that such witness is a party, or interested in the event, (2) that his testimony relates to a personal transaction or communication with the deceased person, (3) that the action is against the personal representative of the deceased or a person deriving title or interest from, through or under the deceased, and (4) that the witness is testifying in his own behalf or interest. Collins v. Covert, 246 N.C. 303, 98 S.E.2d 26 (1957); Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 131 S.E.2d 456 (1963).

Reasons for Exclusion. — The exclusion of such testimony rests not merely upon the ground that the dead man cannot have a fair showing, but upon the broader and more practical ground that the other party to the action has no chance by the oath of the relevant witness to reply to the oath of the party to the action. In re Will of Mann, 192 N.C. 248, 134 S.E. 649 (1926).

Courts are not disposed to extend the disqualification of a witness under this section to those not included in its express terms. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952); Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

The provisions of this section may be waived by the adverse party. Andrews v. Smith, 198 N.C. 34, 150 S.E. 670 (1929).

Where an administrator brought proceedings under former § 1-569 et seq., to examine a defendant to discover assets of the estate of the deceased, the administrator waived the provisions of this section and the testimony thus taken could be introduced by the defendant in his own behalf. Andrews v. Smith, 198 N.C. 34, 150 S.E. 670 (1929).

If the plaintiffs at a former trial called the defendant as an adverse witness, examined her in detail about her relations with deceased, such examination would seem to be a waiver of this section and would open the door for the defendant to testify in another trial in respect to the matters about which the plaintiffs examined her. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

Where a party claiming under a deceased person examines the attorney for the deceased in respect to the execution and delivery of deeds

to the land in controversy and the consideration therefor, such examination constitutes a waiver of this section in respect to communications or transactions with decedent, and the other party is entitled to cross-examine the attorney as to such transactions. However, the waiver does not apply to other and independent transactions. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

Where the plaintiffs adversely examined the defendant for the purpose of obtaining evidence for use in the trial as provided in former §§ 1-568.1 to 1-568.16, that examination is a waiver of the protection afforded by this section to the extent that either party may use it upon the trial. Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

But adverse examinations of defendant in regard to transactions with decedent, which examinations were taken in prior actions nonsuited, do not operate as a waiver of this section so as to render competent defendant's testimony in subsequent trials in regard to such transactions. McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Where an action to recover for injuries to one passenger is consolidated with two actions for wrongful deaths of two other passengers against the same defendant, the admission of testimony of plaintiff passenger in regard to a transaction between defendant and one of the deceased passengers does not constitute a waiver of this section in regard to the two actions for wrongful death. McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Under certain circumstances the personal representative can waive the protection afforded by this section, and when this is done, it is frequently referred to as "opening the door" for the testimony of the opposing party or interested survivor. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Province of Court to Decide What Testimony May "Come In". — When a personal representative "opens the door" by testifying to a transaction, it is not in his province, but that of the court, to decide what testimony favorable to the adverse party may "come in." Mansfield v. Wade, 208 N.C. 790, 182 S.E. 475 (1935).

This section applies to actions in tort as well as actions on contract. Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934). See Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

This section prohibits the surviving party from testifying in his own behalf with respect to personal transactions and communications between him and a deceased person in an action in which the survivor seeks to establish a claim, either in contract or in tort, against the estate of the deceased. Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960).

Itemized and Verified Accounts. — Section 8-45 relating to itemized and verified accounts is subordinate to this section. See note of William M. Lloyd & Co. v. Poythress, 185 N.C. 180, 116 S.E. 584 (1923), placed under § 8-45.

Testimony Not Barred by Section. — Where a widow was entitled during her widowhood to the profits on the land devised by her deceased husband, but not to his moneys commingled therewith in a deposit in a bank, and she died devising the total amount of the deposit: Held, testimony as to her receipt of the money from the crops was competent, not falling within the provisions of this section, and did not affect the title to other money owned by her husband at his death and given to her for life by his will. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

Same — Conversations with Living Persons. — Where the widow under the terms of the will of her husband could only dispose of the moneys in the bank to her credit, and not such as could at her death pass to the remainderman under his will, it could be shown by disinterested witnesses as to what part passed under the widow's will, as not objectionable evidence under this section based upon conversations with other living parties interested under the husband's will. White v. Mitchell, 196 N.C. 89, 144 S.E. 526 (1928).

Testimony of conversations with party to action wherein witness related statements of decedent is not in contravention of this section. Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938).

Same — Rehearsal of Conversation. — Direct evidence of a conversation and understanding with the plaintiff's testator is, under this section, incompetent, but a rehearsal of that conversation is a part of the res gestae, and admissible. Gilmer v. McNairy, 69 N.C. 335 (1873).

Same — Personal letters written by decedent to his granddaughter, one of the propounders of his will, were held admissible over the objection that they constituted personal transactions with the deceased which are prohibited by the "dead man's statute." In re Will of McDowell, 230 N.C. 259, 52 S.E.2d 807 (1949).

Same — Testimony to Prove Time When Act Was Done. — Where the act of the widow's execution of dissent to the will and the delivery of such dissent by her to the court is established by evidence, an interested party may testify, after the death of the widow, as to the time she saw the widow file the dissent in the clerk's office, the testimony being offered not for the purpose of proving the widow's execution of the dissent but only to establish that the act was done within the time allowed. Philbrick v. Young, 255 N.C. 737, 122 S.E.2d 725 (1961).

Same — Record Evidence. — While testimony as to personal transactions with the

deceased payee of a note would be incompetent to establish defenses to the note over the objection of the personal representative of the payee, record evidence tending to establish such defenses is not precluded by this section. Flippin v. Lindsey, 221 N.C. 30, 18 S.E.2d 824 (1942).

The death certificate of the daughter intestate recorded no transaction between the child's mother and the doctor, and even had that been the case, record evidence does not fall within the ban of this section. Spillman v. Forsyth Mem. Hosp., 30 N.C. App. 406, 227 S.E.2d 292 (1976).

Same — Testimony Competent as to Only One of Two Defendants Is Admissible. — When there is more than one defendant, testimony which is competent as to one party should not be excluded by virtue of this section because it is not competent against another party in the suit. Lamm v. Gardner, 250 N.C. 540, 108 S.E.2d 847 (1959); Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Instruction as to Use of Section Cannot Be Obtained by Declaratory Judgment. — In an action instituted under the Declaratory Judgment Act the court has no authority to instruct a litigant whether to take advantage of the provision of this section, upon the hearing of the cause upon its merits, since such instructions upon a question of procedure do not fall within the purview of the act. Redmond v. Farthing, 217 N.C. 678, 9 S.E.2d 405 (1940).

Applied in Elledge v. Welch, 238 N.C. 61, 76 S.E.2d 340 (1953); Heiland v. Lee, 207 F.2d 939 (4th Cir. 1953); Fesmire v. First Union Nat'l Bank, 267 N.C. 589, 148 S.E.2d 589 (1966); North Carolina State Bar v. Temple, 2 N.C. App. 91, 162 S.E.2d 649 (1968); Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971); Schoolfield v. Collins, 281 N.C. 604, 189 S.E.2d 208 (1972); Woodard v. McGee, 21 N.C. App. 487, 204 S.E.2d 871 (1974); Brown v. Moore, 286 N.C. 664, 213 S.E.2d 342 (1975); In re Will of Wadsworth, 30 N.C. App. 593, 227 S.E.2d 632 (1976); Waters v. Humphrey, 33 N.C. App. 185, 234 S.E.2d 462 (1977); Stone v. Paradise Park Homes, Inc., 37 N.C. App. 97, 245 S.E.2d 801 (1978); Etheridge v. Etheridge, 41 N.C. App. 44, 255 S.E.2d 729 (1979); Hanover Co. v. Twisdale, 42 N.C. App. 472, 256 S.E.2d 840 (1979); Page v. Wilson Mem. Hosp., 49 N.C. App. 533, — S.E.2d — (1980).

Stated in State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Cited in Hinson v. Morgan, 225 N.C. 740, 36 S.E.2d 266 (1945); Bell v. Chatwick, 226 N.C. 598, 39 S.E.2d 743 (1946); Ballard v. Ballard, 230 N.C. 629, 55 S.E.2d 316 (1949); Reynolds v. Earley, 241 N.C. 521, 85 S.E.2d 904 (1955); Green v. Eastern Constr. Co., 1 N.C. App. 300, 161 S.E.2d 200 (1968); Peaseley v. Virginia Iron, Coal & Coke Co., 12 N.C. App. 226, 182 S.E.2d 810 (1971); Wall v. Sneed, 13 N.C. App. 719, 187 S.E.2d 454 (1972); Wall v. Sneed, 30 N.C. App. 680, 228 S.E.2d 81 (1976).

II. PERSONS DISQUALIFIED BY SECTION.

A. Parties to the Action.

A member of the board of county commissioners is not a competent witness as to transactions with the defendant's intestate in a suit by the board. Commissioners of Forsyth v. Lash, 89 N.C. 159 (1883).

A principal debtor, who was a party to an action to foreclose a mortgage given by his sureties as security for the loan, was an incompetent witness to a contract with the deceased creditor. Benedict v. Jones, 129 N.C. 475, 40 S.E. 223 (1901).

A defendant executor cannot testify concerning a land transaction between himself and the intestate, in a suit brought by creditors of the estate to subject the land alleged to have been fraudulently conveyed to the defendant by the intestate. State ex rel. Bryant, & Bro. v. Morris, 69 N.C. 444 (1873); Grier v. Cagle, 87 N.C. 377 (1882).

Guardian. — Testimony of a guardian, suing an executor to establish a gift made by a testatrix to the guardian's ward, as to what occurred between the testatrix and executor, was admissible as against the objection that the guardian could not testify as to any communication or transaction between himself and testatrix. Zollicoffer v. Zollicoffer, 168 N.C. 326, 84 S.E. 349 (1915).

A "next friend" is not a party to the suit. But his liability for costs renders him incompetent to testify to the transactions or conversations here under consideration. Mason v. McCormick, 75 N.C. 263 (1876). See McLeary v. Norment, 84 N.C. 235 (1881).

Original Beneficiary of Life Insurance Policy. — In an action by the person substituted as beneficiary in a policy of life insurance to recover the policy and proceeds as against the original beneficiary after the death of the insured, the original beneficiary is precluded by this section from testifying to the effect that she had the policy in her possession and was holding same as security for a loan to insured and for premiums paid by her on the policy, since such testimony tends to establish an oral assignment of the policy to her as security, she being a party to the action and having a direct pecuniary interest in the outcome. Harrison v. Winstead, 251 N.C. 113, 110 S.E.2d 903 (1959).

Parties in Probate of Will. — In a proceeding for the probate of a will, both propounders and caveators are parties interested in the event within the meaning and spirit of this section. In re Will of Brown, 194 N.C. 583, 140 S.E. 192 (1927).

Under this section the beneficiary under a will may not testify to transactions and communications with the deceased, but he may in proceedings of devisavit vel non give his opinion, based on his own observations, as to the mental incapacity of the deceased at the time of the execution of the writing propounded, and then testify to personal transactions he has had with him as being a part of the basis of his opinion, when evidence of this character is properly so confined upon the trial by instructions or otherwise, the weight and credibility being for the jury to determine. In re Will of Brown, 194 N.C. 583, 140 S.E. 192 (1927).

A caveator or a propounder in a will contest is a "party" to whom the prohibitions and exceptions of this section apply. In re Will of Ricks, 292 N.C. 28, 231 S.E.2d 856 (1977).

Partner. — Where one partner is (a) a party to the action, (b) is interested in the event of the action, and (c) the other partner is dead, because his lips are sealed in death the living partner is incompetent to testify in his own behalf to any transaction or communication between himself and the intestate concerning his relationship to the copartnership and to relate certain conversations he had with deceased about the assets of the partnership. Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943).

In a suit by distributees to recover from administrators and surviving partner money found on the person of decedent and claimed by his partner, testimony of the partner, concerning his relations to the partnership and the relation of certain conversations he had with deceased about the assets of the partnership, is clearly inadmissible under this section. Wingler v. Miller, 223 N.C. 15, 25 S.E.2d 160 (1943).

Party Acting in Corporate Capacity. — One who is a party to a suit, though in his corporate capacity, is not competent to testify as to a transaction with a person deceased. Commissioners of Forsyth v. Lash, 89 N.C. 159 (1883).

Payee of Promissory Note. — The Dead Man's Statute is clearly applicable to the testimony of a payee of a promissory note. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Surviving Occupant of Car. — Testimony of a surviving occupant in a car to the effect that he was not driving but that one of the other occupants killed in the accident was driving at the time of the accident, comes within the provisions of this section in actions against the surviving occupant for wrongful death. McCurdy v. Ashley, 259 N.C. 619, 131 S.E.2d 321 (1963).

Surviving Stockholders. — In an action by a corporation and the surviving principal stockholders against the widow of a deceased principal stockholder, involving the liability of the corporation under its contract for the purchase of the stock of the deceased stockholder, the surviving stockholders are incompetent to testify as to conversations between the stockholders modifying the stock purchase agreement in favor of the corporation or the surviving stockholders. Collins v. Covert, 246 N.C. 303, 98 S.E.2d 26 (1957).

Decedent's Tenant. — In an action for goods sold and delivered to the intestate, a tenant of the intestate who was furnished with goods from the plaintiff's store, and who settled with the intestate, was competent to testify in the plaintiff's behalf as to the intestate's delivery to him of the merchandise because the witness was not a party to the action. Sorrell v. McGhee, 178 N.C. 279, 100 S.E. 434 (1919).

Surviving tenant by the entirety is the "survivor of a deceased person" within the meaning of this section in an action which attacks the validity of a deed by which the tenancy by the entirety was created. Gribble v. Gribble, 25 N.C. App. 366, 213 S.E.2d 376, cert. denied, 287 N.C. 465, 215 S.E.2d 623 (1975).

Party May Testify as to Transaction with Deceased Agent of Opponent. — This section does not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent. Bailey v. Westmoreland, 251 N.C. 843, 112 S.E.2d 517 (1960); Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Hence, where a note is executed to two payees jointly and one of them thereafter acquires the interest of the other and sues the makers of the note, after the death of the other payee, testimony of the maker as to a contemporaneous agreement with the deceased payee, acting for himself and as agent of the other payee, that the note should not become a binding obligation until the happening of a stated contingency, is competent as to plaintiff payee's original share of the note, even though it is incompetent as to the share acquired by him as assignee of the deceased payee. Bailey v. Westmoreland, 251 N.C. 843, 112 S.E.2d 517 (1960).

But This Rule Applies Only Where Agent Was Not Personally Liable. — The rule that this section does not render an interested witness incompetent to testify to a transaction between himself and a deceased agent of his opponent has been applied only in factual situations where the deceased agent was not personally liable in respect to the alleged cause of action. It has no application where the liability, if any, of the principal, rests solely on the alleged tortious acts of the agent under the doctrine of respondeat superior. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Testimony of the surviving occupant of the car tending to show that the other occupant, killed in the accident, was driving at that time is incompetent in an action by the survivor against the owner of the vehicle sought to be held liable under the doctrine of agency, since

the owner, after having paid such liability, would have a right of action against the estate of the deceased, and therefore the transaction comes within the spirit if not the letter of this section. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962).

Testimony by Agent of Adverse Party Admissible. — In an action on an insurance policy by the son of the deceased owner, testimony of insurer's agent that prior to his death the owner directed him to transfer the policy to the owner's son because the owner was giving the land to his son, was not precluded by this section. King v. National Union Fire Ins. Co., 258 N.C. 432, 128 S.E.2d 849 (1963).

Action to Enforce Agreement to Bequeath Property in Consideration of Services. — Where the plaintiff, in her own right and as administratrix of her mother, seeks to recover upon an alleged contract made by her mother and another person now deceased, under which her mother performed services to such other person under his agreement that he would devise and bequeath to her all of his property, it is incompetent for the plaintiff to testify to communications or transactions between her mother and such other person tending to establish her demand, for she is a party interested, within the contemplation of the statute. Brown v. Adams, 174 N.C. 490, 93 S.E. 989 (1917).

B. Persons Interested in the Event of the Action.

1. In General.

Section Not Confined to Parties to Action. — The provisions of this section are not confined to the parties to the action, but extend to testimony of a witness interested in the result of the action. Honeycutt v. Burleson, 198 N.C. 37, 150 S.E. 634 (1929).

Test for Disqualifying Interest. — To determine when such interests exists as to render a person incompetent, the following rule should be applied: The true test of the competency of a witness is whether he bears such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action; if not, he is not disqualified. Jones v. Emory, 115 N.C. 158, 20 S.E. 206 (1894); Henderson v. McLain, 146 N.C. 329, 59 S.E. 873 (1907).

Nature of Interest Involved. — This section does not disqualify every witness who, in the broadest sense of the term, is interested in the event of the action, but only such as have a direct and substantial or a direct legal or pecuniary interest in the result. Jones v. Emory, 115 N.C. 158, 20 S.E. 206 (1894); Helsabeck v. Doub, 167 N.C. 205, 83 S.E. 241 (1914); In re Gorham, 177 N.C. 271, 98 S.E. 717 (1919); Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

It follows that a mere sentimental interest will not suffice. Sutton v. Walters, 118 N.C. 495, 24 S.E. 357 (1896); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

And it has been held that relationship of the parties alone does not constitute the direct, legal, pecuniary interest required. See Sutton v. Walters, 118 N.C. 495, 24 S.E. 357 (1896); Porter v. White, 128 N.C. 42, 38 S.E. 24 (1901); Bennett v. Best, 142 N.C. 168, 55 S.E. 84 (1906); Walston v. Lowry, 212 N.C. 23, 192 S.E. 877 (1937).

To be disqualified as a "person interested in the event" the witness must have a direct legal or pecuniary interest in the outcome of the litigation. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Present Interest. — In Isler v. Dewey, 67 N.C. 93 (1872), the court intimates that the interest necessary to disqualify is a present interest; that is, one retained by the party at the time of examination. In reaching this conclusion it was said: "Any other construction would make a statute, professedly for the removal of the incompetency of witnesses, the means of introducing new incompetencies unknown to the common law and opposed to its principles." See Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

In Bunn v. Todd, 107 N.C. 266, 11 S.E. 1043 (1890), it is said: "Originally this section disqualified a fourth class of persons, i. e. those who have had an interest in the subject matter of the suit, but whose interest has since ceased. This disqualification did not exist at common law, and was struck out of this section of the Code of 1883, except in the cases in which such persons still came under the third class of disqualified persons above [see the Editor's Note and analysis line I of this note] stated."

Witness Having Dual or Alternative Interest. — To determine the competency of a witness who has a dual or alternative interest in the event of the action, the court must decide which of the two interests was the more immediately valuable. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

The competency of the interested witness is limited to the same transaction as the one testified about by the administrator or the deceased, or elicited from the witness himself by the administrator. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

2. Applications.

Agent of Payee of Note. — Testimony of an endorser of a note, as to conversations with the payee's agent, now dead, showing the consideration which induced the endorsement, is not excluded under this section, the agent not being a party interested in the event within the

meaning of the statute for, although the agent guaranteed all notes to the payee, if there was a failure of consideration the payee could hold neither of the guarantors and had the endorser been liable he could not have recovered from the agent. American Agrl. Chem. Co. v. Griffin, 204 N.C. 559, 169 S.E. 152 (1933).

Agent of Third Person in Transaction with Deceased. — Assuming that a collision between two motor vehicles is a "transaction" within the meaning of this section, then one who has acted as an agent for a third person in a transaction with a person since deceased, is ordinarily competent to testify to conversations or transactions of the decedent. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Attorney Formerly Holding Note for Collection. — An attorney formerly holding a note for collection is not an interested party in an action on the note within the meaning of this section, prohibiting testimony by interested parties as to transactions with or declarations of a decedent. Vannoy v. Stafford, 209 N.C. 748, 184 S.E. 482 (1936).

Brother-in-Law of Decedent in Action to Recover Embezzled Funds. — The testimony of a witness, in an action against the administrator of his deceased brother-in-law to recover certain sums obtained by the deceased on two vouchers made to a fictitious firm and embezzled by him, that he collected the vouchers for the deceased through his bank and sent the proceeds to the deceased, was not incompetent as falling within the provisions of this section, the witness not being a party in interest and having no direct, legal or pecuniary interest in the event of the action. Fort Worth & D.C. Ry. v. Hegwood, 198 N.C. 309, 151 S.E. 641 (1930).

Depositor's Son in Action to Recover Moneys Deposited. — In an action by the administrator of a deceased person against a bank to recover moneys deposited by the intestate, resisted on the ground that the deceased had authorized the bank to pay the money upon his son's checks, the latter being present at the time, the son was interested in the event since he would be liable to the plaintiff if he was not authorized to draw the checks and possibly to the defendant, and his testimony was incompetent under this section, and the fact that a third person was present at the time of the transaction and testified at the trial does not affect this result. Donoho v. Wachovia Bank & Trust Co., 198 N.C. 765, 153 S.E. 451 (1930).

Draftsman of Deed Sought to Be Reformed. — In an action for reformation of a deed to a county board of education for mistake of the draftsman in failing to insert a reversionary clause therein in accordance with the agreement between the grantors and grantee, testimony of the draftsman relating to declarations of a deceased member of the board and of the superintendent of schools, tending to show that it was agreed that the reversionary clause should be inserted, was held not precluded by this section, the draftsman not being a party interested in the event as contemplated by the statute. Ollis v. Board of Educ., 210 N.C. 489, 187 S.E. 772 (1936).

Holder of Insurance Policy. — A policy holder in a mutual life insurance company is not disqualified as "interested in the event of the action" to testify for the company suing to cancel another policy. Mutual Life Ins. Co. v. Leaksville Woolen Mills, 172 N.C. 534, 90 S.E. 574 (1916). See also Gwaltney v. Provident Sav. Life Assurance Soc'y, 132 N.C. 925, 44 S.E. 659 (1903); Gwaltney v. Provident Sav. Life Assurance Soc'y, 134 N.C. 552, 47 S.E. 122 (1904).

Husband and Wife. — Witness may have a very large pecuniary interest in fact — as the interest of a wife in an important lawsuit to which her husband is a party — and still be competent, while a comparatively slight legal interest will disqualify the witness. Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

It has been consistently held by this court that the prohibition against the testimony of a "person interested in the event" extends only to those having a "direct legal or pecuniary interest," and not to the sentimental interest the husband or wife would naturally have in the lawsuit of the other. Burton v. Styers, 210 N.C. 230, 186 S.E. 248 (1936). See § 8-56 and note.

Same — Separate Suits. — Where husband and wife instituted separate suits to recover, each respectively, for personal services rendered by them to defendant's testate, it was held that each was competent to testify for the other, since neither had a direct pecuniary interest in the action of the other, and was not therefore an interested party in the other's action within the meaning of this section, the testimony not being as to a transaction between the witnesses, and the deceased, but between a third party and deceased. Burton v. Styers, 210 N.C. 230, 186 S.E. 248 (1936).

Same — Interest of Wife in Compensation Due Husband. — In an action against an administrator to recover the value of services the plaintiff alleges he has rendered the deceased, the wife of the plaintiff has no interest in the event which would bar her testimony as to a transaction with the deceased, and it is competent for her to testify to the contract relied upon by her husband the plaintiff. Helsabeck v. Doub, 167 N.C. 205, 83 S.E. 241 (1914). See Price v. Askins, 212 N.C. 583, 194 S.E. 284 (1937).

Same — Where plaintiffs acquire ownership as issue of devisee, devisee's husband has no pecuniary legal interest in plaintiffs' real property; therefore, his testi-

mony as to the decedent's devise is not incompetent under this section. Rape v. Lyerly, 287 N.C. 601, 215 S.E.2d 737 (1975).

Same — Husband as Interested Party in Check Given Wife. — When a check made payable to one of the intestate's daughters and signed by the intestate was introduced in evidence to show an advancement, the daughter's husband was held competent under this section to testify over objection that the check was given his wife as a wedding present, he having no interest in the event of the action. Likewise another daughter was permitted to testify for her sister, the transaction testified to not being between the witness and deceased, but between the witness's sister and deceased father. Vannoy v. Green, 206 N.C. 80, 173 S.E. 275 (1934).

Same — Husband as Interested Party in Deed Drawn by Wife. — The husband is an interested witness in the event of the action, though not a party, when a trust deed made by his deceased wife is being attacked for the want of his joining therein; and upon the question of abandonment, his evidence, to the effect that his wife said to him, she would give him a horse if he would leave, was incompetent. The testimony of the daughter that she heard the conversation to that effect would be the "indirect testimony of an interested witness as to a transaction or communication with deceased," and also incompetent. Whitty v. Barham, 147 N.C. 479, 61 S.E. 372 (1908).

Same — Husband's Interest in Wife's Action to Recover for Services. — So it has been held that a husband is not disqualified by interest from testifying in his wife's behalf in her action to recover for services rendered a deceased person, the possibilities of his being benefited by her will or in case of her intestacy being too remote. McCurry v. Purgason, 170 N.C. 463, 87 S.E. 244 (1915).

Same — Husband of Decedent Grantee. — Where the blind husband of a grantee, in a deed reserving a life estate in the grantor, was present and heard the grantor acknowledge its execution and delivery, he was a competent witness to prove such execution and delivery, his wife having died prior to the grantor and the title therefore being vested in her son, in that his evidence disclosed no personal transaction or communication and he was not a party in interest within this section. Turlington v. Neighbors, 222 N.C. 694, 24 S.E.2d 648 (1943).

Same — Husband of Donee of Gift May Testify as to Declarations Made by Donor to Donee. — The husband of the donee of a gift may testify as to directions given and declarations made by the donor to the donee, since the testimony is not in behalf of the husband or in behalf of a party succeeding to his interest nor as to a transaction or communication between him and the deceased the testimony being as to a transaction between donor and donee. Scottish Bank v. Atkinson, 245 N.C. 563, 96 S.E.2d 837 (1957).

Same — Widower Has No Interest in Division of Wife's Lands among Children. — When a husband and wife, each owning certain lands, enter into an agreement to pool their lands for division among their children, and the wife dies intestate before her lands are deeded in accordance with the agreement the husband has a life estate in her lands as tenant by the curtesy regardless of the disposition of the lands among the children, and therefore has no direct pecuniary interest in an action by the children to whom deeds were not executed to declare the heirs of another child estopped to assert an interest in the lands of their mother, and his testimony of the agreement with his wife is not precluded by this section. Coward v. Coward, 216 N.C. 506, 5 S.E.2d 537 (1939).

The interest of one who temporarily held the title to the lands in dispute prior to the defendant is a sufficient interest in the event to disqualify his testimony as to a conversation or transaction with the plaintiff's deceased predecessor in title. Dill-Cramer-Truitt Corp. v. Downs, 201 N.C. 478, 160 S.E. 492 (1931).

A partner in intestate's firm may not testify as to transactions or communications with intestate in an action by brokers against the estate on a claim for commissions and advancements. Fenner v. Tucker, 213 N.C. 419, 196 S.E. 357 (1938).

Nonmember of Partnership. — Where the defendant's liability depends upon whether he was a member of the defendant partnership at the time the firm contracted a debt, which is the subject of the action, with the plaintiff who has since died and whose administrator has been made a party to the action, a witness who was not a member of the firm is not such person interested in the result as would exclude his direct testimony, under the provisions of this section as to the payment to his own knowledge by the deceased of the partnership debts. Herring v. Ipock, 187 N.C. 459, 121 S.E. 758 (1924).

Sheriff in Action by Deputy. — A deputy collected a sum of money on account of taxes and deposited the same with G. with instructions to pay it over to the sheriff, which was not done, and the deputy was afterwards required to pay the sheriff the sum so collected; it was held, in an action to recover the amount, brought by the deputy against the administrator of G., that the sheriff had no interest in the event of the action, and was a competent witness under this section. Allen v. Gilkey, 86 N.C. 64 (1882).

Stockholder's Interest in Recovery on Contract of Sale. — Where defendant's intestate made two separate contracts with the holders of stock in a corporation to purchase

their respective holdings, in an action by one of the stockholders to recover on the contract of sale the other testified that he had no claim against the estate on his contract. It was held the witness was not interested in the event, and his testimony as to transaction between decedent and plaintiff as to the contract of sale of plaintiff's stock was competent under this section. Winborne v. McMahan, 206 N.C. 30, 173 S.E. 278 (1934).

Trustor's Son Where Estate Insolvent. — In an action involving the validity of a deed of trust, where the trustor is dead and his estate insolvent, the son of the trustor is a competent witness as to his declarations concerning the trust; the disqualification of the son under this section is removed by the insolvency of his father's estate, for there is nothing for the children in any event of the action. Gidney v. Logan, 79 N.C. 214 (1878).

C. Persons Deriving Title or Interest Through Parties or Interested Persons.

In General. — The words of this section "derives its interest or title by assignment or otherwise" mean — gets from a source — some person, through or under one or more persons, successively, directly or indirectly, immediately or mediately, "his interest or title," any valuable interest in part or share of something real or personal, of whatever nature, whether legal or equitable, acquired by assignment, or by any other means, or in any other manner. Carey v. Carey, 104 N.C. 171, 10 S.E. 156 (1889).

The exclusion under this section applies to privies as well as parties. Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960).

Deceased Assignee. — When deceased has had no interest in lands, but was simply an assignee, evidence of his declarations is admissible as no claim of title is made under him. Condor v. Secrest, 149 N.C. 201, 62 S.E. 921 (1908).

Attorney. — The fact that an attorney has had an interest in the event of a suit on account of the fee taxed does not disqualify him under this section. Syme v. Broughton, 85 N.C. 367 (1881). Nor is an attorney of one of the parties precluded from testifying for his client concerning the agreement. Propst v. Fisher, 104 N.C. 214, 10 S.E. 295 (1889).

Testimony of Grantee of Deceased Debtor. — In an action in the nature of a creditor's bill, evidence of the brother of the immediate grantee of the deceased debtor was held incompetent as in favor of their sister, claiming title under the witness, the validity of which title was affected by the testimony. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917).

Trustee. — In an action by trustors against a trustee to compel an accounting for the proceeds of a foreclosure sale the incompetency of the trustor to testify as to transactions between himself and the deceased cestui que trust must be predicated upon the assumption that trustee under the deed of trust derived his "title or interest from, through or under" the cestui, and furthermore that it is this interest which is attacked. Garrett v. Stadiem, 220 N.C. 654, 18 S.E.2d 178 (1942).

Trustor. — Where a deed of trust was attacked for fraud, the trustee having died, and the property having been conveyed by a substituted trustee to the defendants, the trustor is not excluded by this section from being a witness for the plaintiff, who also claimed title through him. Isler v. Dewey, 67 N.C. 93 (1872).

III. WHEN THE DISQUALIFICATION EXISTS.

A. Testimony Disqualified.

Party May Not Contradict Former Witness. — A defendant having an interest in the event of an action is not permitted under this section to testify in his own behalf, for the purpose of contradicting a former witness whose testimony tended to show that the defendant fraudulently procured an assignment from a person deceased. Bushee v. Surles, 77 N.C. 62 (1877).

Where Adverse Party Non Compos Mentis. — A party interested in the event of the action may not testify as a witness as to a transaction with the adverse party who at the time of trial has been adjudged non compos mentis. Price v. Whisnant, 232 N.C. 653, 62 S.E.2d 56 (1950).

Action Concerning Disputed Boundary. — Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication prohibited by this section. Poole v. Russell, 197 N.C. 246, 148 S.E. 242 (1929).

The defendant in an action for money demanded is disqualified by this section, to testify as to the time and place of signing a receipt by the plaintiff's intestate, in support of his plea of satisfaction. Sumner v. Candler, 86 N.C. 71 (1882).

Receipt of Money from Person Now Deceased. — Where, in an action to establish a claim against an estate, plaintiff introduces evidence that prior to his death decedent had received the funds in dispute, testimony by her that she had never received any part of the funds is tantamount to testifying that decedent

had not paid her any part thereof, and is incompetent under this section. Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947).

Testimony by the maker of notes as to transactions with deceased payee tending to establish nonliability was properly excluded as coming within prohibition of this section. Perry v. First Citizens Nat'l Bank & Trust Co., 226 N.C. 667, 40 S.E.2d 116 (1946).

In an action to recover for services rendered deceased, testimony by the plaintiff that plaintiff boarded deceased is incompetent under the provisions of this section. Price v. Pyatt, 203 N.C. 799, 167 S.E. 69 (1933).

Contest over Will. — As between the propounder or an interested executor and a person who is interested in the result of the trial, this section, rendering an interested survivor incompetent as a witness to a personal transaction with a deceased person, applies in a contest over a will, notwithstanding the proceeding is in rem. There is an exception when the evidence is directed solely towards the question or issue of mental condition or testamentary capacity. In that case, it is competent for the interested witness to give testimony of such transaction or conversation, solely, however, as a basis for the opinion formed as to the mental condition or capacity of the deceased. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

B. Testimony Not Disqualified.

Party Testifying against Interest. — Under this section a witness may testify against his own interest, even if thereby other parties to the suit are injuriously affected and the disqualification applies only when a witness tesifies in his own behalf. In re Worth's Will, 129 N.C. 223, 39 S.E. 956 (1901); Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

In proceedings to caveat a will, an heir at law who would receive more as a beneficiary under the will if it is not set aside may testify to declarations made by the testator after its execution which are competent to show that it was obtained by fraud and undue influence; and such testimony, being against the interests of the witness, is not prohibited by this section. In re Worth's Will, 129 N.C. 223, 39 S.E. 956 (1901); In re Will of Fowler, 159 N.C. 203, 74 S.E. 117 (1912).

When the witness is testifying not in his own behalf or interest, but against his interest, he is not disqualified by this section. Sanderson v. Paul, 235 N.C. 56, 69 S.E.2d 156 (1952).

Testimony Not against Representatives. — The administrator of a deceased guardian is a competent witness to prove the execution to said guardian by a debtor of a bond for the payment of money, such testimony not being against the representatives of a deceased person. Thompson v. Humphrey, 83 N.C. 416 (1880).

Testimony in Favor of Representative. — Where a witness was not asked to testify against the representative or assignee of a dead person as to any transaction or communication between himself and the person deceased, but in favor of such a representative, the testimony being offered by the party to the suit who represented the dead person, it was held that such testimony does not fall within the inhibition of this section, which is intended to protect the deceased person's representative or assignee, who is suing or being sued. Bonner v. Stotesbury, 139 N.C. 3, 51 S.E. 781 (1905).

Where the witness was testifying for, rather than against, the person deriving title or interest from, through or under a deceased person, such testimony does not come within the inhibitions of this section. Sprinkle v. Ponder, 233 N.C. 312, 64 S.E.2d 171 (1951).

Representative Not a Party. — It is competent for a plaintiff, as a witness for himself, to testify where the representative of the deceased was not a party to the suit. Thomas v. Kelly, 74 N.C. 174 (1876).

Sureties Entitled to Same Protection as Representative. — The rule to be deduced from the authorities is that the surety, who comes not within the letter but within the intendment of the law, stands in the same position and is entitled to the same protection as the representative of his deceased principal when sued. McGowan v. Davenport, 134 N.C. 526, 47 S.E. 27 (1904).

Conversations with Third Parties Present. — A witness is not incompetent, under this section, to testify to a conversation had with two persons, one of whom is dead at the time of the trial, in reference to a contract made between them and the witness. Peacock v. Stott, 90 N.C. 518 (1884).

This section makes no exception where other parties are present but leaves these witnesses to be called by either, and their testimony to come before the jury and be considered by itself, its credit unaffected by the testimony of the interested party. MacRae v. Molley, 90 N.C. 521 (1884).

Where the conversation is not strictly with the intestate, but is one held with him and two others who were associated with him in the transaction, then the provisions of this section do not incapacitate the party from testifying. Johnson v. Townsend, 117 N.C. 338, 23 S.E. 271 (1895).

Action for Breach of Contract. — In an action against the administrator of a deceased person to recover for breach of the deceased's contract to devise, testimony of witnesses not interested in the event as to declarations made by the deceased against his interest was properly admitted. Hager v. Whitener, 204 N.C. 747, 169 S.E. 645 (1933).

Action for Breach of Warranty. — In an action against an insane person for damages for breach of warranty in a deed, a witness who is not interested in the recovery is not disqualified by this section, though he may have an interest in the land. Lemly v. Ellis, 143 N.C. 200, 55 S.E. 629 (1906).

Action in Ejectment. — Where some of the witnesses in an action in ejectment were not interested in the event, their testimony did not fall within the intent and meaning of this section and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claimed as adverse possessor, was reversible error entitling the plaintiff to a new trial. Pitman v. Hunt, 197 N.C. 574, 150 S.E. 13 (1929).

In an action to declare a deed void on the ground that it was never delivered to the grantee, since deceased, testimony offered by the grantor tending to show that the deed had not been delivered is not incompetent under this section. Gulley v. Smith, 203 N.C. 274, 165 S.E. 710 (1932).

Transactions with Partnership. — The death of one of the partners in a firm will not incapacitate the witness from proving a transaction with the firm while the other partner, who was present at the interview, is living. Peacock v. Stott, 90 N.C. 518 (1884).

IV. SUBJECT MATTER OF THE TRANSACTION.

A. In General.

This section relates not only to "personal transactions" but also to "communications" with a deceased person. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Not Applicable unless Transaction Is Personal. — Under this section the parties in interest are disqualified from testifying only as to personal transactions with the deceased. McCall v. Wilson, 101 N.C. 598, 8 S.E. 225 (1888); Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899); Davidson v. Bardin, 139 N.C. 1, 51 S.E. 779 (1905).

Test as to When Transaction Is "Personal". — A fair test in undertaking to ascertain what is a "personal transaction or communication" with the deceased is to inquire whether, in case the witness testifies falsely, the deceased, if living, could contradict it of his own knowledge. Sherrill v. Wilhelm, 182 N.C. 673, 110 S.E. 95 (1921); Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

A personal transaction or communication within the purview of this section is anything done or said between the witness and the deceased person or lunatic tending to establish the claim being asserted against the personal representative of the deceased person, or the committee of the lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951); Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969); Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

A personal transaction or communication within the purview of this section is anything done or said between the witness and the deceased person tending to establish the claim being asserted against the personal representative of the deceased person. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968); Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 735 (1979).

A personal transaction as used in this section includes that which is done by one person which affects the rights of another, and out of which a cause of action has arisen. Smith v. Dean, 2 N.C. App. 553, 163 S.E.2d 551 (1968).

Same — Caveat to Will. — On an issue of devastavit vel non it was not competent to prove by a witness whose husband was one of the caveators and heirs at law of the testator, declarations of said testator offered for the purpose of showing undue influence, as such witness had an interest in the real estate, dependent upon the result of the action. Linebarger v. Linebarger, 143 N.C. 229, 55 S.E. 709 (1906).

Same — The interest which a married woman has in the real property of her husband before and during coverture comes within the intent and meaning of this section, and will exclude testimony by her of a communication or transaction between her husband and a deceased person as to a contract made between them whereby a mortgage on the lands of her husband executed prior to his marriage was to be canceled by the deceased. Honeycutt v. Burleson, 198 N.C. 37, 150 S.E. 634 (1929).

Same — The mother, in her illegitimate child's action against the estate of the deceased father on a contract made by him for the child's support, is not a party interested in the event of the action whose evidence on the trial is excluded under the provisions of this section. Conley v. Cabe, 198 N.C. 298, 151 S.E. 645 (1930).

Same — A husband has no vested interest in the real estate of his wife, and it would seem that he is not a "person interested in the event" within the contemplation of this section in an action involving his wife's title to realty. Allen v. Allen, 213 N.C. 264, 195 S.E. 801 (1938).

Transaction Must Be Exclusive Source of Knowledge. — In order to exclude testimony under this provision, it must be made to appear that the knowledge of the witness was derived from a personal transaction with the deceased

person. Thompson v. Onley, 96 N.C. 9, 1 S.E. 620 (1887). And it is proper to show whether the witness had knowledge of the fact testified to, from sources extraneous to his personal communications or relations with the deceased. Charlotte Oil & Fertilizer Co. v. Rippy, 123 N.C. 656, 31 S.E. 879 (1898), rehearing denied, 124 N.C. 643, 32 S.E. 980 (1899).

Testimony of a witness as to what he himself did in regard to the transaction does not come within the prohibition of this section when it does not relate to acts or communications with the deceased person in regard to such transaction. Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957).

Testimony as to Independent Facts. — A party in interest may testify to any substantive fact which is independent of any transaction or communication with the deceased or is based upon independent knowledge not dervied from such source. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917). See also In re Will of Saunders, 177 N.C. 156, 98 S.E. 378 (1919); Price Real Estate & Ins. Co. v. Jones, 191 N.C. 176, 131 S.E. 587 (1926).

Testimony of an interested witness as to independent facts and circumstances, within his own knowledge, or as to what he saw or heard take place between deceased and a third party, is not rendered incompetent by this section, since in such instances the testimony does not relate to a personal transaction or communication between the witness and deceased and, accordingly, appellant's exceptions to the admission of such testimony were not sustained. Wilder v. Medlin, 215 N.C. 542, 2 S.E.2d 549 (1939).

This section does not preclude a witness from testifying to independent facts and circumstances within her observation and knowledge or from giving evidence of what she saw or heard take place between the deceased and another or others, not involving personal transactions between herself and the deceased. Collins v. Lamb, 215 N.C. 719, 2 S.E.2d 863 (1939).

The disqualification of a party to the action to testify against the personal representative of a deceased person as to a transaction or communication with the deceased does not prohibit such interested party from testifying as to the acts and conduct of the deceased where the interested party is merely an observer and is testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955); Carswell v. Greene, 253 N.C. 266, 116 S.E.2d 801 (1960); Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

An interested party is not prohibited by this section from testifying concerning his independent acts. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

This section does not preclude an interested party from testifying as to his own acts or the acts and conduct of the decedent when the witness is testifying as to facts based upon independent knowledge not derived from any personal transaction or communication with the deceased. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Same — Any acts done in observation of a deceased person are considered independent acts and not within the statutory exclusion. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

This section does not prohibit an interested party from testifying as to acts and conduct of the deceased where the interested party was merely an observer. Archer v. Norwood, 37 N.C. App. 432, 246 S.E.2d 37, cert. denied, 295 N.C. 645, 248 S.E.2d 249 (1978).

The prohibitions of this section do not prevent a witness from testifying as to the acts and conduct of the deceased where the witness is merely an observer and is testifying to facts based upon independent knowledge. In re Will of Simmons, 43 N.C. App. 123, 258 S.E.2d 466 (1979).

Same — Facts Occurring Out of Presence of Deceased. — A witness who offered to prove a fact which occurred out of the presence of, and which was in no sense a transaction with, a deceased person is not incompetent under this section. It is only when the transaction is between the deceased and the living party that the statute prohibits the latter from testifying. Lockhart v. Bell, 86 N.C. 443 (1882).

Same — The acts of two independent drivers, total strangers to each other up to the point of impact, cannot be said to be acts done with a deceased person but are acts done in observation of a deceased person, thus, testimony as to these acts are not excluded by this section. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

A defendant is not prevented from describing the conduct and movements of a deceased's car by the phrase "concerning a personal transaction" when the movements were quite independent and apart from, and in no way connected with, or prompted or influenced by reason of, the conduct of the party testifying. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Same — In action for alienation of affections and criminal conversation against the administrators of the alleged tort-feasor, plaintiff's testimony that when he returned to his home at night he found the deceased standing in the living room of the unlighted house, and that on two other occasions he saw his wife and the deceased alone at farm cabins,

was held competent as testimony of independent facts. Hardison v. Gregory, 242 N.C. 324, 88 S.E.2d 96 (1955).

Same — Action for Debt. — In an action in the nature of a creditor's bill, testimony of the deceased debtor's grantee that the deceased grantor occupied the building part of the time after she got her deed to the land in litigation was held admissible as being to a substantive fact of which she had knowledge independently of any statement by the deceased. Sutton v. Wells, 175 N.C. 1, 94 S.E. 688 (1917).

Testimony Concerning Mental Capacity. — Where a witness testifies to the want of mental capacity in a grantor to take a deed, and that his opinion was formed from conversation and communication between the witness and grantor, it was held competent to prove the facts upon which such opinion was founded, the provisions not applying as the subject was not a "transaction" within its meaning. McLeary v. Norment, 84 N.C. 235 (1881); Rakestraw v. Pratt, 160 N.C. 436, 76 S.E. 259 (1912).

Beneficiaries under the will are competent to testify as to transactions with the testator solely on the issue of testamentary capacity. In re Will of Lomax, 226 N.C. 498, 39 S.E.2d 388 (1946).

A party interested in the event may testify as to transactions with a decedent when such testimony relates solely to the issue of mental capacity. Goins v. McLoud, 231 N.C. 655, 58 S.E.2d 634 (1950).

The rule prohibiting an interested party from testifying as to a transaction with a decedent does not preclude a caveator from testifying as to his opinion of the mental condition of testator. In re Will of Thompson, 248 N.C. 588, 104 S.E.2d 280 (1958).

A person (who would otherwise be precluded from testifying by this section), after testifying as to the mental capacity of a deceased person may testify to transactions and communications with deceased in order to show the jury that the opinion was well founded. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970).

However, such evidence will be rejected when it is offered for the purpose of proving and does tend to prove vital and material facts which will fix liability against the representative of a deceased person, or committee of a lunatic, or anyone deriving his title or interest through them. Whitley v. Redden, 276 N.C. 263, 171 S.E.2d 894 (1970); In re Will of Ricks, 292 N.C. 28, 231 N.C. 28, 231 S.E.2d 856 (1977).

A party or an interested witness may, notwithstanding this section, in an action to set aside a will, a deed or other writing, testify to communications or conversations with a deceased to show the basis upon which the party or witness has formed an opinion regarding the mental capacity of the deceased, when he testifies to such an opinion, and when the lack of such capacity is a ground for setting aside the instrument. In re Will of Ricks, 292 N.C. 28, 231 S.E.2d 856 (1977).

B. Particular Transactions.

In a proceeding for dower, the decision of the question whether the plaintiff left her husband's home of her own volition or by reason of what the law will recognize as compulsion, is an inquiry that does not necessarily involve a transaction or communication with her husband which disqualifies her under this section. Hicks v. Hicks, 142 N.C. 231, 55 S.E. 106 (1906).

Driving of Car Is "Transaction" Between Occupants of Same Car. — Where the only evidence of negligence in an action by the wife of the driver to recover for injuries sustained in an automobile accident was her testimony that he was traveling at an excessive speed upon a curve, and that the accident occurred when the car failed to make the curve, and that she had spoken to him in regard to the speed he was driving the car, the driving of the car was a transaction within the meaning of the term as used in this section and her testimony of his manner of driving and her statement to him regarding the speed was incompetent under this section, her testimony of the transaction and communication being an essential or material link in the chain establishing liability of the estate to her. Boyd v. Williams, 207 N.C. 30, 175 S.E. 832 (1934).

Prior to the 1967 amendment to this section it was held that the surviving occupant of an automobile, in an action against the estate of the deceased occupant, was an incompetent witness as to the identity of the driver immediately preceding and at the time of the wreck. Tharpe v. Newman, 257 N.C. 71, 125 S.E.2d 315 (1962). See Davis v. Pearson, 220 N.C. 163, 16 S.E.2d 655 (1941).

Two occupants of the same automobile are engaged in a "personal transaction," thereby rendering incompetent the testimony of one against the personal representative of the other's estate. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

But a collision between two motor vehicles is not a "personal transaction" within the meaning of this section. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

And Section Does Not Exclude Testimony of Surviving Driver. — Considering the fact that the only relationship between a defendant and a decedent was the impact of their vehicles, such a collision is not a personal transaction within the meaning of the term, and this section is not applicable to the testimony of the surviving driver in a two-vehicle collision. Brown v. Whitley, 12 N.C. App. 306, 183 S.E.2d 258 (1971).

Conversation between Decedent and Third Person. — This section does not apply to the testimony of an interested witness as to a conversation between her deceased father and a living defendant. This is not testimony "concerning a personal transaction." Abernathy v. Skidmore, 190 N.C. 66, 128 S.E. 475 (1925).

Testimony by a party as to a conversation between decedent and a third person did not concern a personal transaction or communication between the witness and the decedent, therefore it is not excluded by this section. Hodges v. Hodges, 257 N.C. 774, 127 S.E.2d 567 (1962).

The transaction observed and testified to by the plaintiff mother of intestate was not one between her and the deceased doctor but was one between the deceased doctor and a third party, her daughter. Therefore, notwithstanding her interest, she was properly allowed to testify concerning it. Spillman v. Forsyth Mem. Hosp., 30 N.C. App. 406, 227 S.E.2d 292 (1976).

Proof of Handwriting. — A party interested in the event of a suit is not an incompetent witness, under this section, to prove the handwriting of the deceased person. Rush v. Steed, 91 N.C. 226 (1884); Hussey v. Kirkman, 95 N.C. 63 (1886); Armfield v. Colvert, 103 N.C. 147, 9 S.E. 461 (1889); Sawyer v. Grady, 113 N.C. 42, 18 S.E. 79 (1893); Lister v. Lister, 222 N.C. 555, 24 S.E.2d 342 (1943).

The plaintiff on his examination-in-chief, in an action against an executor or administrator, is competent to testify to the handwriting of deceased from his general knowledge, but not to testify that he saw deceased actually sign the particular instrument. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

A husband, who has testified that he knows his wife's handwriting, is competent to testify after his wife's death, that her signature was on the note in question, and while his further testimony that she signed the instruments in question is technically incompetent under this section, such further testimony will not be held prejudicial when this fact is established by other competent testimony. Waddell v. Carson, 245 N.C. 669, 97 S.E.2d 222 (1957).

Claim That Intestate Was Holder in Due Course. — Where the administrator of the deceased claims that his intestate was a holder of a negotiable instrument in due course for value, and relies upon his intestate's possession to make out a prima facie case, it is not a personal transaction or communication with the deceased, prohibited by statute, for it may be shown in rebuttal that after maturity it was seen in the possession of another claimant of the title. Price Real Estate & Ins. Co. v. Jones, 191 N.C. 176, 131 S.E. 587 (1926).

Loan and Instrument Evidencing Same. — In an action by the widow against the executor of her husband upon an acknowledgment of indebtedness executed by the husband to her, the widow is incompetent to testify that she had loaned her husband the sum or that she saw him sign the instrument and that he delivered it to her. McGowan v. Beach, 242 N.C. 73, 86 S.E.2d 763 (1955).

Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon "balance on account" was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by this section. Walston v. Coppersmith, 197 N.C. 407, 149 S.E. 381 (1929).

Sale of Interest in Partnership. — This section does not apply to a transaction between living persons by which one of them sold to the other his interest in a firm of which the decedent was the other partner. Brantley v. Marshbourn, 166 N.C. 527, 82 S.E. 959 (1914).

Personal Services. — Since personal services rendered by plaintiff to decedent are of necessity personal transactions between them, plaintiff may not testify directly that he rendered such services nor establish this fact indirectly by testifying that he expected pay for such services or as to their value, or that he had not been paid for them. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951).

The performance of services by a witness for the deceased has been held to be a personal transaction. Godwin v. Tew, 38 N.C. App. 686, 248 S.E.2d 771 (1978).

Services of Physician. — Testimony by a physician, the plaintiff, that he attended the deceased as such, for which he had an account against him, of the number of visits, sum due therefor, etc., is incompetent as being "personal" transactions with the deceased, prohibited by this section. Dunn v. Currie, 141 N.C. 123, 53 S.E. 533 (1906); Knight v. Everett, 152 N.C. 118, 67 S.E. 328 (1910).

In a civil action for rents allegedly received by defendant's intestate from plaintiffs' property, evidence of plaintiffs, that deceased went into possession of the premises, shortly after default in payments to a mortgagee, for the purpose of collecting the rents and applying same to plaintiffs' mortgage indebtedness, that afterwards defendant's intestate purchased the property and plaintiffs executed notes to defendant's intestate and saw a deed for the premises in the possession of deceased, is excluded by this section as personal transactions and communications with defendant's intestate. McMichael v. Pegram, 225 N.C. 400, 35 S.E.2d 174 (1945).

Sale of Property by Guardian. — It is competent for the plaintiff to prove the sale of his

property by his guardian as this is not a personal transaction within the meaning of this section. State ex rel. Dobbins v. Osborne, 67 N.C. 259 (1872).

Possession of Stock. — See Jones v. Waldroup, 217 N.C. 178, 7 S.E.2d 366 (1940).

Testimony Given in Former Trial. — It is competent for the plaintiff's witness to testify what the deceased maker of the note sued upon testified on a former trial as to its payment, such not being a personal transaction within the meaning of the provisions of this section. Costen v. McDowell, 107 N.C. 546, 12 S.E. 432 (1890); Worth v. Wrenn, 144 N.C. 656, 57 S.E. 388 (1907).

Testimony as to Placement of Deed. — This section does not exclude testimony that the witness saw the decedent place the deed, under which the witness claims, in a trunk as it does not involve a communication or transaction with him. Cornelius v. Brawley, 109 N.C. 542, 14 S.E. 78 (1891); Carroll v. Smith, 163 N.C. 204, 79 S.E. 497 (1913).

Probate of Wills. — In Cox v. Beaufort County Lumber Co., 124 N.C. 78, 32 S.E. 381 (1899), it was held that this section does not apply to wills, but that they are governed by §§ 31-9 and 31-10; this was placed on the ground that this section applies where there is necessarily a contract or agreement between the parties, and in the case of a will there is ordinarily no transaction between the parties.

By the same reasoning it was held that attesting a will is not a "personal transaction," the witness being of the law and not of the party. Collins v. Collins, 101 N.C. 114, 7 S.E. 687 (1888). But a beneficiary may not testify as to the leaving of a holograph will with her for safekeeping. McEwan v. Brown, 176 N.C. 249, 97 S.E. 20 (1918). A beneficiary may, however, testify that when a will was opened it contained certain erasures and that they were not made by him. In re Will of Saunders, 177 N.C. 156, 98 S.E. 378 (1919).

Circumstances may arise, however, in which the person interested as a beneficiary may attempt to testify as to personal transactions or conversations with the deceased and this testimony would, of course, be excluded. But the rule of exclusion does not apply, as may be inferred from the preceding cases, as to facts of which the witness had knowledge by means other than by personal transactions with the deceased. So the rule does exclude the witness from testifying as to the identity of certain papers as being those which he had previously seen in the testator's presence; nor to the fact that it was the same "will," when only for the purpose and effect of the identification of the sheets in question. In re Will of Mann, 192 N.C. 248, 134 S.E. 649 (1926).

Under this section a party interested in the results of the action is incompetent to testify to declaration of the deceased, whose will is under attack, when the issue is as to undue influence. In re Will of Plott, 211 N.C. 451, 190 S.E. 717 (1937).

This section applies to caveat proceedings notwithstanding that they are in rem, with the exception that beneficiaries under the will are competent to testify as to transactions with deceased testator solely upon the issue of testamentary capacity. In re Will of Lomax, 226 N.C. 498, 39 S.E.2d 388 (1946).

A challenge to the testimony of a witness on the ground that any knowledge regarding a purported will and where it was located was obtained as the result of a personal transaction or communication with the testatrix was rejected. In re Will of Wilson, 258 N.C. 310, 128 S.E.2d 601 (1962).

This section operates to exclude evidence by caveator in a caveat proceeding concerning any personal transactions or communications between him and decedent. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

Settlement of Estate. — Testimony relating to an agreement between administrator and distributee in regard to the settlement of an estate was incompetent in an action by distributee's administrator to recover assets. Wilder v. Medlin, 215 N.C. 542, 2 S.E.2d 549 (1939).

V. EXCEPTIONS.

This section contains only two exceptions, one of which relates to the identity of the driver of a motor vehicle, and the other relates to cases in which the representative of the lunatic or deceased person has "opened the door" by testifying or offering the testimony of the deceased or insane person. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970).

However, the Supreme Court has stated what seems to be another exception to this section which provides that after a witness has stated his opinion as to the mental capacity of such deceased person, and where this opinion has been formed from conversations and communications with such person, it is competent to offer such in evidence as constituting the basis of such opinion. While it is conceded that a sane declaration by a person may be some evidence of sanity, the statute as written by the legislature does not contain this exception. Whitley v. Redden, 5 N.C. App. 705, 169 S.E.2d 260 (1969), rev'd on other grounds, 276 N.C. 263, 171 S.E.2d 894 (1970). See ante, this note, analysis line IV.

Exception for Similar Evidence Previously Introduced. — This section does not apply where evidence, similar to that which is being introduced, has previously been introduced and the door has been opened to the

objecting party. Davison v. West Oxford Land Co., 126 N.C. 704, 36 S.E. 162 (1900).

When defendant, representative of deceased, is examined in behalf of himself and his corepresentative concerning a personal transaction between plaintiff and deceased, under this section, he thus opens the door and makes competent the testimony of his adversary concerning the same transaction. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

Testimony otherwise incompetent under this section is rendered admissible when the personal representative of a deceased person, or the committee of a lunatic, or the person deriving his title or interest from, through, or under the deceased person or lunatic, is examined in his own behalf, or the testimony as to declarations of the deceased person or lunatic is given in evidence concerning the same transaction or communication. Peek v. Shook, 233 N.C. 259, 63 S.E.2d 542 (1951).

But this section gives a personal representative no right to "open the door," over the other party's objection, by incompetent evidence. Gurganus v. Guaranty Bank & Trust Co., 246 N.C. 655, 100 S.E.2d 81 (1957).

Introduction by opposing party of evidence of transaction between plaintiff and decedent opens door to plaintiff's testimony in regard thereto. Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966).

Grounds for Exceptions. — The rule of exclusion, if left absolute in form, might in certain cases, it was thought, work unequally, and therefore the exception was inserted to make it fair and just in its operation. There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication. It could not be otherwise without opening the door much wider than the necessity of the particular case justified. Pope v. Pope, 176 N.C. 283, 96 S.E. 1034 (1918). Where the testimony, of a deceased adverse party has been given and is available, the reason for the exclusion rule ceases. Phillips v. Interstate Land Co., 174 N.C. 542, 94 S.E. 12 (1917).

Limitation of Exception. — Where the door is opened to the opposing party to testify for himself, he can testify only as to those particular transactions and communications to which the testimony of the deceased person or his representative was pertinent. Sumner v. Candler, 92 N.C. 634 (1885).

In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by this section, such evidence must relate to the particular subject matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy. Walston v. Coppersmith, 197 N.C. 407, 149 S.E. 381 (1929).

The door is opened, under this section, by the representative of deceased taking the stand, only in respect to the transaction or set of facts about which such representative testifies. If one party opens the door as to one transaction, the other party cannot swing it wide in order to admit another independent transaction. Batten v. Aycock, 224 N.C. 225, 29 S.E.2d 739 (1944).

Similar Evidence Subsequently Introduced. — The rule is that when incompetent evidence is admitted over objection, the admission of such evidence is cured where the same evidence, or evidence of substantially the same import, is thereafter admitted without objection. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

The incompetence of the adverse party to testify may be removed by her being cross-examined as to the transaction in question. When the door is thus opened for the adverse party, it is only opened to the extent that he may testify as to the transaction about which he was cross-examined. Godwin v. Tew, 38 N.C. App. 686, 248 S.E.2d 771 (1978).

Illustrations. — Where the defendant executor has testified as to certain matters relating to the identification of certain letters the deceased had written upon the question of whether he should be held liable as a partner for the debts of a firm, it is competent for the plaintiff's witness to testify in the plaintiff's behalf, as to other matters relating thereto and tending to fix the deceased with liability as a partner, under the principle that when the defendant has himself "opened the door by his own evidence" the plaintiff may testify as to the completed transaction, and this section prohibiting testimony as to transaction, etc., with a deceased person, does not apply. Herring v. Ipock, 187 N.C. 459, 121 S.E. 758 (1924).

It is incompetent as a transaction with a deceased person for the plaintiff to testify as to personal services rendered to the deceased as coming within her demand for damages, where the defendant had not "opened the door" by asking the plaintiff for an explanation as to why she had changed the amount at her demand. Pulliam v. Hege, 192 N.C. 459, 135 S.E. 288 (1926).

The prohibition against a beneficiary testifying as to transactions with deceased testator on the question of undue influence relates solely to transactions with the deceased, and a beneficiary is competent to testify as to circumstances tending to show undue influence on the part of the propounder unrelated to any transaction which the witness had with testator. In re Will of Lomax, 226 N.C. 498, 39 S.E.2d 388 (1946).

Where, in an action to recover upon a quantum meruit for personal services rendered deceased, defendant executor first testified as to his version of the services rendered, it did not violate this section for plaintiff to testify in rebuttal as to the services she rendered, since the "door had been swung wide" by defendant's prior testimony. Highfill v. Parrish, 247 N.C. 389, 100 S.E.2d 840 (1957).

If the challenged testimony did violate this section, it was rendered admissible when the sister of intestate, as plaintiff's witness, testified that defendant was driving and that he was not intoxicated. This opened the door for defendant's version of the matter. Bryant v. Ballance, 13 N.C. App. 181, 185 S.E.2d 315 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 513 (1972).

In an action to recover the amount of a note from the estate of the borrower's attorney-in-fact, there was no merit to defendant's contention that much of the affidavit testimony upon which the trial court based its decision should have been excluded under this section as testimony of transactions with a deceased person, since defendant, by offering evidence as to a completely independent transaction, opened the door for plaintiff to give an explanation by his own affidavit. Nye v. Lipton, 50 N.C. App. 224, 273 S.E.2d 313 (1981).

VI. PLEADING AND PRACTICE.

Admission. — Anything that a party to the action has said, if relevant to the issues and not subject to some specific exclusionary rule, is admissible against him as an admission. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

Proper Objection Required. — In order to have the benefit of this section, a party must lodge a proper objection at the time the incompetent testimony is offered. Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 735 (1979).

Effect of Failure to Object. — Objections to the competency of testimony must be taken in due time; if not, they are waived. Therefore, where a party was allowed to testify, upon examination in chief, to a conversation between himself and the defendant's testator, and during the cross-examination the defendant objected to the competency of such testimony and asked that it might be excluded, it was held that, although incompetent, the objection to its reception came too late. Meroney v. Avery, 64 N.C. 312 (1870). Where a general objection as to witness' competency was overruled, and afterwards no specific objection was made to his testimony as to transactions with the decedent, the objection was deemed waived. Norris v. Stewart, 105 N.C. 455, 10 S.E. 912, 18 Am. St. R. 917 (1890).

The objection will not be considered unless so specific as to show that the evidence is objectionable. Perkins v. Berry, 103 N.C. 131, 9 S.E. 621 (1889). The incompetency must appear at the time of the objection to the evidence, so that the court may pass intelligently upon the objection. Harris v. Harris, 178 N.C. 7, 100 S.E. 125 (1919).

The objecting party has the burden of establishing the incompetency of the evidence. Etheridge v. Etheridge, 41 N.C. App. 39, 255 S.E.2d 735 (1979).

Motion to Strike Out Incompetent Part of Answer. — The rule is that where a question asked a witness is competent, exception to his answer, when incompetent in part, should be taken by motion to strike out the part that is objectionable. Brown v. Green, 3 N.C. App. 506, 165 S.E.2d 534 (1969).

When Admission of Evidence Harmless. — The erroneous admission of evidence of transactions with deceased persons prohibited by this section becomes immaterial when from the answers by the jury to the issues it appears that this evidence was disregarded by them. Ray v. Ray, 175 N.C. 290, 95 S.E. 550 (1918).

Determination on Appeal of Relevancy of Testimony. — Where testimony of transactions or communications with a decedent is properly excluded as irrelevant to the issue, its competency or incompetency under this section will not be determined on appeal. Pendleton v. Spencer, 205 N.C. 179, 170 S.E. 637 (1933).

§ 8-51.1. Dying declarations.

The dying declarations of a deceased person regarding the cause or circumstances of his death shall be admissible in evidence in all civil and criminal trials and other proceedings before courts, administrative agencies and other tribunals to the same extent and for the same purposes that they might have been admissible had the deceased survived and been sworn as a witness in the proceedings, subject to proof that:

(1) At the time of the making of such declaration the deceased was conscious of approaching death and believed there was no hope of recovery;
(2) Such declaration was voluntarily made. (1973, c. 464, s. 1.)

Legal Periodicals. — For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

For survey of 1978 law on evidence, see 57 N.C.L. Rev. 1061 (1979).

For article entitled, "Toward a Codification of the Law of Evidence in North Carolina," see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

Sixth Amendment Not Violated by Admission of Declaration. — Albeit a dying declaration is indubitably hearsay and the declarant is, of course, not available for cross-examination, the admission of such evidence is not a violation of the Sixth Amendment. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

General Assembly Codified Essentials of Former Law. — "Dying declarations" by the person whose death is an issue in the case have long been admissible in North Carolina provided (1) at the time they were made the declarant was in actual danger of death; (2) he had full apprehension of the danger; (3) death did in fact ensue; and (4) declarant, if living, would be a competent witness to testify to the matter. In 1973, the General Assembly codified the essentials of those requirements in this section. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

And Case Law Requirements Are Unchanged. — In State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976), and in State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976), it was noted, without deciding, that the words "no hope of recovery" in the statute might make the statutory exception to the hearsay rule more restrictive than existing case law. The Supreme Court has now concluded that the statutory prerequisites that the deceased must have been "conscious of approaching death and believed that there was no hope of recovery" do not change the case-law requirements that in order to be admissible the declarations of a decedent must have been "in present anticipation of death." State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

The statutory prerequisites that the deceased must have been "conscious of approaching death and believed that there was no hope of recovery" do not change case-law requirements that in order to be admissible the declaration of a decedent must have been "in present anticipation of death." It is enough if he "believed he was going to die." State v. Penn, 36 N.C. App. 482, 244 S.E.2d 702 (1978).

Rationale Based on Trustworthiness of Declaration. — The rationale of this section clearly rests upon a belief in the general trustworthiness of dying declarations, rather than upon the necessity for bringing to justice the perpetrators of secret homicides. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

The common law and statutory requirement of "no hope of recovery" rests upon the tenet that when an individual believes death to be imminent, the ordinary motives for falsehood are absent and most powerful considerations impel him to speak the truth. The solemnity of approaching death is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

The public necessity of preventing secret homicides from going unpunished requires the preservation of dying declarations as evidence, notwithstanding the inability of the defendant to cross-examine his accuser. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Section Expands the Admissibility of Statements. — The overall effect of this section was to liberalize the dying declaration exception to the hearsay rule by expanding the admissibility of such statements to all civil and criminal trials. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

Declarant's Death Need Not Be in Issue. — Admissibility seems no longer to be confined to situations in which the declarant's death is in issue, but rather extends to any situation in which the cause or circumstances of the declarant's death may be relevant to any issue in litigation. State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

It is not necessary that the declarant should be in the very act of dying; it is enough if he is under the apprehension of impending dissolution. Stated in simpler terms, it is enough if he believed he was going to die. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

And Test Is Not Actual Swiftness with Which Death Ensues. — The fact that the declarant survived one week longer than the doctor had told him he might live did not affect

the admissibility of his dying declarations. The test is the declarant's belief in the nearness of death when he made the statement, not the actual swiftness with which death ensued. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

It is not necessary for the declarant to state that he perceives he is going to die. If all the circumstances, including the nature of the wound, indicate that the declarant realized death was near, this requirement of the law is satisfied. State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976); State v. Lester, 294 N.C. 220, 240 S.E.2d 391 (1978).

The consciousness of approaching death may be made to appear from what the injured person said; or from the nature and extent of the wounds inflicted, being obviously such that he must have felt or known that he could not survive; as well as from his conduct at the time and the communications, if any, made to him by his medical advisers, if assented to or understandingly acquiesced in by him. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

The declaration must have been voluntary and made when the declarant was conscious of approaching death and without hope for recovery. State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976).

The admissibility of a declaration as a dying declaration is a question to be determined by the trial judge, and when the judge admits the declaration, his ruling is reviewable only to determine whether there is evidence tending to show facts essential to support it. State v. Bowden, 290 N.C. 702, 228 S.E.2d 414 (1976); State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976).

The admissibility of dying declarations is a decision for the trial judge, and review by the Supreme Court is limited to the narrow question of whether there is any evidence tending to show the factual prerequisites to admissibility. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Whether a dying declaration is admissible is a question for the trial court, and his ruling is reviewable on appeal only with respect to whether there was sufficient competent evidence tending to show facts essential to support his ruling. State v. Penn, 36 N.C. App. 482, 244 S.E.2d 702 (1978).

A dying declaration is not conclusive, its weight and credibility being for the jury to determine. It may be impeached in the same manner as any other sworn statement. State v. Harding, 291 N.C. 223, 230 S.E.2d 397 (1976).

Once admitted into evidence, a dying declaration is no different from other testimony. The extent of its credibility is a matter for the jury and it is subject to impeachment or corroboration upon the same grounds and in the same manner as the testimony of a sworn witness. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Declarations Made in Response to Leading Questions. — The fact that the dying declarations were made in response to leading questions did not require their exclusion from evidence. The qualifying questions were not perfunctory to be used in the event the dying man took a turn for the worse, but were clearly appropriate in light of the declarant's severe injuries and inability to speak, and the declarations were as nearly spontaneous as declarations by one under the circumstances could be. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Impeachment of Dying Declaration. — The impeachment of a dying declaration must proceed under the ordinary rules of evidence. Under these rules, for the purpose of impeachment, a party is entitled to introduce evidence only of the general reputation or character of the witness. Therefore, the courts do not permit the witness to be impeached by independent evidence of particular misconduct. Specifically, this means that a witness may not be impeached by record evidence of his conviction of crime. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

Evidence of the general character or reputation of a decedent is relevant on the issue of his dying declaration and is admissible to impeach or to sustain the declaration. This is an exception to the usual rule that evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide. State v. Stevens, 295 N.C. 21, 243 S.E.2d 771 (1978).

§ 8-52: Repealed by Session Laws 1973, c. 41.

§ 8-53. Communications between physician and patient.

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. Confidential information obtained in medical records shall be

furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin; provided, that the court, either at the trial or prior thereto, or the Industrial Commission pursuant to law may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1885, c. 159; Rev., s. 1621; C. S., s. 1798; 1969, c. 914; 1977, c. 1118.)

Cross References. — As to the competency of doctor of chiropractic to testify as an expert in his field, see § 90-157.2.

Legal Periodicals. — See 13 N.C.L. Rev. 326; 16 N.C.L. Rev. 53.

For note on the discretion of the trial judge in compelling disclosure of privileged information when in the area of physician-patient privilege, see 41 N.C.L. Rev. 627 (1963).

For case law survey on evidence, see 43 N.C.L. Rev. 900 (1965).

For note on authority of the judge in a child custody hearing to compel disclosure by a treating physician on the mental stability of one of the parties, see 46 N.C.L. Rev. 956 (1968); 47 N.C.L. Rev. 265 (1968).

For note on reporting patients for review of driver's license, see 48 N.C.L. Rev. 1003 (1970).

For comment surveying North Carolina Law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For comment on release of medical records by North Carolina hospitals, see 7 N.C. Cent. L.J. 299 (1976).

For a comment on the evidentiary implications at trial of the physician-patient privilege, see 12 Wake Forest L. Rev. 849 (1976).

For survey of 1979 law on evidence, see 58 N.C.L. Rev. 1456 (1980).

CASE NOTES

I. General Consideration.
II. Nature and Scope of Privilege.
III. Waiver.
IV. Compelled Disclosure.

I. GENERAL CONSIDERATION.

Privilege Is Statutory. — At common law, communications from patients to physicians are not privileged. Such privilege is purely statutory. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

Section Amends Common-Law Rule. — Under the common law, communications which passed between a patient and a physician in the confidence of the professional relation and information acquired by the physician while attending or treating the patient were not privileged or protected from disclosure by the physician. This section as interpreted by the Supreme Court has the effect of amending this common-law rule. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Legislative Intent. — The legislature intended this section to be a shield and not a sword. It was careful to make provision to avoid injustice and suppression of truth by putting it in the power of the trial judge to compel disclosure. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Purpose of Section. — One of the objects of this statute is to encourage full and frank disclosure to the doctor. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

It is the purpose of statutes such as this section to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

The purpose of this section is to create a privileged relationship between physician and patient. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964); Johnson v. United Ins. Co. of America, 262 N.C. 253, 136 S.E.2d 587 (1964).

Purpose of Section Must Be Carried Out at Superior Court Level. — If the spirit and purpose of this section is to be carried out, it must be at the superior court level. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of this section, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

Proviso Refers to Exceptional Situations. — In view of the primary purpose of this section to create a privileged relationship between physician and patient, it is clear the proviso is intended to refer to exceptional, rather than ordinary, factual situations. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

This section and § 8-53.3 are to be read in pari materia. When so read, they extend the physician-patient privilege to the psychologist-client situation and withdraw the privilege in all situations where "necessary to a proper administration of justice." The reasons for the exceptions to the privileges granted by the two statutes are the same and it would be discordant to fail to extend to § 8-53.3 the amendment of this section which made it clear that the legislature intended that disclosure could be compelled prior to trial. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

This section is not applicable in an involuntary commitment proceeding. In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

Applied in Wilder v. Edwards, 7 N.C. App. 513, 173 S.E.2d 72 (1970); Gibson v. Montford, 9 N.C. App. 251, 175 S.E.2d 776 (1970); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v. Hodgen, 47 N.C. App. 329, 267 S.E.2d 32 (1980).

Cited in State v. Wade, 197 N.C. 571, 150 S.E. 32 (1929); Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978).

II. NATURE AND SCOPE OF PRIVILEGE.

Relationship of Physician and Patient Must Exist. — The admissions of one accused of crime are not rendered confidential within the meaning of the law when made to a psychiatrist examining him by order of the court in order to form an opinion as to whether the defendant had sufficient capacity to be in law guilty of crime, since, under the circumstances of this case, the relationship of physician and patient did not exist, and this section is not applicable. State v. Newsome, 195 N.C. 552, 143 S.E. 187 (1928).

The relationship of patient and physician within the purview of this section, does not exist between a defendant and an alienist examining him in regard to his sanity. State v. Litteral, 227 N.C. 527, 43 S.E.2d 84 (1947).

Where doctor went to the jail to examine defendant to determine if he was drunk or under the influence of intoxicating liquor at the request of defendant's brother, not at the request of defendant, and not to perform any professional services for defendant, the relationship of patient and physician, under such circumstances, did not exist between defendant and the doctor within the purview of this section. State v. Hollingsworth, 263 N.C. 158, 139 S.E.2d 235 (1964).

This privilege extends only to those cases in which the physician and patient relationship existed at the time of the communication and where the information given was necessary for diagnosis or treatment. State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979).

Effect of Marriage Between Physician and Patient. — If the relation of doctor and patient existed between plaintiff and her former husband, any information which he acquired while attending her in his professional character is protected by this section in the same manner as if they had not been married to each other. Furr v. Simpson, 271 N.C. 221, 155 S.E.2d 746 (1967).

Application to Nurses, Technicians and Others. — The effect of this section is not extended to include nurses, technicians, and others, unless they were assisting, or acting under the direction of, a physician or surgeon. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The provisions of this section also apply to nurses, technicians, and others when they are assisting or acting under the direction of a physician or surgeon, if the physician or surgeon is at the time acting so as to be within the rule set out therein. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969); State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603, appeal dismissed, 283 N.C. 670, 197 S.E.2d 879 (1973).

What Information Included. — It is the accepted construction of this section that it extends, not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. Smith v. John L. Roper Lumber Co., 147 N.C. 62, 60 S.E. 717 (1908). See Creech v. Sovereign Camp, W.O.W., 211 N.C. 658, 191 S.E. 840 (1937); Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960); Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964); In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

This section applies to hospital records offered in evidence in an action to recover death benefits under a policy of insurance, where insurer denies liability on the ground that the application contained false statements with respect to insured's health, insofar as the records contain entries made by physicians and surgeons, or under their direction, pertaining to communications and information obtained by them in attending the insured professionally, which information was necessary to enable them to prescribe for her. However, any other

information contained in the records, if relevant and otherwise competent, is not privileged. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

Information Is No Less Privileged Because It Was Obtained in Hospital. — There is no difference in the application of the statute between examination and treatment of the patient by a physician or surgeon in a hospital and in the home. The information is no less privileged that it was obtained in a hospital. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

Tape Relating to Facts in Death Certificates. — In an action by plaintiff to recover damages for wrongful discharge from his position as superintendent of a State hospital for the mentally disordered, a tape of a meeting of the credentials committee of that hospital would not come within the privilege provided by this section where the information on the tape did not relate to treatment of patients but related basically the facts included in the death certificates of patients which were a matter of public records. Smith v. State, 298 N.C. 115, 257 S.E.2d 399 (1979).

Cross-examination of defendant's psychiatrist concerning incriminating statements made by defendant did not violate defendant's statutory right to privileged communication with his doctor on the basis that no bona fide doctor-patient relationship existed between defendant and his expert witness, or on the basis that, even assuming a valid relationship, defendant waived his right to the privilege by putting the doctor on the stand. State v. Clark, 301 N.C. 176, 270 S.E.2d 425 (1980).

III. WAIVER.

Privilege Is That of Patient. — A physician or surgeon may not refuse to testify; the privilege is that of the patient. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

The records of patients at a hospital are privileged but the privilege is that of the patient — not the hospital. Reserve Life Ins. Co. v. Davis Hosp., 36 F.R.D. 434 (W.D.N.C. 1965).

The privilege created by this statute is for the benefit of the patient alone. In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

The privilege is not absolute, but qualified. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

The privilege created by this statute may be waived by the patient, and in any event is a qualified, rather than an absolute, privilege in that the judge has discretion, either at the trial or prior thereto, to "compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." In re Farrow, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

Only Patient or Court May Authorize Disclosure. — The law protects the patient's secrets, and makes it the duty of the doctor to keep them, a duty he cannot waive. The veil of secrecy can be drawn aside only by the patient or by court, and only when the ends of justice require it. Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

Privilege May Be Waived. — The privilege given by this section is for the benefit of the patient alone, and it may be insisted on or waived at his discretion, subject to the exceptions included in the section. Fuller v. Knights of Pythias, 129 N.C. 318, 40 S.E. 65 (1901); Smith v. John L. Roper Lumber Co., 147 N.C. 62, 60 S.E. 717 (1908). See Creech v. Sovereign Camp, W.O.W., 211 N.C. 658, 191 S.E. 840 (1937); Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

Since the privilege is that of the patient alone, it may be waived by him expressly or impliedly, and cannot be taken advantage of by any other person. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

The privilege is waived by implication where the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Where plaintiff used an affidavit of his physician for the purpose of obtaining a temporary restraining order pending the hearing of his case on the merits, such use did not waive the physician-patient privilege. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

By Patient's Testimony Describing Nature of Injuries in Detail. — While a patient does not waive his right to assert that a communication between himself and his physician is privileged by merely testifying as to his own physicial condition, where the patient voluntarily goes into detail regarding the nature of his injuries, he waives the privilege, and the physician is competent and compellable to testify in regard thereto, since the patient will not be allowed to close the mouth of the only witness in a position to contradict him and fully explain the facts. Capps v. Lynch, 253 N.C. 18, 116 S.E.2d 137 (1960).

A patient may surrender his privilege in a personal injury case by testifying to the nature and extent of his injuries and the examination and treatment by the physician or surgeon. Whether the testimony of the patient amounts to a waiver of privilege depends upon the provisions of the applicable statute and the extent and ultimate materiality of the testimony given

with respect to the nature, treatment, and effect of the injury or ailment. The question of waiver is to be determined largely by the facts and circumstances of the particular case on trial. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

Judge's Finding of Record That Testimony Necessary. — Before a physician may testify to matters arising in his confidential relationship with his patient, this section requires that the trial judge find that in his opinion such testimony is "necessary to a proper administration of justice," and in the absence of such finding appearing of record on appeal, it is reversible error for the trial judge upon defendant's exception to admit testimony of the insured's physician tending to show that the insured in his application for life insurance had made misstatements of material facts that would avoid the insurer's liability in his suit to cancel the policy issued thereon. Metropolitan Life Ins. Co. v. Boddie, 194 N.C. 199, 139 S.E. 228 (1927). See Creech v. Sovereign Camp, W.O.W., 211 N.C. 658, 191 S.E. 840 (1937); Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954).

If the statements were privileged under this section, then in the absence of a finding by the presiding judge, duly entered upon the record, that the testimony was necessary to a proper administration of justice, it was incompetent, and upon defendant's objection should have been excluded. Sawyer v. Weskett, 201 N.C. 500, 160 S.E. 575 (1931).

Where the presiding judge compels disclosure, as provided by this section, he shall enter upon the record his finding that the testimony is necessary to a proper administration of justice. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

In the absence of a finding by the trial court that, in its opinion, the admission of hospital records was necessary to a proper administration of justice, the appellate court is compelled to hold that their exclusion was not error. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The superior court's finding, inserted in the record, that the evidence of a physician was necessary to a proper administration of justice, takes the physician's evidence out of the privileged communication rule provided in this section. State v. Howard, 272 N.C. 519, 158 S.E.2d 350 (1968).

A judge of superior court at term may, in his discretion, compel disclosure of physician-patient communications if, in his opinion, it is necessary to a proper administration of justice and he so finds and enters such finding on the record. Neese v. Neese, 1 N.C. App. 426, 161 S.E.2d 841 (1968).

In construing this section it is incumbent on the presiding judge to find the fact, and this should appear in the record in substance, that, in his opinion, the disclosure is necessary to a proper administration of justice. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

Express Recital of Findings Held Unnecessary. — Although the trial judge made no express recital of findings that the testimony of a pyschiatrist in a sterilization proceeding was necessary to the proper administration of justice, his opinion that such was the case was implicit when he overruled respondent's objection to the testimony asserting the privilege under this section. It must be assumed that the judge was aware of the statute when he made the ruling, and that under these circumstances the very act of ruling was in itself a finding that its admission was necessary to a proper administration of justice. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

IV. COMPELLED DISCLOSURE.

Intent as to Phrase "May Compel Such Disclosure". — The legislature intended to employ the phrase "may compel such disclosure" in this section in such manner as to authorize the court to require disclosure in all situations governed by this section without exception, when disclosure "is necessary to a proper administration of justice." In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Disclosure May Be Compelled Prior to Trial or Filing of Charges. — Construing this section and § 8-53.3 so as to give effect to the obvious intention of the legislature as manifested in the entire act and other acts in pari materia, the language of both of these sections is sufficient to allow the trial court to compel disclosure prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Trial Judge May Compel Disclosure. — The legislature was careful to make provision to avoid injustice and suppression of truth by putting it in the power of the trial judge to compel disclosure. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

The judge, in the exercise of discretion and by the authority of the proviso in this section, may follow the procedure for the admission of testimony and admit hospital records in evidence. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

In a prosecution for possession of heroin, the trial court did not err in ruling that a physician should be required in the interest of justice to give testimony concerning a matchbox containing heroin found on defendant's person

when she was undressed in a hospital emergency room in order that the physician could determine the cause of her unconsciousness. State v. Wooten, 18 N.C. App. 269, 196 S.E.2d 603, appeal dismissed, 283 N.C. 670, 197 S.E.2d 879 (1973).

The statutory privilege is a qualified one, and the judge may compel disclosure by the physician if he finds, in his discretion, that it is necessary for the proper administration of justice. State v. Mayhand, 298 N.C. 418, 259 S.E.2d 231 (1979).

But Only as to Matters Necessary to Proper Administration of Justice. — The trial judge may ascertain from the physician the nature of the evidence involved and may determine what part, if any, should be disclosed as necessary to the proper administration of justice. Obviously, the proper administration of justice might require disclosure as to certain but not as to all matters under the privilege. Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

This section requires, and the decisions of the Supreme Court are to the effect, that the trial judge may admit communication between physician and patient if in his opinion such is necessary to a proper administration of justice. State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

And He Should Not Hesitate to Do So. — Judges should not hesitate to require disclosure where it appears to them to be necessary in order that the truth be known and justice be done. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962); State v. Bryant, 5 N.C. App. 21, 167 S.E.2d 841 (1969).

But Appellate Court Cannot Exercise Trial Judge's Authority. — The appellate court cannot exercise the authority and discretion vested in the trial judge by the proviso in this section, nor can it repeal or amend the statute by judicial decree. If the spirit and purpose of the law is to be carried out, it must be at the superior court level. Sims v. Charlotte Liberty Mut. Ins. Co., 257 N.C. 32, 125 S.E.2d 326 (1962).

§ 8-53.1. Physician-patient privilege waived in child abuse.

Notwithstanding the provisions of G.S. 8-53, the physician-patient privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the North Carolina Juvenile Code, Subchapter XI of Chapter 7A of the General Statutes of North Carolina. (1965, c. 472, s. 2; 1971, c. 710, s. 2; 1981, c. 469, s. 24.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "North Carolina Juvenile Code, Subchapter XI of Chapter 7A" for "Child Abuse Reporting Law, Article 8 of Chapter 110" near the end of the section.

§ 8-53.2. Communications between clergymen and communicants.

No priest, rabbi, accredited Christian Science practitioner, or a clergyman or ordained minister of an established church shall be competent to testify in any action, suit or proceeding concerning any information which was communicated to him and entrusted to him in his professional capacity, and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted, provided, however, that this section shall not apply where communicant in open court waives the privilege conferred. (1959, c. 646; 1963, c. 200; 1967, c. 794.)

Legal Periodicals. — For note on "Privileged Communications — The New North Carolina Priest-Penitent Statute," see 46 N.C.L. Rev. 427 (1968).

For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

CASE NOTES

Statutory Privilege. — Apart from this statute, there is no privilege with reference to communications between a clergyman, or other spiritual advisor, and his communicants or others who seek his advice and comfort. In re Williams, 269 N.C. 68, 152 S.E.2d 317, cert. denied, 388 U.S. 918, 87 S. Ct. 2137, 18 L. Ed. 2d 1362 (1967). Commented on in 45 N.C.L. Rev. 863, 884, 924 (1967).

§ 8-53.3. Communications between psychologist and client.

No person, duly authorized as a practicing psychologist or psychological examiner, nor any of his employees or associates, shall be required to disclose any information which he may have acquired in rendering professional psychological services, and which information was necessary to enable him to render professional psychological services: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1967, c. 910, s. 18.)

Legal Periodicals. — For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For a comment on the evidentiary implications at trial of the physician-patient privilege, see 12 Wake Forest L. Rev. 849 (1976).

For survey of 1979 law on evidence, see 58 N.C.L. Rev. 1456 (1980).

CASE NOTES

Section 8-53 and this section are to be read in pari materia. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

Thus, Disclosure May Be Compelled Prior to Trial or Filing of Charges. — Construing § 8-53 and this section so as to give effect to the obvious intention of the legislature as manifested in the entire act and other acts in pari materia, the language of both of these sections is sufficient to allow the trial court to compel disclosure prior to trial and prior to the filing of criminal charges when such action is necessary to the exercise of its implied or inherent powers to provide for the proper administration of justice. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

While the proviso contained in this section does not contain the precise language of the proviso to § 8-53 specifically providing that the required disclosure may be prior to trial, such was the legislative intent. It would be wholly inconsistent to allow disclosure in the case of a physician-patient relationship while, in a statute extending the rule to the psychologist-client relationship, precluding the required disclosure until the time of trial. In re Albemarle Mental Health Center, 42 N.C. App. 292, 256 S.E.2d 818, cert. denied, 298 N.C. 297, 259 S.E.2d 298 (1979).

This section as written favors a policy of nondisclosure. Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978).

But judges should not hesitate where it appears to them that disclosure is necessary in order that the truth be known and justice done. Flora v. Hamilton, 81 F.R.D. 576 (M.D.N.C. 1978).

Applied in State v. Crews, 296 N.C. 607, 252 S.E.2d 745 (1979).

§ 8-53.4. School counselor privilege.

No person certified by the State Department of Public Instruction as a school counselor and duly appointed or designated as such by the governing body of a public school system within this State or by the head of any private school within this State shall be competent to testify in any action, suit, or proceeding concerning any information acquired in rendering counseling services to any student enrolled in such public school system or private school, and which information was necessary to enable him to render counseling services; provided, however, that this section shall not apply where the student in open

court waives the privilege conferred; provided further that the presiding judge may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1971, c. 943.)

Legal Periodicals. — For comment surveying North Carolina law of relational privielge, see 50 N.C.L. Rev. 630 (1972).

§ 8-53.5. Communications between marital and family therapist and client(s).

No person, duly authorized as a certified marital and family therapist, nor any of his employees or associates, shall be required to disclose any information which he may have acquired in rendering professional marital and family therapy services, and which information was necessary to enable him to render professional marital and family therapy services: provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice. (1979, c. 697, s. 2.)

Editor's Note. — Session Laws 1979, c. 697, s. 4, provides: "This act shall become effective October 1, 1979, and shall expire October 1, 1985."

§ 8-54. Defendant in criminal action competent but not compellable to testify.

In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself. (1856-7, c. 23; 1866, c. 43, s. 3; 1868-9, c. 209, s. 4; 1881, c. 89, s. 3; c. 110, ss. 2, 3; Code ss. 1353, 1354; Rev., ss. 1634, 1635; C. S., s. 1799.)

Cross References. — As to rights of accused, see N.C. Const., Art. I, § 23. As to exceptions, i.e., where witness is not excused from testifying on ground that testimony will tend to incriminate him, see §§ 1-357, 14-38, 14-354, 18-8, 18-27.

Legal Periodicals. — For article discussing the limits to self-incrimination, see 15 N.C.L. Rev. 229.

For note concerning confessions, see 23 N.C.L. Rev. 364.

As to compelling accused to speak so that witness may identify his voice, see note in 27 N.C.L. Rev. 262.

For note on "Constitutional Law — Is the Restricted Cross-Examination Rule Embodied in the Fifth Amendment?", see 45 N.C.L. Rev. 1030 (1967).

For note discussing sua sponte instructions on a defendant's failure to testify, see 54 N.C.L. Rev. 1001 (1976).

CASE NOTES

I. General Consideration.
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I. GENERAL CONSIDERATION.

Change From Common Law. — To correctly interpret and apply this section, it should be remembered that at common law, both in England and in this country, parties were not competent witnesses and were not permitted to testify. Nonetheless, an admission of guilt by defendant was competent evidence just as it is competent today. Then, as now, the law applied and gave effect to the assumption that one charged with crime and wrongful conduct would not remain silent when he had an opportunity to speak. Such silence was evidence of guilt. Thus, when the barrier was removed, preventing the accused from testifying and according him a privilege, it was proper to provide that his failure to utilize the privilege so given should not be regarded as an implied admission. State v. Walker, 251 N.C. 465, 112 S.E.2d 61, cert. denied, 364 U.S. 832, 81 S. Ct. 45, 5 L. Ed. 2d 58 (1960).

Prior to the adoption of this section defendants in criminal actions were not competent to testify in their own behalf. The prevailing theory prior to the adoption of this section was that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with crime, if permitted to testify, to swear falsely. State v. Williams, 6 N.C. App. 611, 170 S.E.2d 640 (1969).

When the common-law rules of evidence, which declared that parties were incompetent to testify, were changed by this section, an important privilege was extended to defendants, guarded by the provision that a failure to exercise it should raise no presumption of guilt against them. State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

The common-law disqualification against interested parties testifying was removed by this section. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Privilege and Not a Duty. — A defendant in a criminal matter can only be examined as a witness by his own request. State v. Ellis, 97 N.C. 447, 2 S.E. 525 (1887).

This section gives a criminal defendant the privilege of testifying in his own behalf. It is not his duty to do so, and he cannot be compelled to testify. If he does, however, he occupies the position of any other witness. He is entitled to the same privileges and is equally liable to be impeached or discredited. State v. Austin, 20 N.C. App. 539, 202 S.E.2d 293, rev'd on other grounds, 285 N.C. 364, 204 S.E.2d 675 (1974).

The word "presumption" as used in this section is equivalent to what is at present generally understood by the word "inference." State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969).

The law is that the jury is not to infer guilt from the fact that the defendant neither testifies nor presents evidence. State v. Willis, 22 N.C. App. 465, 206 S.E.2d 729 (1974).

Defendant Treated as Other Witnesses. — When the defendant exercises this privilege he is treated just as any other witness and thereby subjects himself to all the disadvantages of that position. State v. Efler, 85 N.C. 585 (1881); State v. Hawkins, 115 N.C. 712, 20 S.E. 623 (1894); State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1943).

Where a defendant in a criminal prosecution testifies in his own behalf he waives his constitutional privilege not to answer questions tending to incriminate him and is subject to cross-examination for the purpose of impeaching his credibility as other witnesses. State v. Griffin, 201 N.C. 541, 160 S.E. 826 (1931).

If a defendant in a criminal action testifies, he occupies the position of any other witness, and he is entitled to the same privileges and is equally liable to be impeached or discredited. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Contradiction of Testimony. — Defendant's privilege against self-incrimination was not violated where State was permitted to show for purposes of impeachment that defendant

had not voluntarily turned himself in to the police, and defendant had already testified to the contrary. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Evidence of Other Offenses Where Defendant Does Not Testify. — When the defendant in a criminal trial does not testify, evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; such evidence will be admissible, however, if that evidence is used to show intent, design, guilty knowledge, or scienter or to make out the res gestae or to exhibit a chain of circumstances in respect of the matter on trial, when the other offenses are so connected with the offense charged as to throw light on one or more of these questions. State v. Allen, 50 N.C. App. 173, 272 S.E.2d 785 (1980).

Where There Are Two or More Defendants. — Even prior to the enactment of this section on a trial for an affray, one defendant could not oppose the testifying of his codefendant for himself, the State's counsel not objecting. State v. Hamlett, 85 N.C. 520 (1881).

Failure of Codefendant to Take Stand. — A codefendant on trial cannot be required over his own objection to testify as a witness for defendant. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Defendant may properly raise a violation of this section for the first time on appeal. State v. Fleming, 33 N.C. App. 216, 234 S.E.2d 431, cert. denied, 293 N.C. 161, 236 S.E.2d 705 (1977).

Testimony May Be Used in Subsequent Trial. — Where a defendant, in a prosecution for another crime, testified in his own behalf, after having been informed of his privilege not to testify, admissions made by him are competent evidence against him in a subsequent trial. State v. Simpson, 133 N.C. 676, 45 S.E. 567 (1903).

Applied in State v. Turner, 253 N.C. 37, 116 S.E.2d 194 (1960); State v. Stephens, 262 N.C. 45, 136 S.E.2d 209 (1964); State v. Boone, 39 N.C. App. 218, 249 S.E.2d 817 (1978).

Quoted in State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968).

Cited in State v. Colson, 194 N.C. 206, 139 S.E. 230 (1927); State v. McLeod, 198 N.C. 649, 152 S.E. 895 (1930); State v. Spivey, 198 N.C. 655, 153 S.E. 255 (1930); State v. Vernon, 208 N.C. 340, 180 S.E. 590 (1935); York v. York, 212 N.C. 695, 194 S.E. 486 (1938); State v. Davis, 272 N.C. 102, 157 S.E.2d 671 (1967); State v. Castor, 285 N.C. 286, 204 S.E.2d 848 (1974); State v. Thompson, 293 N.C. 713, 239 S.E.2d 465 (1977); State v. Alston, 35 N.C. App. 691, 242 S.E.2d 523 (1978).

II. EVIDENCE OF DEFENDANT'S CHARACTER.

General Character Can Be Shown. — When a prosecutor or defendant in a criminal action goes upon the stand as a witness he becomes just as any other witness, and his general character can be proven, not only as it was before a charge affecting it was made, but as it is at the date he goes upon the stand. State v. Spurling, 118 N.C. 1250, 24 S.E. 533 (1896).

Same — Not in Issue Unless So Placed. — Where a defendant goes on the witness stand and testifies, he does not thereby put his character in issue, but only puts his testimony in issue, and the State may introduce evidence tending to show the bad character of the witness solely for the purpose of contradicting him. State v. Foster, 130 N.C. 666, 41 S.E. 284 (1902); State v. Cloninger, 149 N.C. 567, 63 S.E. 154 (1908).

When defendant does not go upon the stand, and does not offer evidence of good character, his character is not in issue and it may not be impeached by the State. State v. Proctor, 213 N.C. 221, 195 S.E. 816 (1938).

Unless a defendant in a criminal prosecution testifies as a witness, thereby subjecting himself to impeachment, or produces evidence of his good character to repel the charge of crime, the State may not show his bad character for any purpose. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Same — Where Introduced by Defendant. — The right of the defendant to offer testimony of his good character does not depend upon his having been examined as a witness in his own behalf. State v. Hice, 117 N.C. 782, 23 S.E. 357 (1895); State v. McKinnon, 223 N.C. 160, 25 S.E.2d 606 (1943).

When the defendant introduces evidence himself to prove his good character, then that evidence is substantive evidence, and may be considered by the jury as such. State v. Cloninger, 149 N.C. 567, 63 S.E. 154 (1908).

Same — Put in Issue by State. — Where, in the trial of a criminal action, the defendant testified in his own behalf and introduced no evidence as to his general character, but the State introduced evidence to show that such character was bad, it was held that such evidence by the State could be considered only as affecting the credibility of the defendant as a witness and not as a circumstance in determining the question of his guilt or innocence. State v. Traylor, 121 N.C. 674, 28 S.E. 493 (1897).

III. CROSS-EXAMINATION OF DEFENDANT.

A. Scope of Questioning.

Extent of Cross-Examination Permitted. — Cross-examination of a defendant under this

section is not confined to matters brought out on direct examination, but questions are admissible to impeach, diminish or impair the credit of the witness. State v. Dickerson, 189 N.C. 327, 127 S.E. 256 (1925).

When a defendant voluntarily becomes a witness in his own behalf, he is subject to cross-examination and impeachment as any other witness, and it is proper for the solicitor (now district attorney) to ask him questions concerning his prior criminal record for the purpose of impeaching him, provided the questions are based on information and are asked in good faith. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

In order to impeach a defendant's credibility as a witness, the solicitor (now district attorney) is permitted to cross-examine the defendant as to collateral matters, including other criminal offenses, if the questions are based upon information and are asked in good faith. State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

While defendant in a criminal action may not be required to become a witness unless he voluntarily does so, once he does so, he becomes subject to cross-examination and may be required to answer questions designed to impeach or discredit him as a witness. State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Cross-examination by the State is permitted for the purpose of impeaching the credibility of a witness, including a defendant in a criminal case, and not for the purpose of proving prior offenses. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

In cross-examination, the witness, including a defendant in a criminal case, may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

A testifying defendant is subject to impeachment by cross-examination, generally to the same extent as any other witness. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Once a defendant testifies, he assumes the status of any other witness and is subject to impeachment by the questions and arguments of opposing counsel. These arguments may include comments on the witness's failure to explain or deny incriminating evidence since, if an innocent explanation exists or a denial can properly be made, the witness may reasonably be expected to provide it. State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978).

For purposes of impeachment, a defendant as witness may be cross-examined by the district attorney concerning prior inconsistent statements, prior convictions, and any specific acts of misconduct which tend to impeach his character. State v. Herbin, 298 N.C. 441, 259 S.E.2d 263 (1979).

Same — Discretion of Trial Judge. — The limits of legitimate cross-examination of a defendant are largely within the discretion of the trial judge and, absent a showing that the verdict was improperly influenced by his rulings on the scope of that cross-examination, those rulings will not be held for error. State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973).

The scope of cross-examination of a criminal defendant is subject to the discretion of the trial judge and the questions must be asked in good faith. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

The scope of the cross-examination of a defendant with regard to specific acts of criminal and degrading conduct for which there has been no conviction is normally subject to the discretion of the trial judge, and the questions must be asked in good faith. The purpose of this rule permitting such a wide scope for impeachment is that such evidence is a proper and relevant means of aiding the jury in assessing and weighing the credibility of the defendant. State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

B. Particular Areas of Inquiry.

Cross Examination as to Unproved Accusations or Arrests for Unrelated Offenses Not Allowed. — For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been accused, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been arrested for such unrelated criminal offense. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Witness, including a defendant in a criminal case, cannot be impeached by cross-examination as to whether he has been

arrested for, indicted for or accused of an unrelated criminal offense. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

A defendant may not be asked on cross-examination for impeachment purposes if he has been accused, arrested or indicted for a particular crime, but he may be asked if he in fact committed the crime. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975); State v. Alford, 289 N.C. 372, 222 S.E.2d 222 (1976).

It is improper to cross-examine a witness, including a defendant in a criminal trial, as to indictments, warrants or arrests which may have been made against him. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Cross-Examination as to Other Offenses for Which Defendant Has Been Indicted. — For purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial. In respect of this point, State v. Maslin, 195 N.C. 537, 143 S.E. 3 (1928), and decisions in accord with Maslin, are overruled, on the basic ground that an indictment cannot rightly be considered as more than an unproved accusation. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

The rule that a witness, including the defendant in a criminal case, may no longer be cross-examined for impeachment purposes as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial applies only to trials begun after December 15, 1971, the date of the decision in State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971). State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972).

Cross-Examination with Respect to Prior Convictions. — A witness, including the defendant in a criminal case, may be cross-examined for purposes of impeachment with respect to prior convictions of crime. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

Cross-examination for impeachment purposes is not limited to conviction of crimes. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

Trial judge did not err in admitting defendant's testimony under cross-examination of prior criminal convictions where the district attorney repeatedly asked defendant what he had been convicted of, not what he had been charged with, it was defendant who unresponsively volunteered information as to charges, and defendant's motion to strike all testimony as to charges was allowed and the judge instructed the jury to disregard all of it. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Inquiry of a witness, including a defendant, into prior convictions for certain crimes is relevant to impeach the witness. State v. Collins, 29 N.C. App. 120, 223 S.E.2d 575 (1976).

Where the defendant on cross-examination testified about an additional conviction for assault with a firearm which he had failed to mention during his direct examination, this was relevant impeachment evidence, thus, it was not only proper, it was also prudent for the prosecutor to attempt to elicit further details about defendant's prior convictions. State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

And Specific Acts of Misconduct. — Where a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. State v. Poole, 289 N.C. 47, 220 S.E.2d 320 (1975).

An accused person who testifies as a witness may be cross-examined regarding prior acts of misconduct. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Trial judge did not err in allowing cross-examination of defendant concerning the circumstances of his undesirable discharge from military service. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Cross-examination for purposes of impeachment of a defendant who testifies in his own behalf is not limited to questions concerning prior convictions, but also extends to questions relating to specific acts of criminal and degrading conduct for which there has been no conviction. State v. Ross, 295 N.C. 488, 246 S.E.2d 780 (1978).

Cross-Examination as to Conviction Subsequently Set Aside. — While it was improper for the solicitor (now district attorney) to cross-examine defendant concerning a conviction for felonious assault when this conviction had been subsequently set aside and on retrial defendant had been convicted only of simple assault — if the solicitor (now district attorney) knew such was the case — defendant was hardly prejudiced when he had admitted convictions for a large number of different criminal offenses committed over a long period of years. State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Denial of Impeaching Questions. — When defendant denies impeaching questions as to his prior criminal record, his answers are conclusive in the sense that they cannot be rebutted by other evidence, but the solicitor is not precluded from rephrasing his questions to include such details as the docket number of the case, the name of the court, the date of trial, the offense charged, and the sentence imposed.

State v. Weaver, 3 N.C. App. 439, 165 S.E.2d 15 (1969).

Contradicting Witness's Denial of Prior Offenses. — Denial of prior offenses by a witness, including a defendant in a criminal case, may not be contradicted by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Defendant May Be Recalled for Further Cross-Examination. — A defendant who avails himself of the privilege of testifying in his own behalf is subject to being recalled for further cross-examination, since the court has full discretion to allow a witness to be examined at any stage of the trial out of the usual order or to be recalled for reexamination. State v. Austin, 20 N.C. App. 539, 202 S.E.2d 293, rev'd on other grounds, 285 N.C. 364, 204 S.E.2d 675 (1974).

IV. DEFENDANT NOT TESTIFYING.

A. Effect.

Failure to Take Stand. — The failure of a defendant charged with homicide to take the witness stand voluntarily will not create a presumption against him. State v. Bynum, 175 N.C. 777, 95 S.E. 101 (1918).

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940).

A defendant's failure to testify may not be considered an admission of the truth of testimony which tends to incriminate him. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

North Carolina cases do not prescribe any mandatory formula with regard to defendant's failure to testify not creating any presumption against him, but instead look to see if the spirit of this section has been complied with. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

B. Fact Commented on by Prosecution.

Same — How Far Subject to Comment. — It is the privilege, but not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all, certainly not unless under very peculiar circumstances, which must be necessarily passed upon by the judge presiding at the trial, as a matter of sound discretion. Gragg v. Wagner, 77 N.C. 246 (1877).

The introduction or nonintroduction of a party as a witness in his own behalf should be the subject of comment only as the introduction or nonintroduction of any other witness might be. Goodman v. Sapp, 102 N.C. 477, 9 S.E. 483 (1889).

The failure of defendant to testify in his own behalf should not be made the subject of comment by the court except to inform the jury that a defendant may or may not testify in his own behalf as he may see fit, and that his failure to testify does not create any presumption against him. State v. McNeill, 229 N.C. 377, 49 S.E.2d 733 (1948); State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951); State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 794 (1976).

This section is interpreted as denying the right of counsel to comment on the failure of a defendant to testify. The reason for the rule is that extended comment from the court or from counsel for the State or defendant would tend to nullify the declared policy of the law that the failure of one charged with crime to testify in his own behalf should not create a presumption against him or be regarded as a circumstance indicative of guilt or unduly accentuate the significance of his silence. To permit counsel for a defendant to comment upon or offer explanation of the defendant's failure to testify would open the door for the prosecution and create a situation that this section was intended to prevent. State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951).

Where a defendant's wife and three other women, and several men testified in his behalf, but he did not testify, to say that the defendant was "hiding behind his wife's coat tail" was tantamount to commenting on his failure to testify, which is not permitted by this section. State v. McLamb, 235 N.C. 251, 69 S.E.2d 537 (1952).

Statement by solicitor (now district attorney) in the presence of the jury that he had not said a word about defendant not going to the witness stand violated this section. State v. Roberts, 243 N.C. 619, 91 S.E.2d 589 (1956).

The effect of this section has been to prohibit the district attorney from making any reference to or comment on defendant's failure to testify. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975).

Counsel may not comment upon the failure of a defendant in a criminal prosecution to testify. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

This section unquestionably prohibits any mention before the jury of a defendant's failure to testify in his own behalf. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

This section does not restrict the prosecuting attorney from making such comments upon the evidence and drawing such deductions therefrom as would have been legitimate before the passage of the act, for, while enlarging the rights of the defendants, this section did not abridge the privileges of the prosecution. State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

A bare statement by the prosecution to the effect that the State's evidence was uncontradicted was not an improper reference to the defendant's failure to testify. State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

The effect of this section is to prohibit the district attorney from commenting on defendant's failure to testify. State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

The State may fairly draw the jury's attention to the failure of the defendant to produce exculpatory evidence or to contradict the State's case. State v. Tilley, 292 N.C. 132, 232 S.E.2d 433 (1977).

The district attorney had a right to comment on defendant's failure to account for the hours between 4:30 and 6:45 P.A., especially after the defendant had offered evidence tending to establish an alibi. The prosecutor's remarks were directed solely at defendant's failure to offer evidence rebutting the State's case, rather than at his failure to take the stand. State v. Stanfield, 292 N.C. 357, 233 S.E.2d 574 (1977).

Exception to improper remarks of counsel during the argument must be taken before verdict. The rationale for this rule is that a party cannot be allowed to speculate upon his chances for a verdict, and then complain because counsel were not arrested in their comments upon the case. Such exceptions, like those to the admission of incompetent evidence, must be made in apt time, or else be lost. State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

Exception in Death Cases. — The general rule that exception to improper remarks of counsel during the argument must be taken before verdict has been modified in recent years so that it does not apply to death cases, when the argument of counsel is so prejudicial to the defendant that in this court's opinion, it is doubted that the prejudicial effect of such argument could have been removed from the jurors' minds by any instruction the trial judge might have given. State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

A slip of the tongue in an instruction on defendants' failure to testify will not be held to be prejudicial error if not called to the attention of the court and if it does not appear that the jury could have been prejudiced thereby. State v. Willis, 22 N.C. App. 465, 206 S.E.2d 729 (1974).

C. Instructions to Jury.

1. Curative.

Prejudice Removed by Instruction. — If the defendant elects not to testify as a witness in his own defense any comment by the solicitor (now district attorney), calling attention to this failure, is improper; but where the presiding judge carefully instructs the jury that defendant's failure to testify in his own defense should not be construed in anywise to his prejudice, the presiding judge properly and effectively removes any prejudicial effect that might result from the solicitor's (now district attorney) argument. State v. Lewis, 256 N.C. 430, 124 S.E.2d 115 (1962).

If the district attorney improperly comments on defendant's failure to testify, the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness. State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

Improper comment on defendant's failure in a criminal case to testify may be cured by an instruction from the court that the argument is improper followed by prompt and explicit instructions to the jury to disregard it. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

New Trial If No Curative Instruction on Improper Argument Given. — When there is an objection to prohibited statements on the failure of the defendant to testify, it is the duty of the court not only to sustain objection to the prosecuting attorney's improper and erroneous argument but also to instruct the jury that the argument was improper with prompt and explicit instructions to disregard it. If no proper curative instruction is given, the prejudicial effect of the argument requires a new trial. State v. Soloman, 40 N.C. App. 600, 253 S.E.2d 270 (1979).

2. Necessity of Request.

Instruction Discretionary Absent Request. — Court need not charge that failure of defendant to testify should not be considered against him in absence of request. State v. Jordan, 216 N.C. 356, 5 S.E.2d 156 (1939).

Ordinarily, it would seem better to give no instruction concerning a defendant's failure to testify unless such an instruction is requested by the defendant. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (1971); State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973); State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

The failure of the trial court to instruct the jury upon the effect of defendant's failure to testify is not error because such an instruction is not required unless specifically requested by defendant. State v. Smith, 24 N.C. App. 498, 211 S.E.2d 539 (1975).

It is the better practice not to instruct on the defendant's failure to testify. State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976).

Absent a special request, the trial court is not required to instruct the jury that defendant's failure to testify creates no presumption against him. State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977).

3. Proper.

Proper Instruction. — The court's remarks to the jury in instructing them that defendant was within his rights in not testifying, and that his failure to testify should not be considered against him, were held without error upon defendant's exception. State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936).

A charge to the effect that a defendant has a right not to testify and that his failure to testify should not be considered as a circumstance against him, will not be held for error on the ground that it called to the jury's attention the fact of defendant's absence from the stand. State v. Wood, 230 N.C. 740, 55 S.E.2d 491 (1949).

There is no hard and fast form of expression or consecrated formula required, but the jury may be instructed that as to the defendant the jury should scrutinize his testimony in the light of his interest in the outcome of the prosecution but that if after such scrutiny the jury believes that the witness has told the truth, it should give his testimony the same weight it would give the testimony of any other credible witness. It is not mandatory that the judge charge the jury in this respect, but the charge is permissible and it appears to be the uniform practice. State v. Williams, 6 N.C. App. 611, 170 S.E.2d 640 (1969).

Giving unrequested proper instructions relating to the failure of the defendant to exercise his right to testify or refrain from testifying under the provisions of this section is not reversible error. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (1971).

The trial judge's statement in his charge to the jury did not constitute prejudicial error where the charge, taken as a whole, did not give the jury the impression that defendant's failure to present evidence was to be taken against him. State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972).

Although it is the better practice to give no instruction concerning the failure of defendant to testify unless he requests it, the trial court's instruction in a first degree murder case to the effect that defendant's failure to testify should not be considered by the jury was not prejudicial to defendant. State v. Bryant, 283 N.C. 227, 195 S.E.2d 509 (1973).

While it is the better practice to give no instructions on the defendant's failure to testify, there is no error in giving an unrequested instruction on defendants' failure to testify if it correctly states the law. State v. Willis, 22 N.C. App. 465, 206 S.E.2d 729 (1974).

Any instruction is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

Where an instruction was unduly repetitious, but stripped of unnecessary verbiage, the instruction was that a defendant may or may not testify in his own behalf as he sees fit, and that his failure to testify shall not be held against him to any extent, this instruction met the requirements of this section. State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975), cert. denied, 425 U.S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976).

A nontestifying defendant has the right, upon proper request, to have the court tell the jury in substance that his failure to take the witness stand and testify in his own behalf does not create any presumption against him. State v. Leffingwell, 34 N.C. App. 205, 237 S.E.2d 550 (1977).

The trial court did not err in instructing the jury regarding defendant's failure to testify even though defendant did not request the instruction. State v. Hill, 34 N.C. App. 347, 238 S.E.2d 201 (1977).

Language of Statute Should Be Used. — The better practice is for the trial judge to use the language employed in this section without additions if there is a request for such instructions. State v. Powell, 11 N.C. App. 465, 181 S.E.2d 754, cert. denied, 279 N.C. 396, 183 S.E.2d 243 (1971).

Trial court's instruction that the jury must be very careful not to allow defendant's silence to influence their decision in any way did not constitute prejudicial error, though an instruction more nearly in the language of this section would have been preferable. State v. House, 17 N.C. App. 97, 193 S.E.2d 327 (1972); State v. Phifer, 17 N.C. App. 101, 193 S.E.2d 413 (1972), cert. denied, 283 N.C. 108, 194 S.E.2d 636 (1973).

An instruction which incorporates the precise language of this section is not only acceptable, but it has often been suggested as being the preferred instruction. State v. Penland, 20 N.C. App. 73, 200 S.E.2d 672 (1973), appeal dismissed, 284 N.C. 621, 201 S.E.2d 692 (1974).

Trial judge's instruction to the jury that they "should" not consider defendant's failure to take the stand against him, rather than that they "shall" not consider his failure to take the stand against him, was not error. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

While it is better practice to use the words of the statute, i.e., "shall not create any presumption against him," the use of the words "should not" in an instruction concerning defendant's failure to testify was not such error as to require a new trial. State v. Boone, 293 N.C. 702, 239 S.E.2d 459 (1977).

4. Improper.

Erroneous Instructions. — While the interpretations of this section require defendant's testimony to be scrutinized, it was the province of the jury to determine from his demeanor and the attending circumstances the weight which they would accord his testimony, and a charge of the court that "the law presumes" that he is naturally laboring under the temptation to testify to whatever he thinks may be necessary to clear himself and that the jury should take into consideration what a conviction would mean to defendant, etc., was held to impose a burden and cast a shadow upon his testimony greater than the law required and constituted reversible error. State v. Wilcox, 206 N.C. 691, 175 S.E. 122 (1934).

While it is proper for the court to instruct the jury to scrutinize testimony of a defendant in a criminal prosecution because of his interest in the verdict, it was error for the court to fail to follow such instructions with a charge that if after such scrutiny the jury found him worthy of belief they should give his testimony as full credit as they would that of any other witness. State v. Dee, 214 N.C. 509, 199 S.E. 730 (1938).

A charge to the jury to "very carefully and very cautiously scrutinize" defendant's testimony is not to be commended. State v. Auston, 223 N.C. 203, 25 S.E.2d 613 (1943).

Instruction that the defendants "did not offer any evidence as they have the right to do" was incomplete and prejudicially erroneous. State v. Baxter, 285 N.C. 735, 208 S.E.2d 696 (1974).

§ 8-55. Testimony enforced in certain criminal investigations; immunity.

If any justice, judge or magistrate of the General Court of Justice shall have good reason to believe that any person within his jurisdiction has knowledge of the existence and establishment of any faro bank, faro table or other gaming table prohibited by law, or of any place where intoxicating liquors are sold contrary to law, in any town or county within his jurisdiction, such person not being minded to make voluntary information thereof on oath, then it shall be lawful for such justice, magistrate, or judge to issue to the sheriff of the county in which such faro bank, faro table, gaming table, or place where intoxicating liquors are sold contrary to law is supposed to be a subpoena, capias ad testificandum, or other summons in writing, commanding such person to appear immediately before such justice, magistrate, or judge and give evidence on oath as to what he may know touching the existence, establishment and whereabouts of such faro bank, faro table or other gaming table, or place where intoxicating liquors are sold contrary to law, and the name and personal description of the keeper thereof. Such evidence, when obtained, shall be considered and held in law as an information on oath, and the justice, magistrate or judge may thereupon proceed to seize and arrest such keeper and destroy such table, or issue process therefor as provided by law. No person shall be excused, on any prosecution, from testifying touching any unlawful gaming

done by himself or others; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offenses so done or participated in by him. (R. C., c. 35, s. 50; 1858-9, c. 34, s. 1; Code, ss. 1050, 1215; 1889, c. 355; Rev., ss. 1637, 3721; 1913, c. 141; C. S., s. 1800; 1969, c. 44, s. 22; 1971, c. 381, s. 4.)

CASE NOTES

Section Constitutional. — This section is not unconstitutional by reason of the Fifth Amendment to the Constitution of the United States, because it does not apply to the State; nor does it violate N.C. Const., Art. I, § 11 (now see Const., Art. I, § 23), for the reason that the said statute grants a pardon to the witness. In re Briggs, 135 N.C. 118, 47 S.E. 403 (1904).

Witness Compellable to Testify. — In a prosecution for gaming a witness may be compelled to testify, although his answer tends to criminate him, since he is pardoned for the offense. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Cited in State v. Foster, 228 N.C. 72, 44 S.E.2d 447 (1947).

§ 8-56. Husband and wife as witnesses in civil action.

In any trial or inquiry in any suit, action or proceeding in any court, or before any person having, by law or consent of parties, authority to examine witnesses or hear evidence, the husband or wife of any party thereto, or of any person in whose behalf any such suit, action or proceeding is brought, prosecuted, opposed or defended, shall, except as herein stated, be competent and compellable to give evidence, as any other witness on behalf of any party to such suit, action or proceeding. Nothing herein shall render any husband or wife competent or compellable to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery; or in any action or proceeding for or on account of criminal conversation, except that in actions of criminal conversation brought by a married person in which the character of the spouse is assailed, that spouse shall be a competent witness to testify in refutation of such charges: Provided, however, that in all such actions and proceedings, the husband or wife shall be competent to prove, and may be required to prove, the fact of marriage. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. (1866, c. 43, ss. 3, 4; C. C. P., s. 341; Code, s. 588; Rev., s. 1636; 1919, c. 18; C. S., s. 1801; 1945, c. 635; 1977, c. 547.)

Legal Periodicals. — For note on privileged communications between husband and wife, see 15 N.C.L. Rev 282.

As to competency of husband and wife to testify in action for criminal conversation, see 26 N.C.L. Rev. 206.

For note on privileged communications between husband and wife, see 46 N.C.L. Rev. 643 (1968).

For note on testimony by one spouse against the other of adultery under North Carolina law, see 48 N.C.L. Rev. 131 (1969).

For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

CASE NOTES

I. General Consideration.
II. As Witness in Particular Actions.
A. Proceeding in Consequence of Adultery.
B. Divorce on Account of Adultery.
C. Criminal Conversation.
III. Confidential Communications.
A. What Constitutes.
B. Unprotected.

I. GENERAL CONSIDERATION.

Design of Section. — This legislation is based upon the gravest reasons of public policy and is designed, not only to prevent collusion where the same exists, but to remove the opportunity for it. Hicks v. Hicks, 4 N.C. App. 28, 165 S.E.2d 681, reversed on other grounds, 275 N.C. 370, 167 S.E.2d 761 (1969).

Coverage of Section. — Husbands and wives are competent and compellable to give evidence for or against each other, save only in the particular cases mentioned in the section. Barringer v. Barringer, 69 N.C. 179 (1873).

Common Law. — At common law, husband and wife could not testify in an action to which either was a party. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969); Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Section Applies to Answers to Interrogatories. — The provisions of this section and § 50-10 which render a husband or wife an incompetent witness apply to answers to interrogatories as well as to testimony at trial. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

The provision of Rule 26(b) of the Rules of Civil Procedure that "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony [now "information"] sought appears reasonably calculated to lead to the discovery of admissible evidence" refers only to testimony that will or might be inadmissible at trial. This section and § 50-10 are distinguishable from Rule 26(b) in that they relate to the disqualification of husband or wife as a witness with reference to specific matters, not to the admissibility or inadmissibility of the testimony of a qualified witness. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Applied in Rouse v. Creech, 203 N.C. 378, 166 S.E. 174 (1932); Watts v. Watts, 44 N.C. App. 46, 260 S.E.2d 170 (1979).

Quoted in Earles v. Earles, 26 N.C. App. 559, 216 S.E.2d 739 (1975).

Cited in Nelson v. Nelson, 197 N.C. 465, 149 S.E. 585 (1929).

II. AS WITNESS IN PARTICULAR ACTIONS.

A. Proceeding in Consequence of Adultery.

Public policy demands that the wife be protected against the absolute defense of adultery which the husband seeks to prove by his own testimony. Hicks v. Hicks, 275 N.C. 370, 167 S.E.2d 761 (1969).

Action for Alimony as Action "in Consequence of Adultery". — A husband's interposition of the plea of adultery in the wife's action for alimony and alimony pendente lite converted the action into an "action or proceeding in consequence of adultery" within the meaning of this section. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

Neither Husband Nor Wife May Testify in Action or Proceeding in Consequence of Adultery. — Under this section and § 50-10, neither a husband nor a wife is a competent witness in any action inter se to give evidence for or against the other in any action or proceeding in consequence of adultery, or in any action or proceeding for divorce on account of adultery, and may not be compelled to give such evidence. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972); Greene v. Greene, 15 N.C. App. 314, 190 S.E.2d 258, appeal withdrawn, 282 N.C. 151, 191 S.E.2d 365 (1972).

B. Divorce on Account of Adultery.

Divorce for Adultery. — In divorce action for alleged adultery, neither the husband nor the wife is a competent witness. Horne v. Horne, 75 N.C. 101 (1876); Perkins v. Perkins, 88 N.C. 41 (1883); Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964).

A husband could not be compelled to testify in support of the admissibility of photographs showing him engaged in various acts of adultery in an action by the wife for alimony on the ground of adultery, since the action for alimony without divorce was a divorce action encompassed by the provisions of

this section and § 50-10 and a husband cannot be compelled to give testimony in support of his wife's allegation that he committed adultery. VanDooren v. VanDooren, 37 N.C. App. 333, 246 S.E.2d 20, cert. denied, 295 N.C. 653, 248 S.E.2d 258 (1978).

C. Criminal Conversation.

In a wife's action for criminal conversation with her husband and the alienation of his affections, testimony by the wife relative to statements made to her by her husband tending to show his illicit relationship with defendant were incompetent. Knighten v. McClain, 227 N.C. 682, 44 S.E.2d 79 (1947).

Action by Husband. — In an action for criminal conversation wherein the husband had testified to immoral relations between his wife and the defendant, the wife was a competent witness for the defendant for the purpose of refuting the charges made against her character. Chestnut v. Sutton, 204 N.C. 476, 168 S.E. 680 (1933).

III. CONFIDENTIAL COMMUNICATIONS.

A. What Constitutes.

Confidential Communications — Defined. — The confidential communications made between husband and wife which neither will be compelled to disclose, are those which are communicated "during their marriage." Whitford v. North State Life Ins. Co., 163 N.C. 223, 79 S.E. 501 (1913).

Same — Protected. — The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895).

A confidential communication between husband and wife is privileged and neither spouse may be compelled to disclose it when testifying as a witness. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Whatever is known by reason of that intimacy [marriage] should be regarded as knowledge confidentially acquired, and neither husband nor wife should be allowed to divulge it to the danger or disgrace of the other. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

A tape recording, made by the husband without the wife's knowledge, of a conversation between them while alone, except for the presence of their eight-year-old child who was singing and playing at the time, was incompetent evidence over the wife's objection. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Letters from Husband to Wife. — In a suit in equity to set aside a judgment rendered in an action at law for fraud, letters from the plaintiff in the former action to his wife respecting fraud in that action were properly excluded, when the letters were obtained by a third party with the consent of the wife, the letters being privileged communications and inadmissible against either the husband or the wife. McCoy v. Justice, 199 N.C. 602, 155 S.E. 452 (1930).

Acts of Sexual Intercourse Are "Confidential Communications". — In the wife's action for alimony and alimony pendente lite, the wife may not be compelled to answer interrogatories which seek to elicit her answers under oath as to acts of sexual intercourse between the husband and wife, since such an act is a "confidential communication" within the meaning of this section. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972).

B. Unprotected.

Communications Not Protected. — Only confidential communications are within the rule; hence a communication made in the known presence of a third person, or one relating to business matters which in their nature might be expected to be divulged, is not protected. Hicks v. Hicks, 271 N.C. 204, 155 S.E.2d 799 (1967).

Where a witness for the State had written a letter to his wife, and his wife, without his knowledge or consent, had given the letter to the defendant, the witness could not be cross-examined relative to the letter in an attempt to prove bias. State v. Banks, 204 N.C. 233, 167 S.E. 851 (1933).

Admission of a police officer's testimony that he heard defendant say to his wife, "I am in real trouble this time" did not violate the marital privilege since the communication was not confidential as it was made within the hearing of a third party, and at any rate the privilege refers only to testimony by a spouse about the confidential communication. State v. Setzer, 42 N.C. App. 98, 256 S.E.2d 485 (1979).

Testimony by plaintiff-wife concerning unnatural sex acts between the plaintiff and the defendant-husband was not rendered inadmissible by this section which establishes a spousal privilege applicable to the testimony of husband or wife in any action or proceeding in consequence of adultery. An application of this section is not proper when the testimony regarding sexual conduct is offered to establish constructive abandonment in a temporary alimony proceeding. Haddon v. Haddon, 42 N.C. App. 632, 257 S.E.2d 483 (1979).

§ 8-57. Husband and wife as witnesses in criminal actions.

The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness

to be examined shall not be used to the prejudice of the defense. Every such person examined as a witness shall be subject to be cross-examined as are other witnesses. No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage. Nothing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding, except to prove the fact of marriage and facts tending to show the absence of divorce or annulment in cases of bigamy and in cases of criminal cohabitation in violation of the provisions of G.S. 14-183, and except that in all criminal prosecutions of a spouse for an assault upon the other spouse, all criminal prosecutions of a spouse for communicating a threat to the other spouse, or in any criminal prosecution of a spouse for trespass in or upon the separate residence of the other spouse when living separate and apart from each other by mutual consent or by court order, or for any criminal offense against a legitimate or illegitimate or adopted or foster minor child of either spouse, or for abandonment, or for neglecting to provide for the spouse's support, or the support of the children of such spouse, it shall be lawful to examine a spouse in behalf of the State against the other spouse: Provided that this section shall not affect pending litigation relating to a criminal offense against a minor child. (1856-7, c. 23; 1866, c. 43; 1868-9, c. 209; 1881, c. 110; Code, ss. 588, 1353, 1354; Rev., ss. 1634, 1635, 1636; C. S., s. 1802; 1933, c. 13, s. 1; c. 361; 1951, c. 296; 1957, c. 1036; 1967, c. 116; 1971, c. 800; 1973, c. 1286, s. 11.)

Legal Periodicals. — For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

For survey of 1976 case law on evidence, see 55 N.C.L. Rev. 1033 (1977).

CASE NOTES

I. General Consideration.
A. Spouse Incompetent to Testify.
B. Application in Particular Actions.
II. Failure to Testify.
III. Cross-Examination of Spouse.
IV. Confidential Communications.
V. Actions in Which Spouse Competent to Testify.

I. GENERAL CONSIDERATION.

A. Spouse Incompetent to Testify.

Common Law. — At common law the husband or wife of the defendant in a criminal case was incompetent to testify either for the State or for the defense. State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968).

At common law, a husband or a wife was incompetent to testify either for or against his or her defendant-spouse in a criminal action. This section changed this rule to the effect that a husband or a wife can testify for a defendant-spouse. The common law rule remains in effect, however, regarding testimony against a spouse in a criminal action. State v. Suits, 296 N.C. 553, 251 S.E.2d 607 (1979).

Effect of Section. — Under this section the husband or wife is a competent witness for the defendant in all criminal actions or proceedings. But neither is competent or compellable to give evidence against the other in any criminal proceeding. State v. Harbison, 94 N.C. 885 (1886). See State v. Watson, 215 N.C. 387, 1 S.E.2d 886 (1939).

Under this section a wife is neither competent nor compellable to testify against her husband in a criminal proceeding, hence, hearsay evidence of her declarations, not made in his presence or by his authority, which would be prejudicial to the husband, is inadmissible. State v. Reid, 178 N.C. 745, 101 S.E. 104 (1919). See State v. Cotton, 218 N.C. 577, 12 S.E.2d 246 (1940).

This section in effect forbids the testimony of one spouse against another in criminal proceedings unless the case falls within one of the exceptions enumerated in the statute. State v. Reavis, 19 N.C. App. 497, 199 S.E.2d 139 (1973).

Applicability to Common-Law Marriages. — Common-law marriages are invalid in North Carolina. Hence, the husband-wife testimonial privilege granted in this section may not be asserted by a criminal defendant to disqualify a witness alleged to be his spouse by virtue of a common-law marriage contracted in North Carolina. This State, however, will recognize as valid a common-law marriage if the acts alleged to have created it took place in

a state in which such a marriage is valid. State v. Alford, 298 N.C. 465, 259 S.E.2d 242 (1979).

Effect of Termination of Marital Relation. — When the marital relationship terminates, the asserted reasons for this section, the preservation of the sanctity of the home and the fictional oneness of husband and wife, are no longer pertinent; but evidence that defendant and his wife were experiencing less than harmonious marital relations is insufficient to terminate the privilege. State v. Reavis, 19 N.C. App. 497, 199 S.E.2d 139 (1973).

This section is an evidentiary rule and applies to a spouse testifying, or to the admission of a statement by a spouse into evidence. State v. Cousin, 291 N.C. 413, 230 S.E.2d 518 (1976).

This section was not intended to prohibit, and it does not prohibit, a husband or wife from making voluntary statements to police officers during the investigatory stage of a criminal proceeding. State v. Aaron, 29 N.C. App. 582, 225 S.E.2d 117, cert. denied, 290 N.C. 663, 228 S.E.2d 455 (1976), cert. denied, 430 U.S. 908, 97 S. Ct. 1180, 51 L. Ed. 2d 585 (1977).

Act May Be Declaration. — An act by a spouse, such as a gesture, can be a declaration within the meaning of this rule. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

An oral statement is not the only type of evidence that must be excluded as a "declaration" of a spouse. An act, such as gesture, can be a declaration within the meaning of this rule. State v. Suits, 296 N.C. 553, 251 S.E.2d 607 (1979).

Failure to Exclude Incompetent Testimony. — When evidence rendered incompetent by this section was admitted, it became the duty of the trial judge to exclude the testimony, and his failure to do so must be held reversible error whether exception was noted or not. State v. Porter, 272 N.C. 463, 158 S.E.2d 626 (1968).

Where evidence is rendered incompetent by this section, it is the duty of the trial judge to exclude it, and his failure to do so is reversible error, whether objection is interposed and exception noted or not. State v. Thompson, 290 N.C. 431, 226 S.E.2d 487 (1976); State v. McKenzie, 46 N.C. App. 34, 264 S.E.2d 391 (1980).

B. Application in Particular Actions.

Discretion of Trial Judge. — Where the defendant husband was alleged to have stolen certain property, it was competent for him to introduce his wife as a witness to prove from what source he got the money to pay for such property, but unless he introduced her in proper time it rested within the discretion of the trial judge whether her testimony would be received. State v. Lemon, 92 N.C. 790 (1885).

Consolidation of Prosecutions against Husband and Wife. — Where husband and wife were separately indicted for the same homicide and the prosecutions were consolidated and tried together over their objections, and the wife's testimony, though admitted only as to her, was to the effect that her husband killed deceased and forced her, through fear, to confess and attempt to exculpate him, her testimony was necessarily inculpatory of the husband and impinged this section, and his motion for a mistrial and severance at the conclusion of the State's evidence should have been granted. State v. Cotton, 218 N.C. 577, 12 S.E.2d 246 (1940).

A wife under this section was not competent to testify against her husband in a prosecution for felonious burning and the admission of her testimony entitled him to a new trial. State v. Kluttz, 206 N.C. 726, 175 S.E. 81 (1934).

Husband's Extrajudicial Statement Implicating Codefendant Wife. — Where testimony disclosed that any part of the husband's extrajudicial statement implicating the codefendant wife was deleted by the State, there was no violation of the rule of this section. State v. Mathis, 13 N.C. App. 359, 185 S.E.2d 448 (1971).

Spouse's Conduct As Declaration. — Where in response to the officer's inquiry as to whether the defendant had a knife, the jury was informed that the defendant's wife left the room and returned with a pocket knife, identified as State's Exhibit Number 3, this conduct was equivalent to the wife stating, "Yes, the defendant has a knife, and here it is." Thus, the court committed prejudicial error in allowing the police officer to testify to the wife's actions. State v. Suits, 296 N.C. 533, 251 S.E.2d 607 (1979).

Adultery Prior to Marriage. — Where a man and woman are indicted for fornication and adultery, and a nol. pros. is entered as to the feme defendant, the husband of the woman is a competent witness to show adultery between the defendants committed before the marriage of the woman and the witness. State v. Wiseman, 130 N.C. 726, 41 S.E. 884 (1902).

Competency of Divorced Parties. — A divorced husband is incompetent to testify against the divorced wife in the trial of an indictment against her for fornication and adultery which occurred prior to the divorce. State v. Raby, 121 N.C. 682, 28 S.E. 490 (1877).

Where the former husband or wife is prosecuted for a felony, the divorced spouse is a competent witness to testify for the State as to what occurred during the subsistence of their marriage in his or her presence when the alleged felony was being committed. State v. Alford, 274 N.C. 125, 161 S.E.2d 575 (1968).

Applied in State v. Spain, 3 N.C. App. 266, 164 S.E.2d 486 (1968); State v. Ward, 34 N.C. App. 598, 239 S.E.2d 291 (1977).

Stated in State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972).

Cited in State v. Byrd, 21 N.C. App. 734, 205 S.E.2d 326 (1974); State v. Phifer, 290 N.C. 203, 225 S.E.2d 786 (1976); State v. Thompson, 293 N.C. 713, 239 S.E.2d 465 (1977).

II. FAILURE TO TESTIFY.

Failure of Wife to Appear and Testify. —The failure of the wife to be examined as a witness in behalf of a husband tried for a criminal offense, is expressly excluded as evidence to the husband's prejudice by this section, though she was competent to testify. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

Where the trial judge had properly excluded from the consideration by the jury, testimony relating to the wife's failure to appear and testify in behalf of her husband on his trial for a homicide, the defendant could not successfully complain of error on appeal in the failure of the trial judge to again instruct the jury thereon, when there had been no exception taken to the charge of the court or the refusal of any prayer for instruction on the subject. State v. Harris, 181 N.C. 600, 107 S.E. 466 (1921).

During the absence of the judge, the solicitor [now district attorney] in his argument to the jury called the jury's attention to the fact that defendant's wife had not testified in his behalf, and persisted in the argument after objection by defendant's counsel. Upon its return, the court sustained the objection, and near the conclusion of its charge to the jury stated that the law did not permit such comment and that the jury should not let the argument influence it. The solicitor's [now district attorney] comment violated this section, and was prejudicial, and called for prompt peremptory and certain caution by the court, not only that the argument should be disregarded, but that the failure of defendant's wife to testify should not be considered to his prejudice, and the action of the court in merely sustaining the objection and the caution later given by the court near the conclusion of the charge was insufficient to free the case of prejudice. State v. Helms, 218 N.C. 592, 12 S.E.2d 243 (1940).

Failure to Instruct as to Failure of Wife to Appear and Testify. — In a prosecution for first-degree murder, where the district attorney in his argument to the jury used the failure of defendant's wife to testify on defendant's behalf to the prejudice of the defense, the failure of the trial judge to intervene on his own motion and promptly instruct the jury that the wife's failure to testify and the improper argument regarding that fact must be disregarded and under no circumstances used to the prejudice of the defendant was reversible error. State v. McCall, 289 N.C. 570, 223 S.E.2d 334 (1976).

Or Instruct Concerning Such Evidence Improperly Placed before Jury. — When evidence forbidden by this section was argumentatively placed before the jury and used to the prejudice of the defense, it was the duty of the judge ex mero motu to intervene and promptly instruct the jury that the wife's failure to testify and the improper argument concerning that fact had to be disregarded and under no circumstances used to the prejudice of the defendant. State v. Thompson, 290 N.C. 431, 226 S.E.2d 487 (1976).

III. CROSS-EXAMINATION OF SPOUSE.

Scope. — A wife cannot be compelled to testify against her husband in a criminal action; but when she takes the stand in his behalf, she is subject to cross-examination in the same manner and to the same extent as any other witness. State v. Tola, 222 N.C. 406, 23 S.E.2d 321 (1942).

Where defendant's wife testifies in his behalf, she is subject to be cross-examined to the same extent as if unrelated to him. State v. Bell, 249 N.C. 379, 106 S.E.2d 495 (1959).

When defendant's wife was examined as witness for defendant, she was therefore subject to be cross-examined to the same extent as if unrelated to him. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

As to Prior Inconsistent Statements. — In a prosecution for murder committed in the perpetration of an armed robbery and for conspiracy to commit armed robbery, if based on information and asked in good faith, it was permissible for the district attorney to ask defendant's wife about her prior inconsistent statements as they related to her previous relationship with the trigger man for purposes of impeachment. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

IV. CONFIDENTIAL COMMUNICATIONS.

Admission Prohibited. — The confidential communications between husband and wife cannot, on the grounds of public policy, be admitted in evidence. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895).

Declarations of Wife Not Made in Husband's Presence. — Testimony of a State's witness of a declaration of defendant's wife to the effect that if defendant had not been driving so slow "he wouldn't have been caught" entitled defendant to a new trial notwithstanding his failure to move to strike the answer, since testimony of the wife against the husband was forbidden by this section, and a fortiori her

declarations against him not made in his presence or by his authority were precluded by this section. State v. Warren, 236 N.C. 358, 72 S.E.2d 763 (1952); State v. Dillahunt, 244 N.C. 524, 94 S.E.2d 479 (1956).

The statutory prohibition against compelling a spouse to give evidence against the other spouse has been extended to testimony concerning declarations made by the husband or wife of the defendant, while not in the presence of the defendant, even though there was no objection interposed to such testimony. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Communication Not Included. — Testimony of a witness, that at the time of the arrest of the defendant by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," was not a confidential communication between husband and wife within the contemplation of this section and could be testified to by the witness who was present and heard it, and was some evidence of guilt in connection with the other evidence in the case. State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929).

V. ACTIONS IN WHICH SPOUSE COMPETENT TO TESTIFY.

Abandonment of Wife. — Under this section the wife is a competent witness against her husband as to the fact of abandonment, or neglect to provide adequate support. State v. Brown, 67 N.C. 470 (1872).

Proof of Marriage. — The wife is competent to prove the fact of marriage under an indictment against her husband for abandonment. State v. Chester, 172 N.C. 946, 90 S.E. 697 (1916).

Same — Bigamy. — In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage, public cohabitation as man and wife being public acknowledgments of the relation and not coming within the nature of the confidential relations which the policy of the law forbids either to give in evidence. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897). See also State v. McDuffie, 107 N.C. 885, 12 S.E. 83 (1890).

By the express provisions of this section, defendant's legal wife was a comptent witness before the grand jury, which was considering an indictment against him charging him with a violation of the provisions of § 14-183, "to prove the fact of marriage . . . ." State v. Vandiver, 265 N.C. 325, 144 S.E.2d 54 (1965).

Same — Bigamous Cohabitation. — Prior to the 1957 amendment to this section, it was held, while in a prosecution for bigamous cohabitation, as in a prosecution for bigamy, the wife was competent to testify against the husband to prove the face of marriage, her testimony was limited to proof of the fact of marriage and any testimony by her as to other incriminating facts, such as testimony tending to show that they had not been divorced, was incompetent. State v. Setzer, 226 N.C. 216, 37 S.E.2d 513 (1946); State v. Hill, 241 N.C. 409, 85 S.E.2d 411 (1955).

Assault. — In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats was not inadmissible under the provisions of this section, but was admissible for the purpose of showing knowledge and identifying the perpetrators of the crime, and was distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery. State v. Alderman, 182 N.C. 917, 110 S.E. 59 (1921).

The rule that neither the husband nor wife is competent to testify against the other in criminal cases does not apply to proof of assault by the one upon the other. State v. French, 203 N.C. 632, 166 S.E. 747 (1932).

Effect of Marriage Subsequent to Assault. — The fact that subsequent to an assault the defendant married the prosecuting witness did not render her an incompetent witness against him at the trial. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

Felony Committed by One Spouse against the Other. — It appears that an exception the general common-law rule that one spouse is not a competent witness against the other in a criminal proceeding is applicable where one spouse is tried for a felony committed against the other spouse. State v. Robinson, 15 N.C. App. 362, 190 S.E.2d 270, cert. denied, 281 N.C. 762, 191 S.E.2d 363 (1972).

Where defendant was charged with a serious felony which she and others allegedly perpetrated against the man she contended was her husband, the public's interest in having her brought to justice far outweighed any conceivable interest the public might have in precluding her alleged husband from testifying against her. State v. Robinson, 15 N.C. App. 362, 190 S.E.2d 270, cert. denied, 281 N.C. 762, 191 S.E.2d 363 (1972).

Threats. — In a homicide case, where there was a plea and evidence of self-defense, it was competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. State v. Rice, 222 N.C. 634, 24 S.E.2d 483 (1943).

§ 8-57.1. Husband-wife privilege waived in child abuse.

Notwithstanding the provisions of G.S. 8-56 and G.S. 8-57, the husband-wife privilege shall not be ground for excluding evidence regarding the abuse or neglect of a child under the age of 16 years or regarding an illness of or injuries to such child or the cause thereof in any judicial proceeding related to a report pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes of North Carolina. (1971, c. 710, s. 3.)

Editor's Note. — Article 8 of Chapter 110, referred to in this section, was repealed by Session Laws 1979, c. 815, s. 2, effective Jan. 1, 1980. For present provisions as to the screening of abuse and neglect complaints, see §§ 7A-542 through 7A-552.

Legal Periodicals. — For comment surveying North Carolina law of relational privilege, see 50 N.C.L. Rev. 630 (1972).

§ 8-57.2. Presumed father or mother as witnesses where paternity at issue.

Whenever an issue of paternity of a child born or conceived during a marriage arises in any civil or criminal proceeding, the presumed father or the mother of such child is competent to give evidence as to any relevant matter regarding paternity of the child, including nonaccess to the present or former spouse, regardless of any privilege which may otherwise apply. No parent offering such evidence shall thereafter be prosecuted based upon that evidence for any criminal act involved in the conception of the child whose paternity is in issue and/or for whom support is sought, except for perjury committed in this testimony. (1981, c. 634, s. 1.)

Editor's Note. — Session Laws, 1981, c. 634, s. 2, makes the act effective Oct. 1, 1981.

§ 8-58: Repealed by Session Laws 1973, c. 1286, ss. 11, 26.

Cross References. — See Editor's note following the analysis to Chapter 15.

§§ 8-58.1 to 8-58.5: Reserved for future codification purposes.

Article 7A.

Restrictions on Evidence in Rape Cases.

§ 8-58.6. Restrictions on evidence in rape or sex offenses cases.

(a) As used in this section, the term "sexual behavior" means sexual activity of the complainant other than the sexual act which is at issue in the indictment on trial.

(b) The sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior:

(1) Was between the complaint and the defendant; or

(2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant; or

(3) Is evidence of a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to lead the defendant reasonably to believe that the complainant consented; or

(4) Is evidence of sexual behavior offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged.

(c) No evidence of sexual behavior shall be introduced at any time during the trial of a charge of rape or any lesser included offense thereof or a sex offense or any lesser included offense thereof, nor shall any reference to any such behavior be made in the presence of the jury, unless and until the court has determined that such behavior is relevant under subsection (b). Before any questions pertaining to such evidence are asked of any witness, the proponent of such evidence shall first apply to the court for a determination of the relevance of the sexual behavior to which it relates. The proponent of such evidence may make application either prior to trial pursuant to G.S. 15A-952, or during the trial at the time when the proponent desired to introduce such evidence. When application is made, the court shall conduct an in-camera hearing, which shall be transcribed, to consider the proponent's offer of proof and the arguments of counsel, including any counsel for the complainant, to determine the extent to which such behavior is relevant. In the hearing, the proponent of the evidence shall establish the basis of admissibility of such evidence. If the court finds that the evidence is relevant, it shall enter an order stating that the evidence may be admitted and the nature of the questions which will be permitted.

(d) The record of the in-camera hearing and all evidence relating thereto shall be open to inspection only by the parties, the complainant, their attorneys and the court and its agents, and shall be used only as necessary for appellate review. At any probable cause hearing, the judge shall take cognizance of the evidence, if admissible, at the end of the in-camera hearing without the questions being repeated or the evidence being resubmitted in open court. (1977, c. 851, s. 1; 1979, c. 682, s. 8.)

Editor's Note. — Session Laws 1979, c. 682, ss. 13 and 14, provide: "Sec. 13, All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Legal Periodicals. — For a survey of 1977 law on evidence, see 56 N.C.L. Rev. 1069 (1978).

For a note on the rape victim shield statute, see 3 Campbell L. Rev. 113 (1981).

CASE NOTES

Codification of Rule of Relevance. — This section is nothing more than a codification of this jurisdiction's rule of relevance as that rule specifically applies to the past sexual behavior of rape victims. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980).

Section Does Not Violate Defendant's Right to Confront Witnesses. — This section, referred to as the rape victim shield statute, does not violate a rape defendant's constitutional right to confront the witnesses against him because it prevents him from automatically questioning the victim about her prior sexual experience since (1) there is no constitutional right to ask a witness questions that are irrelevant, (2) the statute is primarily procedural in its impact and application and does not alter any of the defendant's substantive rights, and (3) there are valid policy reasons, aside from questions of relevance,

which support the statute. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980).

This section changes the rule of evidence in such a way that matters collateral to the issues on trial may not be introduced into evidence, and this change in the rule of evidence does not violate a defendant's constitutional right to cross-examine witnesses who appear against him. State v. Porter, 48 N.C. App. 565, 269 S.E.2d 266 (1980).

Naked inferences of prior sexual activity by a rape victim with third persons, without more, are irrelevant to the defense of consent in a rape trial. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980).

Evidence of Discussion Between Complainant and Defendant Inadmissible. — In a prosecution for rape, evidence of a discussion between the complainant and defendant concerning the complainant's sexual problems was not admissible under subdivision (b)(1) of this section since such discussion did not constitute sexual behavior or activity between the complainant and defendant. State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980).

Evidence of Different Semen Stains on Victim's Clothing. — This section was not unconstitutionally applied to defendant when the trial court excluded evidence that three different semen stains were found on clothing worn by an alleged rape victim since the inference raised by such evidence — that the victim had had sex with two persons other than defendant at some time prior to the sexual acts in question — was not probative of the victim's consent to those acts. State v. Fortney, 301 N.C. 31, 269 S.E.2d 110 (1980).

Evidence of Prosecutrix' Moral Environment Irrelevant Where Defendant Denies Act of Intercourse. — Whether the prosecutrix in a prosecution for second degree rape lived in an environment of sexual immorality or in a cloistered convent has no relevance to the issues in a case where defendant denies that any act of intercourse or other assault took place. State v. McLean, 294 N.C. 623, 242 S.E.2d 814 (1978), decided prior to the effective date of this section.

Decisions of Trial Court at Voir Dire Hearing Held Proper. — In a prosecution for assault with intent to commit rape, the trial court did not err in refusing to permit defendant to testify at a voir dire hearing to determine whether testimony as to prior conduct of the prosecutrix was admissible under subdivision (b)(3) of this section as evidence of a pattern of sexual behavior closely resembling defendant's version of the alleged encounter and in postponing its ruling on the admissibility of the testimony of prior conduct until after it had heard defendant's version of the events in question. State v. White, 48 N.C. App. 589, 269 S.E.2d 323 (1980).

Applied in State v. Milano, 297 N.C. 485, 256 S.E.2d 154 (1979).

§§ 8-58.7 to 8-58.11: Reserved for future codification purposes.

Article 7B.

Expert Testimony.

§ 8-58.12. Hypothetical question not required.

There shall be no requirement that expert testimony be in response to a hypothetical question. (1981, c. 543, s. 1.)

Editor's Note. — Session Laws 1981, c. 543, s. 4, makes the act effective Oct. 1, 1981.

§ 8-58.13. Opinion testimony permitted.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. (1981, c. 543, s. 2.)

§ 8-58.14. Disclosure of facts or data underlying expert opinion.

Upon trial the expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests, otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or voir dire before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination. (1981, c. 543, s. 3.)

Article 8.

Attendance of Witness.

§ 8-59. Issue and service of subpoena.

In obtaining the testimony of witnesses in causes pending in the trial divisions of the General Court of Justice, subpoenas shall be issued and served in the manner provided in Rule 45 of the Rules of Civil Procedure for civil actions. Provided that in criminal cases any law-enforcement officer authorized to make arrests and employed by a local law-enforcement agency may effect service of a subpoena for the attendance of witnesses by telephone communication with the person named. However, in the case of a witness served by telephone communication pursuant to this section, neither an order to show cause nor an order for arrest shall be issued until such person has been served personally with the written subpoena. (1777, c. 115, s. 36, P. R.; R. C., c. 31, s. 59; Code, s. 1355; Rev., s. 1639; C. S., s. 1803; 1959, c. 522, s. 2; 1967, c. 954, s. 3; 1971, c. 381, s. 5; 1981, c. 267.)

Effect of Amendments. — The 1981 amendment added the second and third sentences.

Local Modification. — Cumberland: 1957, c. 1324, s. 2.

Cross References. — As to duty of clerk to issue subpoena, see § 7A-103.

Editor's Note. — Rule 45 of the Rules of Civil Procedure, referred to in this section, is found in § 1A-1.

CASE NOTES

Applied in State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

Stated in North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976).

§ 8-60: Repealed by Session Laws 1967, c. 954, s. 4.

§ 8-61. Subpoena for the production of documentary evidence.

Subpoenas for the production of records, books, papers, documents, or tangible things may be issued in criminal actions in the same manner as provided for civil actions in Rule 45 of the Rules of Civil Procedure. (1797, c. 476, P. R.; R. C., c. 31, s. 81; Code, s. 1372; Rev., s. 1641; C. S., s. 1805; 1967, c. 954, s. 3; c. 1168.)

Editor's Note. — Rule 45 of the Rules of Civil Procedure, referred to in this section, is found in § 1A-1.

§ 8-62: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — As to subpoenas after removal of cause, see § 1-87.

§ 8-63. Witnesses attend until discharge; effect of nonattendance.

Every witness, being summoned to appear in any of the said courts, in manner before directed, shall appear accordingly, and, subject to the provisions of G.S. 6-51, continue to attend from session to session until discharged, when summoned in a civil action or special proceeding, by the court or the party at whose instance such witness shall be summoned, or, when summoned in a criminal prosecution, until discharged by the court, the prosecuting officer, or the party at whose instance he was summoned; and in default thereof shall forfeit and pay, in civil actions or special proceedings, to the party at whose instance the subpoena issued, the sum of forty dollars ($40.00), to be recovered by motion in the cause, and shall be further liable to his action for the full damages which may be sustained for the want of such witness's testimony; or if summoned in a criminal prosecution shall forfeit and pay eighty dollars ($80.00) for the use of the State, or the party summoning him. If the civil action or special proceeding shall, in the vacation, be compromised and settled between the parties, and the party at whose instance such witness was summoned should omit to discharge him from further attendance, and for want of such discharge he shall attend the next session, in that case the witness, upon oath made of the facts, shall be entitled to a ticket from the clerk in the same manner as other witnesses, and shall recover from the party at whose instance he was summoned the allowance which is given to witnesses for their attendance, with costs.

No execution shall issue against any defaulting witness for the forfeiture aforesaid but after notice made known to him to show cause against the issuing thereof; and if sufficient cause be shown of his incapacity to attend, execution shall not issue, and the witness shall be discharged of the forfeiture without costs; but otherwise the court shall, on motion, award execution for the forfeiture against the defaulting witness. (1777, c. 115, ss. 37, 38, 43, P. R.; 1799, c. 528, P. R.; 1801, c. 591, P. R.; R. C., c. 31, ss. 60, 61, 62; Code, s. 1356; Rev., s. 1643; C. S., s. 1807; 1965, c. 284; 1971, c. 381, s. 12.)

Cross References. — As to payment of witness fees in advance, see § 6-51; as to announcement of discharge of witnesses, see § 6-62.

CASE NOTES

Duty to Attend. — When a subpoena has been served on a witness, he is required by this section to attend from term to term until discharged. State v. Gwynn, 61 N.C. 445 (1868).

Same — Attorney Not Exempt. — A witness who fails to appear when the case is called in which he has been subpoenaed to testify is not justified in his default because he is a practicing attorney at law and has cases to try in another county at the date upon which the case was called wherein he was a witness, and the party who subpoenaed him can recover the penalty, with the costs of the motions. In re Pierce, 163 N.C. 247, 79 S.E. 507 (1913).

Same — Where Service Had on Transient. — A witness, who is summoned in this State, while casually here, but who resides in another state, cannot be required to pay a forfeiture for nonattendance, if he has returned to his own state and is there at his domicile. Kinzey v. King, 28 N.C. 76 (1845).

Test of Inability to Attend. — Where a witness alleges that he was unable to attend court, this inability must be decided by reference to the modes of traveling which are in use in the community. Eller v. Roberts, 25 N.C. 11 (1842).

Nonattendance Need Not Be Willful. — This section does not require that the failure of the witness to attend should be "willful." In re Pierce, 163 N.C. 247, 79 S.E. 507 (1913).

When Witness May Elect. — Where two subpoenas are served upon a witness, requiring his attendance on the same day at different places distant from each other, he is not bound to obey the writ which may have been first served, but may make his election between them. Icehour v. Martin, 44 N.C. 478 (1853).

An issue in bastardy is not a "criminal prosecution" so as to subject a defaulting witness to the fine of eighty dollars ($80.00), prescribed by this section. Ward v. Bell, 52 N.C. 79 (1859).

Applied in State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

§ 8-64. Witnesses exempt from civil arrest.

Every witness shall be exempt from arrest in civil actions or special proceedings during his attendance at any court, or before a commissioner, arbitrator, referee, or other person authorized to command the attendance of such witness, and during the time such witness is going to and returning from the place of such attendance, allowing one day for every thirty miles such witness has to travel to and from his place of residence. (1777, c. 115, s. 44, P. R.; R. C., c. 31, s. 70; Code, s. 1367; Rev., s. 1644; C.S., s. 1808.)

CASE NOTES

Common-Law Rule Not Repealed. — This section does not serve to repeal the common-law rule of exemption of witnesses from civil arrest. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

Exemption Not Applicable to Criminal Proceeding. — The exemption of witnesses from civil arrest accorded by this section, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceedings. White v. Underwood, 125 N.C. 25, 34 S.E. 104 (1899).

Nonresident Attorney. — This section does not prevent service of summons on a nonresident attorney in this State to represent his clients in a matter pending in the federal court. Greenleaf v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).

Procedure for Claiming Exemption. — Where a party has not been granted the exemption from service of summons (which the courts seem to have placed on the same plane as the exemption from civil arrest), his remedy is not a motion to dismiss the action, but a motion, on special appearance, to set aside the return of service. Dell School v. Pierce, 163 N.C. 424, 79 S.E. 687 (1913). This is because the service is not void but voidable. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898).

ARTICLE 9.

Attendance of Witnesses from without State.

§§ 8-65 to 8-70: Transferred to §§ 15A-811 to 15A-816 by Session Laws 1973, c. 1286, s. 9.

ARTICLE 10.

Depositions.

§§ 8-71 to 8-73: Repealed by Session Laws 1967, c. 954, s. 4.

§ 8-74. Depositions for defendant in criminal actions.

In all criminal actions, hearings and investigations it shall be lawful for the defendant in any such action to make affidavit before the clerk of the superior

court of the county in which said action is pending, that it is important for the defense that he have the testimony of any person, whose name must be given, and that such person is so infirm, or otherwise physically incapacitated, or nonresident of this State, that he cannot procure his attendance at the trial or hearing of said cause. Upon the filing of such affidavit, it shall be the duty of the clerk to appoint some responsible person to take the deposition of such witness, which deposition may be read in the trial of such criminal action under the same rules as now apply by law to depositions in civil actions: provided, that the district attorney or prosecuting attorney of the district, county or town in which such action is pending have 10 days' notice of the taking of such deposition, who may appear in person or by representative to conduct the cross-examination of such witness. (Code, s. 1357; 1891, c. 522; 1893, c. 80; Rev., s. 1652; 1915, c. 251; C. S., s. 1812; 1971, c. 381, s. 6; 1973, c. 47, s. 2.)

Legal Periodicals. — For article discussing the constitutional considerations with respect to criminal discovery for the defense and prosecution, see 50 N.C.L. Rev. 437 (1972).

CASE NOTES

Section Does Not Entitle Defendant to List of State's Witnesses. — This section provides for taking the deposition of an incapacitated defense witness, whose name must be given to the court. Patently this section has no application to defendant's motion for a list of the State's witnesses. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

In the absence of a statute requiring the State to furnish it, the defendant in a criminal case is not entitled to a list of the State's witnesses who are to testify against him. There is no such statute in this State. State v. Hoffman, 281 N.C. 727, 190 S.E.2d 842 (1972).

Where there are several defendants in the same bill of indictment, it is not necessary to notify each of the others of the taking of a deposition by one for use as evidence on his behalf. State v. Finley, 118 N.C. 1161, 24 S.E. 495 (1896).

A deposition taken under this section is competent to be read in favor of one prisoner, although it contains testimony charging his codefendant with committing the crime. When so read, it is the duty of the presiding judge to instruct the jury that they are not to consider it as evidence against the codefendant thus charged with the crime, but only as evidence in favor of the prisoner who offers it. State v. Finley, 118 N.C. 1161, 24 S.E. 495 (1896).

§ 8-75: Repealed by Session Laws 1971, c. 381, s. 13.

§ 8-76. Depositions before municipal authorities.

Any board of aldermen, board of town or county commissioners or any person interested in any proceeding, investigation, hearing or trial before such board, may take the depositions of all persons whose evidence may be desired for use in said proceeding, investigation, hearing or trial; and to do so, the chairman of such board or such person may apply in person or by attorney to the superior court clerk of that county in which such proceeding, investigation, hearing or trial is pending, for a commission to take the same, and said clerk, upon such application, shall issue such commission, or such deposition may be taken by a notary public of this State or of any other state or foreign country without a commission issuing from the court; and the notice and proceedings upon the taking of said depositions shall be the same as provided for in civil actions; and if the person upon whom the notice of the taking of such deposition is to be served is absent from or cannot after due diligence be found within this State, but can be found within the county in which the deposition is to be taken, then, and in that case, said notice shall be personally served on such person by the commissioner appointed to take such deposition or by the notary taking such

deposition, as the case may be; and when any such deposition is returned to the clerk it shall be opened and passed upon by him and delivered to such board, and the reading and using of such deposition shall conform to the rules of the superior court. (1889, c. 151; Rev., s. 1653; C. S., s. 1814; 1943, c. 543.)

§ 8-77. Depositions in quo warranto proceedings.

In all actions for the purpose of trying the title to the office of clerk of the superior court, register of deeds, county treasurer or sheriff of any county, it shall be competent and lawful to take the deposition of witnesses before a commissioner or commissioners to be appointed by the judge of the district wherein the case is to be tried, or the judge holding the court of said district, or the clerk of the court wherein the case is pending, or a notary public, under the same rules as to time of notice and as to the manner of taking and filing the same as is now provided by law for the taking of depositions in other cases; and such depositions, when so taken, shall be competent to be read on the trial of such action, without regard to the place of residence of such witness or distance of residence from said place of trial: Provided, that the provisions of this section shall not be construed to prevent the oral examination, by either party on the trial, of such witnesses as they may summon in their behalf. (1889, c. 428; Rev., s. 1654; C. S., s. 1815; 1943, c. 543.)

§ 8-78. Commissioner may subpoena witness and punish for contempt.

Commissioners to take depositions appointed by the courts of this State, or by the courts of the states or territories of the United States, arbitrators, referees, and all persons acting under a commission issuing from any court of record in this State, are hereby empowered, they or the clerks of the courts respectively in this State, to which such commission shall be returnable, to issue subpoenas, specifying the time and place for the attendance of witnesses before them, and to administer oaths to said witnesses, to the end that they may give their testimony. And any witness appearing before any of the said persons and refusing to give his testimony on oath touching such matters as he may be lawfully examined unto shall be committed, by warrant of the person before whom he shall so refuse, to the common jail of the county, there to remain until he may be willing to give his evidence; which warrant of commitment shall recite what authority the person has to take the testimony of such witness, and the refusal of the witness to give it. (1777, c. 115, s. 42, P. R.; 1805, c. 685, ss. 1, 2, P. R.; 1848, c. 66; 1850, c. 188; R. C., c. 31, s. 64; Code, s. 1362; Rev., s. 1649; C. S., s. 1816.)

Cross References. — As to willful refusal to be sworn or to testify amounting to criminal contempt, see § 5A-11(4).

CASE NOTES

Power Not Exclusively in Commissioner. — The power to commit to jail a person refusing to testify before a commissioner, as provided for in this section, is not given exclusively, if at all, to the commissioner, but he may invoke the aid of the judge from whom he derives his appointment and whose authority is defied. Bradley Fertilizer Co. v. Taylor, 112 N.C. 141, 17 S.E. 69 (1893).

§ 8-79. Attendance before commissioner enforced.

The sheriff of the county where the witness may be shall execute all such subpoenas, and make due return thereof before the commissioner, or other person, before whom the witness is to appear, in the same manner, and under the same penalties, as in case of process of a like kind returnable to court; and when the witness shall be subpoenaed five days before the time of his required attendance, and shall fail to appear according to the subpoena and give evidence, the default shall be noted by the commissioner, arbitrator, or other person aforesaid; and in case the default be made before a commissioner acting under authority from courts without the State, the defaulting witness shall forfeit and pay to the party at whose instance he may be subpoenaed fifty dollars, and on the trial for such penalty the subpoena issued by the commissioner, or other person, as aforesaid, with the indorsement thereon of due service by the officer serving the same, together with the default noted as aforesaid and indorsed on the subpoena, shall be prima facie evidence of the forfeiture, and sufficient to entitle the plaintiff to judgment for the same, unless the witness may show his incapacity to have attended. (1848, c. 66, s. 2; 1850, c. 188, ss. 1, 2; R. C., c. 31, s. 65; Code, s. 1363; Rev., s. 1650; C. S., s. 1817.)

§ 8-80. Remedies against defaulting witness before commissioner.

But in case the default be made before a commissioner, arbitrator, referee or other person, acting under a commission or authority from any of the courts of this State, then the same shall be certified under his hand, and returned with the subpoena to the court by which he was commissioned or empowered to take the evidence of such witness; and thereupon the court shall adjudge the defaulting witness to pay to the party at whose instance he was summoned the sum of forty dollars ($40.00); but execution shall not issue therefor until the same be ordered by the court, after such proceedings had as shall give said witness an opportunity to show cause, if he can, against the issuing thereof. (1850, c. 188, s. 2; R. C., c. 31, s. 66; Code, s. 1364; Rev., s. 1651; C. S., s. 1818.)

§ 8-81. Objection to deposition before trial.

At any time before the trial, or hearing of an action or proceeding, any party may make a motion to the judge or court to reject a deposition for irregularity in the taking of it, either in whole or in part, for scandal, impertinence, the incompetency of the testimony, for insufficient notice, or for any other good cause. The objecting party shall state his exceptions in writing. (1869-70, c. 227, ss. 13, 17; Code, s. 1361; 1895, c. 312; 1903, c. 132; Rev., s. 1648; C. S., s. 1819.)

Legal Periodicals. — For an article entitled, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Purpose of Section. — The purpose of this section is to settle the depositions as evidence before the trial or hearing and thus prevent surprise, misapprehension, confusion and delay on the trial. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

The purpose of this section is to give the party in whose behalf a deposition has been taken

notice of any objection to the deposition and of the grounds for same before the trial. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Time and Manner of Objection. — As stated by this section, exceptions to a deposition, especially those which relate to its regularity, should be disposed of, at the latest, before the trial is entered upon. Barnhardt v. Smith, 86 N.C. 473 (1882); Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887); Ivey v. Bessemer City Cotton Mills, 143 N.C. 189, 55 S.E. 613 (1906). Such objection must be made in writing. Brittain v. Hitchcock, 127 N.C. 400, 37 S.E. 474 (1900).

Objection to the incompetency of testimony and motion to reject the evidence must be made in writing before trial unless the parties shall consent to a waiver of this provision. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Same — When Allowed at Trial. — Where it appeared that no notice had been given to the adverse party of the taking of a deposition, and that it had not been passed upon by the clerk, it was held that an objection to its reception might be taken on the trial of the action. Bryan v. Jeffreys, 104 N.C. 242, 10 S.E. 167 (1889).

When Trial Begins. — Once the case is reached on the calendar and the jury called into the box, "the hurry of a trial" has begun and the time for deliberation and scrutiny of a deposition has passed. The purpose of this section would not be served by a holding that the trial did not begin until after the jury was impaneled. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

The trial begins when the jurors are called into the box for examination as to their qualifications — when the work of impaneling the jury begins — and the calling of a jury is a part of the trial. State v. Swann, 5 N.C. App. 385, 168 S.E.2d 429, rev'd on other grounds, 275 N.C. 644, 170 S.E.2d 611 (1969).

Waiver of Formal Defects. — Where a party attends upon and takes part in taking depositions, he thereby waives all objections of a formal character, but a void process will not be vitalized unless there is an amendment without prejudice to third parties. McArter v. Rhea, 122 N.C. 614, 30 S.E. 128 (1898).

The failure to insert the name of the commissioner in the commission to take the deposition is waived by the objecting party appearing at the taking of the deposition and making no objection thereto until after the trial was begun. Womack v. Gross, 135 N.C. 378, 47 S.E. 464 (1904); Tomlinson Chair Mfg. Co. v. Townsend, 153 N.C. 244, 69 S.E. 145 (1910).

Where the provisions of this section as to making the objection before trial and in writing are not complied with, the objection to the deposition is waived. Woodley v. Hassell, 94 N.C. 157 (1886).

Cited in Hood Sys. Indus. Bank v. Dixie Oil Co., 205 N.C. 778, 172 S.E. 360 (1934); State v. Montgomery, 33 N.C. App. 693, 236 S.E.2d 390 (1977).

§ 8-82. Deposition not quashed after trial begun.

No deposition shall be quashed, or rejected, on objection first made after a trial has begun, merely because of an irregularity in taking the same, provided it shall appear that the party objecting had notice that it had been taken, and it was on file long enough before the trial to enable him to present his objection. (1869-70, c. 227, s. 12; Code, s. 1360; Rev., s. 1647; C. S., s. 1820.)

Legal Periodicals. — For an article entitled, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

CASE NOTES

Objection Should Be Made before Trial. — Where a deposition was open and on file before the trial, and an objection thereto was made for the first time on the trial, it was held that the objection could not be sustained. Morgan v. Royal Fraternal Ass'n, 170 N.C. 75, 86 S.E. 975 (1915). And this is true whether the motion is to quash the deposition in whole or in part. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

Where deposition of a witness is duly taken with full opportunity of cross-examination by the adverse party, with no objection before trial, and the witness is out of the State at the time of trial, exception to the deposition at the trial is without merit. Fleming v. Atlantic Coast Line R.R., 236 N.C. 568, 73 S.E.2d 544 (1952).

Filing as Notice. — Where the deposition had been on file for two or three months before

the trial, the appellant's counsel having notice and being present when it was opened by the clerk and ordered by him to be read in evidence on the trial, and they making no objections thereto, it was held that such deposition could not be quashed on oral objection made at the trial. Carroll v. Hodges, 98 N.C. 418, 4 S.E. 199 (1887).

Manner of Objection. — Since a deposition can be quashed only for irregularities in the taking or the incompetency of witnesses, objection should be taken to the questions and answers of the deponent by way of exception and not by motion to quash the depositions. Jeffords v. Albemarle Waterworks, 157 N.C. 10, 72 S.E. 624 (1911).

Preservation of Exception. — Where a commissioner to take depositions has, over the objection and exceptions of a party litigant, denied him the right of cross-examination of a witness of his opponent, and the litigant has appealed therefrom to the trial court, and preserved his right, the exception gives notice of the grounds upon which it was based, and on his motion on the trial, the deposition relating to that part of the evidence will be stricken. Sugg v. St. Mary's Oil Engine Co., 193 N.C. 814, 138 S.E. 169 (1927).

When Objection Allowed At Trial. — See note of Bryan v. Jeffreys, 104 N.C. 242, 10 S.E. 167 (1889), under § 8-81.

Stated in Gulf States Steel Co. v. Ford, 173 N.C. 195, 91 S.E. 844 (1917).

§ 8-83. When deposition may be read on the trial.

Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise:

(1) If the witness is dead, or has become insane since the deposition was taken.

(2) If the witness is a resident of a foreign country, or of another state, and is not present at the trial.

(3) If the witness is confined in a prison outside the county in which the trial takes place.

(4) If the witness is so old, sick or infirm as to be unable to attend court.

(5) If the witness is the President of the United States, or the head of any department of the federal government, or a judge, district attorney, or clerk of any court of the United States, and the trial shall take place during the term of such court.

(6) If the witness is the Governor of the State, or the head of any department of the State government, or the president of the University, or the head of any other incorporated college in the State, or the superintendent or any physician in the employ of any of the hospitals for the insane for the State.

(7) If the witness is a justice of the Supreme Court, judge of the Court of Appeals, or a judge, presiding officer, clerk or district attorney of any court of record, and the trial shall take place during the term of such court.

(8) If the witness is a member of the Congress of the United States, or a member of the General Assembly, and the trial shall take place during a session of the body of which he is a member.

(9) If the witness has been duly summoned, and at the time of the trial is out of the State, or is more than seventy-five miles by the usual public mode of travel from the place where the court is sitting, without the procurement or consent of the party offering his deposition.

(10) If the action is pending in a magistrate's court the deposition may be read on the trial of the action, provided the witness is more than 75 miles by the usual public mode of travel from the place where the court is sitting.

(11) If the witness is a physician duly licensed to practice medicine in the State of North Carolina, and resides or maintains his office outside the

county in which the action is pending. (1777, c. 115, ss. 39, 40, 41, P. R.; 1803, c. 633, P. R.; 1828, ch. 24, ss. 1, 2; 1836, c. 30; R. C., c. 31, s. 63; 1869-70, c. 227, s. 11; 1881, c. 279, ss. 1, 3; Code, s. 1358; 1905, c. 366; Rev., s. 1645; 1919, c. 324; C. S., s. 1821; 1965, c. 675; 1969, c. 44, s. 23; 1971, c. 381, s. 7; 1973, c. 47, s. 2.)

Cross References. — As to depositions in criminal actions, see § 8-74 and note thereto. As to manner, form, and time of taking exceptions, see §§ 8-81, 8-82 and notes thereto.

Legal Periodicals. — For an article entitled, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

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To the extent they are in conflict, Rule 32 of the Rules of Civil Procedure takes precedence over this section. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

This section is not a "differing procedure" from that of Rule 32 of the Rules of Civil Procedure within the contemplation of the language of Rule 1. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Selected Parts of Depositions. — It is not permissible to introduce selected portions of depositions without offering the whole. Sternberg v. Crockon & Roden Co., 172 N.C. 731, 90 S.E. 935 (1916); Enloe v. Charlotte Coca-Cola Bottling Co., 210 N.C. 262, 186 S.E. 242 (1936).

Meaning of "Duly Summoned". — By reasonable construction the ninth subdivision of this section means that where the deposition has been regularly taken, and where the witness is more than 75 miles from the place of trial without the consent of the party, and the presence of the witness cannot be procured, the deposition may be read if a subpoena has been duly issued — not necessarily served. Tomlinson Chair Mfg. Co. v. Townsend, 153 N.C. 244, 69 S.E. 145 (1910). See Sparrow v. Blount, 90 N.C. 514 (1884).

Where Plaintiff Dies But Action Survives. — Where the deposition de bene esse of the plaintiff in an action has been taken in accordance with law, and the plaintiff has since died, but the cause of action survives, the deposition may properly be read in evidence in behalf of those who survive him in interest, and have properly been made parties to the original action. Barbee v. Cannady, 191 N.C. 529, 132 S.E. 572 (1926).

Witness Unable to Talk. — The deposition of a witness adjudged to be unable to talk or remain in court is admissible in evidence under this section. Willeford v. Bailey, 132 N.C. 402, 43 S.E. 928 (1903).

Deposition Taken in Prior Action. — In the trial of an action a deposition regularly taken in another action between the same parties and involving the same subject matter is admissible as substantive evidence. Hartis v. Charlotte Elec. Ry., 162 N.C. 236, 78 S.E. 164 (1913). It may be introduced whether the deponent was examined as a witness in the case being tried or not. Mabe v. Mabe, 122 N.C. 552, 29 S.E. 843 (1898).

Applied in Glenn v. Smith, 264 N.C. 706, 142 S.E.2d 596 (1965).

Stated in Barnhardt v. Smith, 86 N.C. 473 (1882); Jeffords v. Albemarle Waterworks, 157 N.C. 10, 72 S.E. 624 (1911).

Cited in Stern & Co. v. Herren, 101 N.C. 517, 8 S.E. 221 (1888); Norburn v. Mackie, 264 N.C. 479, 141 S.E.2d 877 (1965).

§ 8-84: Repealed by Session Laws 1975, c. 762, s. 4.

Article 11.

Perpetuation of Testimony.

§ 8-85. Court reporter's certified transcription.

Testimony taken and transcribed by a court reporter and certified by the reporter or by the judge who presided at the trial at which the testimony was given, may be offered in evidence in any court as the deposition of the witness

whose testimony is so taken and transcribed, in the manner, and under the rules governing the introduction of depositions in civil actions. (1971, c. 377, s. 1.)

Editor's Note. — The above section is the seventh paragraph of former § 7-89. It was revised and transferred to its present position by Session Laws 1971, c. 377, s. 1, effective Oct. 1, 1971. Former § 8-85 was repealed by Session Laws 1967, c. 954, s. 4, effective Jan. 1, 1970.

§§ 8-86 to 8-88: Repealed by Session Laws 1967, c. 954, s. 4.

Article 12.

Inspection and Production of Writings.

§ 8-89: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions as to discovery and production of documents for inspection, copying or photographing, see § 1A-1, Rule 34.

§ 8-89.1: Repealed by Session Laws 1975, c. 762, s. 4.

§§ 8-90, 8-91: Repealed by Session Laws 1967, c. 954, s. 4.

Cross References. — For present provisions as to discovery and production of documents for inspection, copying or photographing, see § 1A-1, Rule 34.

§§ 8-92 to 8-96: Reserved for future codification purposes.

Article 13.

Photographs.

§ 8-97. Photographs as substantive or illustrative evidence.

Any party may introduce a photograph, video tape, motion picture, X-ray or other photographic representation as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. This section does not prohibit a party from introducing a photograph or other pictorial representation solely for the purpose of illustrating the testimony of a witness. (1981, c. 451, s. 1.)

Editor's Note. — Session Laws 1981, c. 451, s. 2, makes the act effective Oct. 1, 1981.

Chapter 8A.

Interpreters for Deaf Persons.

Sec.

8A-1. [Recodified.]

§ 8A-1: Recodified as §§ 8B-1 to 8B-8.

Editor's Note. — This Chapter was rewritten by Session Laws 1981, c. 937, s. 1, and has been recodified as Chapter 8B.

Chapter 8B.

Interpreters for Deaf Persons.

Sec.
8B-1. Definitions; right to interpreter; determination of competence.
8B-2. Appointment of interpreters in certain judicial, legislative, and administrative proceedings; removal.
8B-3. Waiver of appointed interpreter.
8B-4. Notice of need for interpreter; proof of deafness.
8B-5. Privileged communications.
8B-6. List of interpreters; coordination of interpreter services.
8B-7. Oath.
8B-8. Compensation.
8B-9. Responsibility for payment of funds to implement Chapter.

§ 8B-1. Definitions; right to interpreter; determination of competence.

As used in this Chapter:

(1) "Appointing authority" means the presiding judge or clerk of superior court in a judicial proceeding, or a hearing officer, examiner, commissioner, chairman, presiding officer or similar official in a legislative or administrative proceeding.

(2) "Deaf person" means a person whose hearing impairment is so significant that the individual is impaired in processing linguistic information through hearing, with or without amplification.

(3) "Qualified interpreter" means an interpreter certified as qualified under standards and procedures promulgated by the Department of Human Resources. If the appointing authority finds that an interpreter possessing these qualifications is not available, an interpreter without these qualifications may be called and used as a qualified interpreter if the interpreter's actual qualifications have otherwise been determined to be adequate for the present need. In no event will an interpreter be considered qualified if the interpreter is unable to communicate effectively with and simultaneously and accurately interpret for the deaf person.

A deaf person who does not utilize sign language may request an aural/oral interpreter. Before this interpreter is appointed, the appointing authority shall satisfy itself that the aural/oral interpreter is competent to interpret the proceedings to the deaf person and to present the testimony, statements, and any other information tendered by the deaf person. (1981, c. 937, s. 1.)

Editor's Note. — This Chapter is former Chapter 8A, as rewritten by Session Laws 1981, c. 937, s. 1, and recodified. Former Chapter 8A consisted of only a single section, § 8A-1.

Session Laws 1981, c. 937, s. 4, provides: "This act shall become effective October 1, 1981, and applies to all trial court, legislative, or administrative proceedings initiated or in process on or after that date."

Legal Periodicals. — For an article entitled, "The 1980 Amendments to the Federal Rules of Civil Procedure and Proposals for North Carolina Practice," see 16 Wake Forest L. Rev. 915 (1980).

§ 8B-2. Appointment of interpreters in certain judicial, legislative, and administrative proceedings; removal.

(a) When a deaf person is a party to or a witness in any civil or criminal proceeding in any superior or district court of the State, including juvenile

proceedings, special proceedings, and proceedings before the magistrate, the court shall appoint a qualified interpreter to interpret the proceedings to the deaf person and to interpret the deaf person's testimony, if any.

(b) When a deaf person is a witness before any legislative committee or subcommittee or legislative research or study committee or subcommittee or commission authorized by the General Assembly, the appointing authority conducting the proceeding shall appoint a qualified interpreter to interpret the proceedings to the deaf person and to interpret the deaf person's testimony.

(c) When a deaf person is a party to or a witness in an administrative proceeding before any department, board, commission, agency or licensing authority of the State, or of any county or city of the State, the appointing authority conducting the proceeding shall appoint a qualified interpreter to interpret the proceedings to the deaf person and to interpret the deaf person's testimony, if any.

(d) If a deaf person is arrested for an alleged violation of criminal law of the State, including a local ordinance, the arresting officer shall immediately procure a qualified interpreter from the appropriate court for any interrogation, warning, notification of rights, arraignment, bail hearing or other preliminary proceeding, but no arrestee otherwise eligible for release on bail under Article 26 of Chapter 15A of the General Statutes shall be held in custody pending the arrival of an interpreter. No answer, statement or admission taken from the deaf person without a qualified interpreter present and functioning is admissible in court for any purpose.

(e) Whenever a juvenile whose parent or parents are deaf is brought before a court for any reason whatsoever, the court shall appoint a qualified interpreter to interpret the proceedings and testimony for the deaf parent or parents, and to interpret any statements or testimony the deaf parent or parents may be called upon to give to the court.

(f) A qualified interpreter shall not be appointed until the appointing authority makes a preliminary determination that the interpreter is able to communicate effectively with and to interpret accurately for the deaf person. If no qualified interpreter can be found who can successfully communicate with this person, he may select his own interpreter without regard to whether the interpreter is "qualified" within the meaning set forth under this statute.

(g) The appointing authority may, on its own motion or on the request of the deaf person, remove an interpreter for inability to communicate or because his services have been waived. (1981, c. 937, s. 1.)

§ 8B-3. Waiver of appointed interpreter.

(a) A deaf person entitled to the services of an interpreter under this Chapter may waive these services. The waiver must be approved in writing by the person's attorney. If the person does not have an attorney, approval must be made in writing by the appointing authority.

(b) A deaf person who has waived an interpreter under this section may provide his own interpreter at his own expense, without regard to whether such interpreter is qualified under this Chapter. (1981, c. 937, s. 1.)

§ 8B-4. Notice of need for interpreter; proof of deafness.

A deaf person entitled to an interpreter under this Chapter shall, if practicable, notify the appropriate appointing authority of his need prior to his appearance. A failure to notify or to request an interpreter is not a waiver of the right to an interpreter. Before appointing an interpreter, an appointing authority may require satisfactory proof of the requesting person's deafness if he has reason to believe the person is not hearing impaired. (1981, c. 937, s. 1.)

§ 8B-5. Privileged communications.

If a communication made by the deaf person through an interpreter is privileged, the privilege extends also to the interpreter. (1981, c. 937, s. 1.)

§ 8B-6. List of interpreters; coordination of interpreter services.

The Department of Human Resources shall prepare and maintain an up-to-date list of qualified and available interpreters. A copy of the list shall be provided to each clerk of superior court. When requested by an appointing authority to provide an interpreter the North Carolina Council for the Hearing Impaired shall assist in arranging for an interpreter at the time and place needed through its program of community services for the hearing impaired. (1981, c. 937, s. 1.)

§ 8B-7. Oath.

Before acting, an interpreter shall take an oath or affirmation that he will make a true interpretation in an understandable manner of the proceedings to the person for whom he is appointed and that he will convey the statements of the person in the English language to the best of his skill and judgment. (1981, c. 937, s. 1.)

§ 8B-8. Compensation.

(a) An interpreter appointed under this Chapter is entitled to a reasonable fee for his services, including waiting time, and reimbursement for necessary travel and subsistence expenses. The fee shall be fixed by the appointing authority who shall consider any fee schedule for interpreters recommended by the Department of Human Resources. Reimbursement for necessary travel and subsistence expenses shall be at rates provided by law for State employees generally.

(b) The fees and expenses of interpreters who serve before any superior or district court criminal and juvenile proceeding are payable from funds appropriated to the Administrative Office of the Courts.

(c) The fees and expenses of interpreters who serve in civil cases and special proceedings are also payable from funds appropriated to the Administrative Office of the Courts.

(d) Fees and expenses of interpreters who serve before a legislative body described in this Article are payable from funds appropriated for operating expenses of the General Assembly.

(e) Fees and expenses of interpreters who serve before any State administrative agency are payable by that agency. The agency shall, upon application to the Department of Administration, be reimbursed for payments made.

(f) Fees and expenses of interpreters who serve before city or county administrative proceedings are payable by the respective city or county. During the fiscal biennium 1981-83, the city or county shall, upon application to the Department of Administration, be reimbursed for payments made.

(g) The Department of Administration and the Office of State Budget and Management shall report to the 1983 General Assembly on the satisfactoriness of the funding of this act by special reserve funds and shall recommend whether this funding be continued and new appropriations made or whether continued reserve funding is unnecessary. (1981, c. 937, s. 1.)

§ 8B-9. Responsibility for payment of funds to implement Chapter.

Responsibility for payment of funds to implement this Chapter rests with the particular entity specified in G.S. 8B-8 whose procedure required the service. (1981, c. 937, s. 2.)

Chapter 9.

Jurors.

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

Sec.
9-1. Jury commission in each county; membership; selection; oath; terms.
9-2. Preparation of jury list; sources of names.
9-2.1. Alternate procedure in certain counties.
9-3. Qualifications of prospective jurors.
9-4. Preparation and custody of list.
9-5. Procedure for drawing panel of jurors; numbers drawn.
9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.
9-6.1. Excuses on account of age.
9-7. Removal of names of jurors who have served from jury list; retention.
9-8, 9-9. [Repealed.]

Article 2.

Petit Jurors.

9-10. Summons to jurors.
9-11. Supplemental jurors; special venire.
Sec.
9-12. Supplemental jurors from other counties.
9-13. Penalty for disobeying summons.
9-14. Jury sworn; judge decides competency.
9-15. Questioning jurors without challenge; challenges for cause.
9-16. Exemption from civil arrest.
9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.
9-18. Alternate jurors.

Article 3.

Peremptory Challenges.

9-19. Peremptory challenges in civil cases.
9-20. Civil cases having several defendants; challenges apportioned; discretion of judge.
9-21. Peremptory challenges in criminal cases governed by Chapter 15A.

Article 4.

Grand Jurors.

9-22 to 9-31. [Repealed.]

Article 1.

Jury Commissions, Preparation of Jury Lists, and Drawing of Panels.

§ 9-1. Jury commission in each county; membership; selection; oath; terms.

Not later than July 1, 1967, there shall be appointed in each county a jury commission of three members. One member of the commission shall be appointed by the senior regular resident superior court judge, one member by the clerk of superior court, and one member by the board of county commissioners. The appointees shall be qualified voters of the county, and shall serve for terms of two years. Appointees may be reappointed to successive terms. A vacancy in the commission shall be filled in the same manner as the original appointment, for the unexpired term. Each commissioner shall take an oath or affirmation that, without favor or prejudice, he will honestly perform the duties of a member of the jury commission during his term of service. The compensation of commissioners shall be fixed by the board of county commissioners, and shall be paid from the general fund of the county, The clerk of superior court shall furnish clerical assistance to the commission, as necessary. (1967, c. 218, s. 1; 1981, c. 720, s. 3.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "July" for "October" in the first sentence.

Legal Periodicals. — For case law survey as to jury composition and unfair tribunal, see 45 N.C.L. Rev. 927 (1967).

CASE NOTES

Editor's Note. — Some of the cases cited in the annotations to this Chapter were decided under the Chapter as it stood before its revision in 1967.

Stated in State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977); State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

Cited in State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56 (1968); State v. Wright, 1 N.C. App. 479, 163 S.E.2d 897 (1968); Bryant v. State Bd. of Assessment, 293 F. Supp. 1379 (E.D.N.C. 1968).

§ 9-2. Preparation of jury list; sources of names.

(a) It shall be the duty of the jury commission beginning July 1, 1981, (and each biennium thereafter) to prepare a list of prospective jurors qualified under this Chapter to serve in the biennium beginning January 1, 1982, (and each biennium thereafter).

(b) In preparing the list, the jury commission shall use the voter registration records of the county. The commission may use fewer than all the names from the voter list if it uses a random method of selection. The commission may use other sources of names deemed by it to be reliable.

(c) Effective July 1, 1983, the list of licensed drivers residing in each county, as supplied to the county by the Division of Motor Vehicles pursuant to G.S. 20-43.4, shall also be required as a source of names for use by the commission in preparing the jury list.

(d) When more than one source is used to prepare the jury list the jury commission shall take randomly a sample of names from the list of registered voters and each additional source used. The same percentage of names must be selected from each list. The names selected from the voter registration list shall be compared with the entire list of names, from the second source. Duplicate names shall be removed from the voter registration sample, and the remaining names shall then be combined with the sample of names selected from the second source to form the jury list. If more than two source lists are used, the same procedure must be used to remove duplicates.

(e) As an alternative to the procedure set forth in subsection (d), the jury commission may merge the entire list of names of each source used, remove the duplicate names, and randomly select the desired number of names to form the jury list.

(f) The jury list shall contain not less than one and one-quarter times and not more than three times as many names as were drawn for jury duty in all courts in the county during the previous biennium, but in no event shall the list include fewer than 500 names, except that in counties in which a different panel of jurors is selected for each day of the week, there is no limit to the number of names that may be placed on the jury list.

(g) The custodian of the appropriate election registration records in each county shall cooperate with the jury commission in its duty of compiling the list required by this section.

(h) As used in this section "random" or "randomly" refers to a method of selection that results in each name on a list having an equal opportunity to be selected. (1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1969, c. 205, s. 1; c. 1190, s. 49½; 1973, c. 83, ss. 1, 2; 1981, c. 430, s. 1; c. 720, s. 1.)

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, added to the first paragraph of the section as it stood before the second 1981 amendment a sentence reading as follows: "In counties in which a different panel of jurors is summoned for each day of the week, there is no limit to the number of names that may be placed on the juror list." A similar provision appears in subsection (f) of the section as rewritten by the second 1981 amendment.

The second 1981 amendment, effective July 1, 1981, rewrote the section to read as set out above.

Legal Periodicals. — As to racial discrimination in selection of jury, see 26 N.C.L. Rev. 185.

CASE NOTES

I. General Consideration.
II. Sources of List.
III. Proof of Discrimination.

I. GENERAL CONSIDERATION.

Editor's Note. — The annotations under this section are from cases decided prior to the 1981 amendments.

The plan in this section for the selection and drawing of jurors is constitutional and provides a jury system completely free of discrimination to any cognizable group. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Constitutionality of Former Chapter. — See State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

Power of State to Prescribe Qualifications of Jurors. — Absent discrimination by race or other identifiable group or class, a state is at liberty to prescribe such qualifications for jurors as it deems proper without offending the Fourteenth Amendment. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345, cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

The legislative intent of this section is to provide a system for objective selection of veniremen. State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980).

The procedure set forth in this Article is objective and systematic. State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980).

Provisions of Former § 9-1 as to Jury List Directory and Not Mandatory. — See State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897); State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898); State v. Bonner, 149 N.C. 519, 63 S.E. 84 (1908); State v. Brown, 233 N.C. 202, 63 S.E.2d 99, cert. denied, 341 U.S. 943, 71 S. Ct. 997, 95 L. Ed. 1369 (1951); State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

Special Statute Allowing Other Method. — Where a statute creating a special criminal court for certain counties allows every facility to the accused for getting a fair and impartial jury, it is not unconstitutional because it does not follow the same methods of drawing the jury which are provided for by the superior courts. State v. Jones, 97 N.C. 469, 1 S.E. 680 (1887).

Applied in State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63 (1973); State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973); State v. Lynch, 300 N.C. 534, 268 S.E.2d 161 (1980).

Stated in State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978).

Cited in Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

II. Sources of List.

A jury commission is not limited to the sources specifically designated by this section. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Selection of Names Only from Certain Letters of Alphabet. — Names for the list of grand and petit jurors were not chosen arbitrarily or nonsystematically in violation of this section where every fourth name from the tax list was taken only from the letters A, B, C, D and M rather than from the entire alphabet. However, the practice of choosing names only from certain letters of the alphabet is not approved, since this section seems to contemplate systematic selection of names from the entire alphabet. State v. King, 299 N.C. 707, 264 S.E.2d 40 (1980).

Jury List Not Discriminatory Because Made from Tax List. — A jury list is not discriminatory merely because it is made from the tax list. The tax list is perhaps the most comprehensive list available for the names of male citizens. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964), decided under former § 9-1.

A jury list is not discriminatory or unlawful because it is drawn from the tax list of the county. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

Even if the tax lists contained a disproportionate male-female ratio, such disproportion did not result from a systematic, arbitrary and intentionally discriminatory process on the part of the jury commission. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972), 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

But commissioners are not limited to use of tax list, and the use of other lists might result in the selection of more women jurors. State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964), decided under former § 9-1.

Failure to Use List of Names Not Appearing on Tax Lists. — The fact that the county commissioners did not also use a list of names of persons who do not appear on the tax lists does not show racial discrimination in the

selection of prospective jurors. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

Use of a jury box containing only the names of property owner is not per se discriminatory as to race and does not unfairly narrow the choice of jurors so as to impinge defendant's statutory or constitutional rights. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345, cert. denied, 396 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970).

Absence of Names of Persons between Ages of 18 and 21. — See note to § 9-3.

Mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly or intentionally discriminatory, will not vitiate the list or afford a basis for a challenge to the array. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972), 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

Jury Commission Need Not Ascertain Validity of Procedures Used in Compiling Lists. — To hold that a jury commission must ascertain the validity of the procedures used by independent bodies in compiling tax and voter registration lists before using such lists as sources of names of prospective jurors would be to impose an impossible burden. State v. Tant, 16 N.C. App. 113, 191 S.E.2d 387, cert. denied, 282 N.C. 429, 192 S.E.2d 839 (1972), 414 U.S. 938, 94 S. Ct. 240, 38 L. Ed. 2d 165 (1973).

Removal of Certain Names From Lists. — Where commissioners laid aside names of several persons, otherwise qualified, because they did not know whether they were residents of the county, and the jury list was completed by the names of other duly qualified persons, if there was any irregularity it did not affect the action of the jurors so drawn and summoned. State v. Wilcox, 104 N.C. 847, 10 S.E. 453 (1889), decided under former § 9-1.

Merely purging the jury list of the names of those who had not paid their taxes, without adding any new names thereto, does not vitiate the venire in the absence of bad faith or corruption on the part of the county commissioners. State v. Dixon, 131 N.C. 808, 42 S.E. 944 (1902), decided under former § 9-1.

Rejection of prospective jurors for want of good moral character and sufficient intelligence was available to the county commissioners as a general objection only when the jury list was being prepared, and not after the names were in the box. State v. Speller, 229 N.C. 67, 47 S.E.2d 537 (1948); State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964), decided under former § 9-1.

III. Proof of Discrimination.

Discrimination on Account of Race. — See State v. Daniels, 134 N.C. 641, 46 S.E. 743 (1904); State v. Brown, 233 N.C. 202, 63 S.E.2d 99, cert. denied, 341 U.S. 943, 71 S. Ct. 997, 95 L. Ed. 1369 (1951); Miller v. State, 237 N.C. 29, 74 S.E.2d 513, cert. denied, 345 U.S. 930, 73 S. Ct. 792, 97 L. Ed. 1360 (1953); Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963); State v. Wilson, 262 N.C. 419, 137 S.E.2d 109 (1964).

How Prima Facie Case of Purposeful Discrimination Established. — The petitioner has the initial burden of establishing a prima facie case of purposeful discrimination. A prima facie case of jury discrimination can be established through a showing of a substantial disparity between the percentage of Negro residents in the county as a whole and on the jury lists, or by a showing of such disparity between the percentages of Negroes on the tax rolls, from which the jury lists are drawn, and on the jury lists. Such a showing is strengthened where the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

The disparity between the percentage of Negroes over 21 years of age in a county (45.5%) and on the jury list (4.5%) constituted a prima facie case of systematic exclusion of Negroes from the county grand and petit jury lists. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

To establish a prima facie case of systematic racial exclusion, defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or that for a substantial period in the past relatively few Negroes have served on the juries of the county notwithstanding a substantial Negro population therein, or both. State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

In order to establish a prima facie case that there has been a violation of the requirement that a jury be composed of persons who represent a fair cross section of the community, defendant must document that the group alleged to have been excluded is a distinctive group; that the representation of the group in question within the venire is not fair and reasonable with respect to the number of such persons in the community; and that this underrepresentation is due to systematic exclusion of the group in the jury selection process. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Distinctiveness of Excluded Group. — In determining whether a group is distinctive or cognizable for the purpose of a challenge to a jury selection plan, three factors which must be

considered are whether there is some quality or attribute in existence which defines or limits the membership of the alleged group, whether there is a cohesiveness of attitudes, ideas, or experiences which serves to distinguish the purported group from the general social mileau, and whether a community of interest must be present within the alleged group which may not be represented by other segments of the populace. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

The North Carolina Supreme Court does not recognize "young people" between the ages of 18 and 29 as a distinct group for the purpose of determining whether a jury panel represents a fair cross section of the community. State v. Price, 301 N.C. 427, 272 S.E.2d 103 (1980).

Effect of State's Failure to Justify Disparity. — If a prima facie case of jury discrimination is proven, the State must justify the disparity. However, the State's failure to do so does not mean that a guilty defendant must go free. The State may indict and try him again by the procedure which conforms to constitutional requirements. Parker v. Ross, 330 F. Supp. 13 (E.D.N.C. 1971), rev'd on other grounds, 470 F.2d 1092 (4th Cir. 1972).

Discrimination Not Established. — There was no systematic exclusion of blacks, women and 18- through 21-year-olds where jury commissions used a neutral systematic selection procedure (e.g., every 6th name) in selecting names from the source lists as required by this section, and it appears that the only criteria used in striking names from the jury lists were the permissible disqualifications set out in § 9-3. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

Discrimination Not Established. — Although the defendant's proof showed that during the period in question blacks made up 17.1 percent of the jury pool but 31.1 percent of the county's population, and young people between the ages of 18 and 29 made up 22.5 percent of the jury pool but 33.3 percent of the county's population, the defendant failed to show that such misrepresentation was the result of a systematic exclusion of those groups by the jury selection process, since the jury commission had fairly and reasonably selected every second name from the county tax listing and every third name from the county voter registration list. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

Requiring Defense Counsel to Investigate Jury Selection Procedures. — It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures with regard to possible systematic racial exclusion prior to the time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

Reasonable Time Allowed Defendant to Investigate Improper Procedures. — A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case. State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

OPINIONS OF ATTORNEY GENERAL

Use of Less Than All Names on Tax and Voter Registration Lists. — See opinion of Attorney General to Mr. Fred P. Parker, Wayne County Attorney, 40 N.C.A.G. 129 (1969).

Commission's Control of List Ceases Upon Preparation of List. — See opinion of Attorney General to Honorable Louise S. Allen, 42 N.C.A.G. 260 (1973).

§ 9-2.1. Alternate procedure in certain counties.

In counties having access to electronic data processing equipment, the functions of preparing and maintaining custody of the list of prospective jurors, the procedure for drawing and summoning panels of jurors, and the procedure for maintaining records of names of jurors who have served, been excused, been delayed in service, or been disqualified, may be performed by this equipment, except that decisions as to mental or physical competency of prospective jurors shall continue to be made by jury commissioners. The procedure for performing these functions by electronic data processing equipment shall be in writing, adopted by the jury commission, and kept available for public inspection in the office of the clerk of court. The procedure must effectively preserve the authorized grounds for disqualification, the right of public access to the list of

prospective jurors, and the time sequence for drawing and summoning a jury panel. (1977, c. 220, s. 1; 1981, c. 430, s. 3.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "having access to electronic" for "having electronic" near the beginning of the first sentence.

§ 9-3. Qualifications of prospective jurors.

All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, who can hear and understand the English language, who have not been convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony (or if convicted of a felony or having pleaded guilty or nolo contendere to an indictment charging a felony have had their citizenship restored pursuant to law), and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause. (1806, c. 694, P. R.; Code, ss. 1722, 1723; 1889, c. 559; 1897, cc. 117, 539; 1899, c. 729; Rev., s. 1957; C. S., s. 2312; 1947, c. 1007, s. 1; 1967, c. 218, s. 1; 1971, c. 1231, s. 1; 1973, c. 230, ss. 1, 2; 1977, c. 711, s. 10.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

The North Carolina plan which imposes a two-year lapse in preparation of new jury lists is constitutional and provides a jury system completely free of discrimination to any cognizable group. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

The law guarantees the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law. It was the manifest purpose of the legislature that all those and only those citizens who possess the proper qualifications of character and intelligence should be selected to serve on juries. State v. Ingram, 237 N.C. 197, 74 S.E.2d 532 (1953).

Mere Showing of Violation of Statutory Procedures Does Not Merit Quashing Indictment. — In the absence of statutory language indicating that preparation of jury lists shall be void if the directions of the act be not strictly observed, a mere showing of a violation of the statutory procedures will not merit the quashing of an indictment. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

In order to justify a dismissal of an indictment on grounds that statutory procedures were violated in the compilation of the jury list, a party must show either corrupt intent, discrimination, or irregularities which affect the actions of the jurors actually drawn and summoned. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

And even a showing that certain qualified persons were improperly disqualified would not require a dismissal of an indictment absent a showing of corrupt intent or systematic discrimination in the compilation of the list, or a showing of the presence upon the grand jury itself of a member not qualified to serve. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

The judge is not required to make findings in the absence of evidence that any qualified person was excluded from jury service, and in the absence of contradictory and conflicting evidence as to the material facts. State v. Vaughn, 296 N.C. 167, 250 S.E.2d 210 (1978), cert. denied, 441 U.S. 935, 99 S. Ct. 2060, 60 L. Ed. 2d 665 (1979).

There was no systematic exclusion of blacks, women and 18- through 21-year-olds where jury commissions used a neutral systematic selection procedure (e.g., every 6th name) in selecting names from the source lists as required by § 9-2, and it appears that the only criteria used in striking names from the jury lists were the permissible disqualifications set out in this section. State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977).

In order for a defendant to preserve his exception to the court's denial of a challenge for cause, he must (1) excuse the challenged juror with a peremptory challenge, (2) exhaust his peremptory challenges before the panel is completed, and (3) thereafter seek, and be denied, peremptory challenge to an additional juror. State v. Spencer, 37 N.C. App. 739, 246 S.E.2d 837 (1978).

Mere Summons Does Not Disqualify Person for Two Years. — It is actual service as a juror rather than a mere summons for jury duty which disqualifies him for service for the next two years. State v. Berry, 35 N.C. App. 128, 240 S.E.2d 633, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978).

The absence from the jury list of the names of persons between the ages of 18 and 21 during the period from July 21, 1971, the effective date of the amendment of § 9-3 lowering the age requirement for jurors from 21 years to 18 years, and September 21, 1971, the date of defendant's trial, was not unreasonable and did not constitute systematic exclusion of this age group from jury service. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

The petit jury which served at the trial of a 20-year-old defendant was not invalidated by the fact that the jury list had not been revised to include the names of persons under 21 years of age. State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972).

Alienage. — Alienage is disqualification of a juror. Hinton v. Hinton, 196 N.C. 341, 145 S.E. 615 (1928).

That a juror had forfeited his citizenship by reason of conviction of a criminal offense was ground for challenge of the juror for cause under former § 9-1. Young v. Southern Mica Co., 237 N.C. 644, 75 S.E.2d 795 (1953).

Challenges in Particular Actions, for Bias, etc. — Former § 9-1, providing that good and lawful men, required by the Constitution to serve on juries, should be men found by the county commissioners to have paid taxes for the preceding year, of good moral character, and of sufficient intelligence, did not abolish challenges to jurors, in particular actions, for bias, interest, kinship, etc. State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903).

Applied in State v. Hubbard, 19 N.C. App. 431, 199 S.E.2d 146 (1973).

Stated in Glover v. North Carolina, 301 F. Supp. 364 (E.D.N.C. 1969).

OPINIONS OF ATTORNEY GENERAL

Person's Mental and Physical Competency Must Be Considered Each Time Person's Name Appears on Prospective Jury List. — See opinion of Attorney General to Mr. J.C. Taylor, 43 N.C.A.G. 292 (1973).

§ 9-4. Preparation and custody of list.

As the jury list is prepared, the name and address of each qualified person selected for the list shall be written on a separate card. The cards shall then be alphabetized and permanently numbered, the numbers running consecutively with a different number on each card. These cards shall constitute the jury list for the county. They shall be filed with the register of deeds of the county, together with a statement of the sources used and procedures followed in preparing the list. The list shall be kept under lock and key, but shall be available for public inspection during regular office hours. (1967, c. 218, s. 1; 1969, c. 205, s. 2.)

CASE NOTES

Requiring Defense Counsel to Investigate Jury Selection Procedures. — It places no undue burden on defense counsel to require them to make investigations into jury composition and selection procedures with regard to possible systematic racial exclusion prior to the

time of trial, so long as the time between retention or appointment of counsel, the date the jury panel is drawn, and the date of trial is not so brief as to make such investigation impractical. State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

Reasonable Time Allowed Defendant to Investigate Improper Procedures. — A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged systematic exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case. State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

§ 9-5. Procedure for drawing panel of jurors; numbers drawn.

The board of county commissioners in each county shall provide the clerk of superior court with a jury box, the construction and dimensions of which shall be prescribed by the administrative officer of the courts. At least 30 days prior to January 1 of any year for which a list of prospective jurors has been prepared, a number of discs, squares, counters or markers equal to the number of names on the jury list shall be placed in the jury box. The discs, squares, counters, or markers shall be uniform in size, weight, and appearance, and may be made of any suitable material. They shall be numbered consecutively to correspond with the numbers on the jury list. The jury box shall be of sufficient size to hold the discs, squares, counters or markers so that they may be easily shaken and mixed, and the box shall have a hinged lid through which the discs, squares, counters or markers can be drawn. The lid shall have a lock, the key to which shall be kept by the clerk of superior court.

At least 30 days prior to any session or sessions of superior or district court requiring a jury, the clerk of superior court or his assistant or deputy shall, in public, after thoroughly shaking the box, draw therefrom the number of discs, squares, counters, or markers equal to the number of jurors required for the session or sessions scheduled. For each week of a superior court session, the senior regular resident superior court judge shall specify the number of jurors to be drawn. For each week of a district court jury session, the chief district judge shall specify the number of jurors to be drawn. Pooling of jurors between or among concurrent sessions of various courts is authorized in the discretion of the senior regular resident superior court judge. When pooling is utilized, the senior regular resident superior court judge, after consultation with the chief district judge when a district court jury is required, shall specify the total number of jurors to be drawn for such concurrent sessions. When grand jurors are needed, nine additional numbers shall be drawn.

As the discs, squares, counters, or markers are drawn, they shall be separately stored by the clerk until a new jury list is prepared.

The clerk of superior court shall deliver the list of numbers drawn from the jury box to the register of deeds, who shall match the numbers received with the numbers on the jury list. The register of deeds shall within three days thereafter notify the sheriff to summon for jury duty the persons on the jury list whose numbers are thus matched. The persons so summoned may serve as jurors in either the superior or the district court, or both, for the week for which summoned. Jurors who serve each week shall be discharged at the close of the weekly session or sessions, unless actually engaged in the trial of a case, and then they shall not be discharged until their service in that case is completed. (1806, c. 694, P. R.; 1868-9, c. 9, ss. 5, 6; c. 175; Code, ss. 1726, 1727, 1731; 1889, c. 559; 1897, c. 117; 1901, c. 28, s. 3; c. 636; 1903, c. 11; 1905, c. 38; c. 76, s. 4; c. 285; Rev., ss. 1958, 1959; C. S., ss. 2313, 2314; 1967, c. 218, s. 1; 1969, c. 205, s. 3.)

CASE NOTES

No language in this Chapter requires the clerk personally, or through an assistant or deputy clerk, to make the random drawing of names of those on the panel from the box so as to render illegal such drawing by someone else. State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3204, 49 L. Ed. 2d 1206 (1976).

Former § 9-3 Partly Mandatory and Partly Directory. — See State v. Watson, 104 N.C. 735, 10 S.E. 705 (1889); State v. Perry, 122 N.C. 1018, 29 S.E. 384 (1898); Moore v. Navassa Guano Co., 130 N.C. 229, 41 S.E. 293 (1902); State v. Banner, 149 N.C. 519, 63 S.E. 84 (1908).

§ 9-6. Jury service a public duty; excuses to be allowed in exceptional cases; procedure.

(a) The General Assembly hereby declares the public policy of this State to be that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health, or safety, or as provided in G.S. 9-6.1.

(b) Pursuant to the foregoing policy, the chief district judge of each district shall promulgate procedures whereby he or any district judge designated by him, prior to the date that a jury session (or sessions) of superior or district court convenes, shall receive, hear, and pass on applications for excuses from jury duty. The procedures shall provide for the time and place, publicly announced, at which applications for excuses will be heard, and prospective jurors who have been summoned for service shall be so informed. In districts that have a trial court administrator, the chief district judge may assign the duty of passing on applications for excuses from jury service to the administrator. In all cases concerning excuses, the clerk of court or the trial court administrator in districts that have a trial court administrator, shall notify prospective jurors of the disposition of their excuses.

(c) A prospective juror excused by a judge in the exercise of the discretion conferred by subsection (b) may be required by the judge to serve as a juror in a subsequent session of court. If required to serve subsequently, the juror shall be considered on such occasion the same as if he were a member of the panel regularly summoned for jury service at that time.

(d) A judge hearing applications for excuses from jury duty shall excuse any person disqualified under § 9-3.

(e) The judge shall inform the clerk of superior court of persons excused under this section, and the clerk within 10 days shall so notify the register of deeds, who shall note the excuse on the juror's card and file it separately from the jury list.

(f) The discretionary authority of a presiding judge to excuse a juror at the beginning of or during a session of court is not affected by this section. (1967, c. 218, s. 1; 1969, c. 205, ss. 4, 5; 1971, c. 377, s. 30; 1979, 2nd Sess., c. 1207, s. 1; 1981, c. 430, s. 2.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, added "or as provided in G.S. 9-6.1" at the end of subsection (a).

The 1981 amendment, effective Oct. 1, 1981, added the third and fourth sentences of subsection (b).

CASE NOTES

Stated in State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977).

Cited in State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

§ 9-6.1. Excuses on account of age.

Any person summoned as a juror who is 65 years or older may establish his exemption without appearing in person by filing a signed statement of the ground of his exemption with the chief district judge of that district, or the district judge or trial court administrator designated by him pursuant to G.S. 9-6(b) at any time five days before the date upon which he is summoned to appear. In the case of supplemental jurors summoned under G.S. 9-11, such notice may be given when summoned. In case the chief district judge, or the judge or trial court administrator designated by him pursuant to G.S. 9-6(b), shall reject the request for exemption, the prospective juror shall be immediately notified by the trial court administrator or the clerk of court by telephone, letter, or personally. (1979, 2nd Sess., c. 1207, s. 2; 1981, c. 9, ss. 1, 2; c. 430, ss. 4, 5.)

Editor's Note. — Session Laws 1979, 2nd Sess., c. 1207, s. 4, makes the act effective Oct. 1, 1980.

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, substituted "chief district judge of that district, or the district judge designated by him pursuant to G.S. 9-6(b)" for "chief judge of the district court of the judicial district" near the end of the first sentence, and added the third sentence.

The second 1981 amendment, effective Oct. 1, 1981, inserted "or trial court administrator" preceding "designated by him pursuant to G.S. 9-6(b)" in the first and third sentences and "by the trial court administrator or the clerk of court" in the third sentence.

§ 9-7. Removal of names of jurors who have served from jury list; retention.

As persons are summoned for jury service, the cards upon which their names appear shall be withdrawn from the jury list and filed separately. The date for which each juror serves shall be noted on his card.

All cards removed from the jury list because of service, or having been excused from service, or because of disqualification, shall be retained for reference in compiling the next jury list. When the succeeding list has been prepared, the list of persons who have served shall be retained for a period of two years. (1967, c. 218, s. 1.)

§ 9-8: Repealed by Session Laws 1967, c. 218. s. 1.

§ 9-9: Repealed by Session Laws 1967, c. 218, s. 1.

Editor's Note. — Section 9-9, which derived from Session Laws 1967, c. 218, s. 1, was repealed effective Jan. 1, 1968, by its own terms.

ARTICLE 2.

Petit Jurors.

§ 9-10. Summons to jurors.

(a) The register of deeds shall, within three days after the receipt of numbers drawn, deliver the list of prospective jurors to the sheriff of the county, who shall summon the persons named therein. The summons shall be served personally, or by leaving a copy thereof at the place of residence of the juror, or by telephone or first-class mail, at least 15 days before the session of court for which the juror is summoned. Service by telephone, or by first-class mail if mailed to the correct current address of the juror on or before the fifteenth day before the day the court convenes, shall be valid and binding on the person served, and he shall be bound to appear in the same manner as if personally served. The summons shall contain information as to the time, place, and authority before whom applications for excuses from jury service may be heard.

(b) All summons served personally or by mail under this section or under G.S. 9-11 shall inform the prospective juror that persons 65 years of age or older are entitled to exemption from jury service for good cause, shall contain a statement for claiming such exemption and stating the cause and a place for the prospective juror's signature, and shall state the mailing address of the clerk of superior court and the date by which such request for exemption must be received. (1779, c. 157, ss. 4, 6, P. R.; R. C., c. 31, s. 29; 1868-9, c. 9, s. 12; Code, s. 1733; Rev., s. 1976; C. S., s. 2320; 1967, c. 218, s. 1; 1979, 2nd Sess., c. 1207, s. 3.)

Cross References. — As to penalty for disobeying summons, see § 9-13.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective Oct. 1, 1980, designated the former provisions of this section as subsection (a) and added subsection (b). Session Laws 1979, 2nd Sess., c. 1207, s. 4, as amended by Session Laws 1979, 2nd Sess., c. 1326 and Session Laws 1981, c. 908, s. 1, provides that the amendment to this section shall not become effective in Mecklenburg and Buncombe Counties until July 1, 1981, and shall not become effectve in Wake County until July 1, 1982.

§ 9-11. Supplemental jurors; special venire.

(a) If necessary, the court may, without using the jury list, order the sheriff to summon from day to day additional jurors to supplement the original venire. Jurors so summoned shall have the same qualifications and be subject to the same challenges as jurors selected for the regular jury list. If the presiding judge finds that service of summons by the sheriff is not suitable because of his direct or indirect interest in the action to be tried, the judge may appoint some suitable person in place of the sheriff to summon supplemental jurors. The clerk of superior court shall furnish the register of deeds the names of those additional jurors who are so summoned and who report for jury service.

(b) The presiding judge may, in his discretion, at any time before or during a session direct that supplemental jurors or a special venire be selected from the jury list in the same manner as is provided for the selection of regular jurors. Jurors summoned under this subsection may be discharged by the court at any time during the session and are subject to the same challenges as regular jurors, and to no other challenges. (1779, c. 156, s. 69, P. R.; 1830, c. 27; R. C., c. 31, s. 29; c. 35, ss. 30, 31; Code, ss. 1733, 1738, 1739, 1740; 1887, c. 53; 1889, c. 441; 1897, c. 364; Rev., ss. 1967, 1968, 1973, 1974, 1975, 3265, 3602; 1911, c. 15; 1913, c. 31, ss. 1, 2; 1915, c. 210; C. S., ss. 2321, 2322, 2338, 2339, 2340, 4635; 1967, c. 218, s. 1; 1969, c. 205, s. 6.)

Cross References. — As to qualification of jurors, see § 9-3.

CASE NOTES

The language of this section is clear and unambiguous, and its provisions authorize the trial judge to order the summoning of supplemental jurors in order to ensure orderly, uninterrupted, and speedy trials. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

Discretion of Judge. — See State v. Brogden, 111 N.C. 656, 16 S.E. 170 (1892); State v. Smarr, 121 N.C. 669, 28 S.E. 549 (1897); State v. Levy, 187 N.C. 581, 122 S.E. 386 (1924); State v. Casey, 212 N.C. 352, 193 S.E. 411 (1937), overruled on other grounds, 248 N.C. 695, 104 S.E.2d 837 (1958); State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948).

A motion for a change of venue or for a special venire from another county, upon the ground that the minds of the residents in the county in which the crime was committed had been influenced against the defendant, is addressed to the sound discretion of the trial court. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

Discretion of Selecting Officer. — Where an officer is empowered to select and summon talesmen he is vested with some discretion. It is his right and duty to use his best judgment in securing men of intelligence, courage, and good moral character, but he must act with entire impartiality. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

There is no statutory or case authority prescribing the methods by which tales jurors must be selected. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Nowhere in the statute is there a provision delineating discretionary restrictions to be placed on an officer in fulfilling the court's order. The statutory recognition that tales jurors may be needed and the statutory language used contemplate a system easily and expeditiously administered. To place procedural restrictions unnecessarily on their selection would defeat the purpose of the system, which is to facilitate the dispatch of the business of the court. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Tales jurors are selected infrequently and only to provide a source from which to fill the unexpected needs of the court. They must still possess the statutory qualifications and are still subject to the same challenges as regular jurors and may be examined by both parties on voir dire. In order to retain the flexibility needed in the administration of such a system, the summoning official must be permitted some discretion, whether he be located in a relatively small community or a more heavily populated area, and to restrict the discretion placed in the summoning official, without proven cause, is to presume he is not worthy of the office which he holds. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

Mere Possibility of Discrimination Does Not Make Panel Objectionable. — Obviously it would be possible for a sheriff, sent out to execute an order of the court under this section to discriminate in the selection of persons to be summoned. This mere possibility does not make the panel actually summoned by him objectionable where the record shows that he did not so discriminate. State v. White, 6 N.C. App. 425, 169 S.E.2d 895 (1969).

An accused is not prejudiced because he is not furnished a list of persons called as supplemental jurors where it became necessary to summon them after the court had properly excluded jurors from the original venire. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

Special Venire Selected without Partiality. — A challenge to the array on the ground that the sheriff and his deputies, under instructions by the sheriff, selected for the special venire freeholders of good character, who had not served on the jury within the past two years and who lived in townships in the county other than the township in which the crime was committed and townships contiguous thereto, was properly refused, the action of the sheriff and the deputies showing no partiality, misconduct and irregularity in making out the list. State v. Dixon, 215 N.C. 438, 2 S.E.2d 371 (1939).

The failure of the trial judge to sign the order for a special venire does not alone invalidate the special venire, it having been ordered and summoned in all other respects in conformity with statute. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Order Substantially a Special Writ of Venire Facias. — A written order entitled as of the action, commanding the sheriff to summon a special venire of twenty-five freeholders from the body of the county to appear on a specified date to act as jurors in the case, is in substance a special writ of venire facias. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Challenge for Cause. — Under this section where a special venire has been ordered by the court for the trial of a capital felony, the veniremen, being selected by the sheriff in his discretion, not from the jury box, are subject to the same challenges for cause as tales jurors. State v. Avant, 202 N.C. 680, 163 S.E. 806 (1932).

Objections Made by Challenges to the Array. — Objections to the special venire based on partiality, misconduct of the sheriff, or irregularity in making out the jury list, are properly made by challenges to the array. State v. Shaw, 284 N.C. 366, 200 S.E.2d 585 (1973).

A motion challenging the array of special jurors was properly denied where the motion did not challenge the order of the court directing the sheriff to select six supplemental jurors, nor the action of the sheriff in selecting the jurors, nor contend that members of the Negro race were systematically excluded by the sheriff in his selection of the six jurors. State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971).

Special Venire Exhausted. — When a special venire is exhausted without completing the jury, the court may order a further venire to be summoned at once from the bystanders. State v. Stanton, 118 N.C. 1182, 24 S.E. 536 (1896).

Accessory May Be Tried by Special Venire. — Where two persons are indicted for murder, one as principal and the other as accessory before the fact, the latter may be tried by a jury selected from a special venire ordered in the case. State v. Register, 133 N.C. 746, 46 S.E. 21 (1903).

Applied in State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971).

§ 9-12. Supplemental jurors from other counties.

(a) On motion of any party or the State, or on his own motion, any judge of the superior court, if he is of the opinion that it is necessary in order to provide a fair trial in any case, and regardless of whether he will preside over the trial of that case, may order as many jurors as he deems necessary to be summoned from any county or counties in the same judicial district as the county of trial or in any adjoining judicial district. These jurors shall be selected and shall serve in the manner provided for selection and service of supplemental jurors selected from the jury list. These jurors shall be subject to the same challenges as other jurors, except challenges for nonresidence in the county of trial.

(b) Transportation may be furnished in lieu of mileage.

(c) Repealed by Session Laws 1971, c. 377, s. 32. (1913, c. 4, ss. 1, 2; C. S., s. 473; 1931, c. 308; 1933, c. 248; 1961, c. 110; 1967, c. 218, s. 1; 1971, c. 377, s. 32.)

CASE NOTES

Discretion of Court. — The trial judge, when he refused defendant's motion to remove an action for homicide to another county, in the exercise of his sound discretion, could have had the jurors summoned from any adjoining county, or from any county in the same judicial district, or had jurors drawn from the jury box of such county. State v. Kincaid, 183 N.C. 709, 110 S.E. 612 (1922); State v. Baxter, 208 N.C. 90, 179 S.E. 450 (1935), decided under former § 1-86.

Discretion of Court. — The granting of a solicitor's (now district attorney's) motion that the jury be drawn from the body of another county is within the court's discretion. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that defendant could not obtain a fair trial because of widespread and unfavorable publicity, is addressed to the discretion of the trial court, and where the record disclosed that the trial judge conducted a hearing, read all the affidavits, and examined the press releases; that each juror selected stated that he could render a verdict uninfluenced by the publicity; and that defendant did not exhaust his peremptory challenges, abuse of discretion in denying the motion was not disclosed. State v. Porth, 269 N.C. 329, 153 S.E.2d 10 (1967), decided under former § 1-86.

The motion of the defendants that a jury be summoned from another county was addressed to the sound discretion of the presiding judge. State v. Yoes, 271 N.C. 616, 157 S.E.2d 386 (1967).

A defendant's motion for a change of venue and his alternative motion for a special venire from another county were addressed to the sound legal discretion of the trial court. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

This section places the matter of ordering jurors to be summoned from another county in the sound discretion of the judge of the superior court. State v. Edwards, 286 N.C. 140, 209 S.E.2d 789 (1974).

Order Tantamount to Denial of Motion to Remove. — When the judge entered an order directing that venire of jurors be drawn from

another county to serve as jurors in the trial, it was tantamount to a denial of a motion to remove the cases to another county for trial. State v. Moore, 258 N.C. 300, 128 S.E.2d 563 (1962), decided under former § 1-86.

Order Justified. — Due to the prior trials and the widespread publicity, the court on motion of the State was justified in ordering the trial jury drawn from another county. State v. Cutshall, 281 N.C. 588, 189 S.E.2d 176 (1972).

Review of Discretion. — A judge's order, entered by virtue of authority vested in him by this section, is not reviewable, unless there has been a manifest abuse of his discretion. State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2278, 29 L. Ed. 2d 859 (1971), decided under former § 1-86 and holding that no abuse of discretion appeared.

A motion for change of venue or for a special venire may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable in the Court of Appeals unless gross abuse of discretion is shown. State v. Ledbetter, 4 N.C. App. 303, 167 S.E.2d 68 (1969).

A defendant's motions for a change of venue or for a special venire from another county, on the ground that he could not get a fair and impartial trial in the county because of extensive publicity and public discussion of the cases, were addressed to the sound legal discretion of the trial court, whose ruling in denying these motions was not disturbed on appeal because (1) the newspaper articles filed in support of the motions were not unduly inflammatory in nature, (2) the articles were published three months prior to the trial and there was no evidence of repeated or excessive publication, and (3) those of the prospective jurors who had read the newspaper accounts stated that they could return an impartial verdict. State v. Penley, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

The courts have consistently held that a motion for removal to an adjacent county or to cause a jury to be selected from an adjacent county on the grounds of unfavorable publicity is addressed to the sound discretion of the court, and that, absent a showing of abuse of discretion, the decision of the trial court is not reviewable. State v. Jackson, 24 N.C. App. 394, 210 S.E.2d 876, rev'd on other grounds, 287 N.C. 470, 215 S.E.2d 123 (1975).

Motions for change of venue or special venire are addressed to the sound discretion of the trial judge and, absent abuse of discretion, his rulings will not be disturbed on appeal. State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

Applied in State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975); Kinston City Bd. of Educ. v. Board of Comm'rs, 29 N.C. App. 544, 225 S.E.2d 145 (1976).

Cited in State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973).

§ 9-13. Penalty for disobeying summons.

Every person summoned to appear as a juror who has not been excused, and who fails to appear and attend until duly discharged, shall be subject to a fine of not more than fifty dollars ($50.00), to be imposed by the court, unless he renders an excuse deemed sufficient. The forfeiture so imposed if not paid forthwith shall be entered as a judgment against the defaulting juror, and the clerk of superior court shall issue an execution against his estate. (1779, c. 157, s. 4, P. R.; 1783, c. 189, P. R.; 1806, c. 694, P. R.; R. C., c. 31, s. 30; Code, ss. 405, 1734; Rev., s. 1977; C. S., s. 2323; 1967, c. 218, s. 1.)

§ 9-14. Jury sworn; judge decides competency.

The clerk shall, at the beginning of court, swear all jurors who have not been selected as grand jurors. Each juror shall swear or affirm that he will truthfully and without prejudice or partiality try all issues in criminal or civil actions that come before him and render true verdicts according to the evidence. Nothing herein shall be construed to disallow the usual challenges in law to the whole jury so sworn or to any juror; and if by reason of such challenge any juror is withdrawn from a jury being selected to try a case, his place on that jury shall be taken by another qualified juror. The presiding judge shall decide all questions as to the competency of jurors. (1790, c. 321, P. R.; 1822, c. 1133, s. 1, P. R.; R. C., c. 31, s. 34; Code, s. 405; Rev., s. 1966; C. S., s. 2324; 1967, c. 218, s. 1.)

Legal Periodicals. — For note on allowing challenge for cause to a prospective juror opposed to capital punishment, see 45 N.C.L. Rev. 1070 (1967).

For comment on constitutional restrictions on the imposition of capital punishment, see 5 Wake Forest Intra. L. Rev. 183 (1969).

CASE NOTES

I. General Consideration.
II. Challenge to Jurors.
III. Competency of Jurors.

I. GENERAL CONSIDERATION.

A defendant is not entitled to a jury of his selection or choice but only to a jury selected pursuant to law and without unconstitutional discrimination against a class or substantial group of the community from which the jury panel is drawn. He has no vested right to a particular juror. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

Applied in State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Vinson, 287 N.C. 326, 215 S.E.2d 60 (1975); State v. Wetmore, 287 N.C. 344, 215 S.E.2d 51 (1975).

Cited in State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971); State v. Moye, 12 N.C. App. 178, 182 S.E.2d 814 (1971); State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

II. CHALLENGE TO JURORS.

The right of challenge is not one to accept, but to reject. It is not given for the purpose of enabling the defendant, or the State, to pick a jury, but to secure an impartial one. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

Challenges for Cause. — It has been held in many cases that the right to challenge a juror for cause is given to afford a litigant fair opportunity to remove objectionable jurors, and was not intended to enable him to select a jury of his own choosing. See Blevins v. Erwin Cotton Mills, 150 N.C. 493, 64 S.E. 428 (1909). The expression of an opinion is sometimes ground for challenge, but is not if the juror states that the opinion could be eliminated and a fair and impartial verdict rendered. State v. Bailey, 179 N.C. 724, 102 S.E. 406 (1920); State v. Winder, 183 N.C. 776, 111 S.E. 530 (1922). The challenge for this cause can be made only by that party against whom the opinion was formed and expressed. State v. Benton, 19 N.C. 196 (1836).

A juror may be examined as to opinions honestly formed, and honestly expressed, manifesting a bias of judgment, not referable to personal partiality, or malevolence; but if the opinion has been made up and expressed under circumstances which involve dishonor and guilt, and where such expression may be visited with punishment, he ought not to be required to testify so as to incriminate himself. State v. Benton, 19 N.C. 196 (1836); State v. Mills, 91 N.C. 581 (1884).

Other grounds for challenge are relation within the ninth degree of affinity (State v. Potts, 100 N.C. 457, 6 S.E. 657 (1888)); opposition to capital punishment (State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903)); nonresidence (State v. Bullock, 63 N.C. 570 (1869); State v. Upton, 170 N.C. 769, 87 S.E. 328 (1915)); employment by party (Oliphant v. Atlantic Coast Line R.R., 171 N.C. 303, 88 S.E. 425 (1916)). But in an indictment for illegal sale of liquor, challenges for cause, in that the jurors belonged to the Anti-Saloon League, were properly disallowed, where the jurors had taken no part in prosecuting or aiding in the prosecution of the defendant. State v. Sultan, 142 N.C. 569, 54 S.E. 841 (1906).

The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

A juror, who was related to the defendant by blood or marriage within the ninth degree of kinship, was properly rejected when challenged by the State for cause on that ground. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

A relationship within the ninth degree between a juror and a State's witness, standing alone, is not legal ground for challenge for cause. Where such relationship exists and is known and recognized by the juror, a defendant's challenge for cause should be rejected only if it should appear clearly that, under the circumstances of the particular case, the challenged juror would have no reason or disposition to favor his kinsman by giving added weight to his testimony or otherwise. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

The trial court did not err in the denial of defendant's challenge for cause directed to the district solicitor's (now district attorney's) father-in-law as a juror, where the challenge was denied only after the juror stated, upon being questioned by the court, that he would not convict on his relationship to the solicitor (now district attorney), and after it was ascertained that the district solicitor (now district attorney) was not prosecuting defendant's case. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

Excluding Jurors for Opposition to Capital Punishment. — Under the decision of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

Judgment of the superior court sentencing defendant to death for first-degree murder had to be vacated under the decision of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968), where the trial court allowed the State's challenges for cause to seven prospective jurors who stated simply a general objection to or conscientious scruples against capital punishment, notwithstanding the trial occurred prior to the Witherspoon decision, since that decision was fully retroactive. State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

A trial judge should allow challenge for cause when a venireman is not willing to consider all possible penalties provided by State law and when the venireman is unalterably committed to vote against the death penalty, regardless of the evidence which might be presented at trial. State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972).

In a capital case, if a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

In a capital case a juror may be properly challenged for cause if he indicates he could not return a verdict of guilty knowing the penalty would be death, even though the State proved to him by the evidence and beyond a reasonable doubt that the accused was guilty of the capital crime charged. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1207 (1976).

In a first-degree murder trial where prospective juror stated that knowing that the death penalty would be imposed he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt, the trial judge, in his discretion, and at the request of the prospective juror, in excusing the prospective juror did not commit prejudicial error. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Time of Challenge. — The court may, in its discretion, permit a juror to be challenged by the State for cause, after he has been tendered to the defendant and before the jury is impaneled. State v. Green, 95 N.C. 611 (1886).

Excusing Unchallenged Juror. — The trial judge could excuse a juror, before the jury was impaneled, although the solicitor (now district attorney) had passed him to the defendant and had not challenged him for cause. State v. Vick, 132 N.C. 995, 43 S.E. 626 (1903).

It is the right and duty of the court to see that a competent, fair and impartial jury is inpaneled and, to that end, the court, in its discretion, may excuse a prospective juror without a challenge by either party. It is immaterial that this is done as the result of information voluntarily disclosed by the prospective juror without questioning. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

It is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Method of Taking Advantage of Error. — The action of a trial judge in determining the qualifications of a juryman, if erroneous, was ground for a challenge to the array by a motion to quash and set aside the entire panel, and in the absence of such challenge a defendant could not be allowed to take advantage of the alleged error after trial and judgment. State v. Moore, 120 N.C. 570, 26 S.E. 697 (1897).

The erroneous allowance of an improper challenge for cause did not entitle the adverse party to a new trial, so long as only those who were competent and qualified to serve were actually impaneled upon the jury which tried his case. This was especially true where the adverse party did not exhaust his peremptory challenges. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated,

403 U.S. 948, 91 S. Ct. 2283, 29 L.Ed.2d 859 (1971); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed.2d 99 (1973).

III. COMPETENCY OF JURORS.

The question of whether a juror is competent is one for the trial judge to determine in his discretion, and his rulings thereon are not reviewable on appeal unless accompanied by some imputed error of law. State v. Blount, 4 N.C. App. 561, 167 S.E.2d 444 (1969); State v. Johnson, 280 N.C. 281, 185 S.E.2d 698 (1972); State v. Watson, 281 N.C. 221, 188 S.E.2d 289, cert. denied, 409 U.S. 1043, 93 S. Ct. 537, 34 L. Ed. 2d 493 (1972); State v. Cameron, 17 N.C. App. 229, 193 S.E.2d 485 (1972), aff'd, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976).

The trial court has broad discretion in the voir dire selection of jurors, and the exercise of the party's right to examine prospective jurors should be carefully supervised by the trial court. State v. Wood, 20 N.C. App. 267, 201 S.E.2d 231 (1973).

The competency of jurors to serve is left largely to the sound legal discretion of the trial judge, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

Ruling on motion for competency of jurors is discretionary with the trial judge and will not be reviewed absent a showing of abuse of discretion or an error of law. State v. Moore, 24 N.C. App. 582, 211 S.E.2d 470 (1975).

Decisions as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Unquestionably the trial judge is vested with broad discretionary powers in determining the competency of jurors and that discretion will not ordinarily be disturbed on appeal. State v. Lee, 292 N.C. 617, 234 S.E.2d 574 (1977).

Review of Discretion. — The rulings of the judge on questions as to the competency of jurors are not subject to review on appeal unless accompanied by some imputed error of law. State v. DeGraffenreid, 224 N.C. 517, 31 S.E.2d 523 (1944); State v. Davenport, 227 N.C. 475, 42 S.E.2d 686 (1947); State v. Suddreth, 230 N.C. 239, 52 S.E.2d 924 (1949); State v. Gibbs, 5 N.C. App. 457, 168 S.E.2d 507 (1969); State v. Johnson, 280 N.C. 281, 185 S.E.2d 698 (1972); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3203, 49 L. Ed. 2d 1205 (1976); State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976); State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

Since a juror during homicide trial had sister of deceased as one of his passengers in a four-mile automobile trip, the defendant moved to set aside the verdict. The juror stated upon oath that he did not know his passenger was the sister of the deceased, and the court found upon investigation that the case was not discussed during the ride. It was held that exception to refusal of motion was not reviewable. State v. Suddreth, 230 N.C. 239, 52 S.E.2d 924 (1949).

The trial court's findings, upon supporting evidence, that persons of defendant's race were not excluded from the petit jury on account of race or color, were conclusive on appeal, and defendant's exception to the overruling of his challenge to the array on that ground presented no reviewable question of law. State v. Reid, 230 N.C. 561, 53 S.E.2d 849, cert. denied, 338 U.S. 876, 70 S. Ct. 138, 94 L. Ed. 537 (1949).

Defendant moved for a new trial on the ground that during the trial he discussed the case with one of the jurors before recognizing him as a juror. The court found that the defendant had not shown that he was in anywise prejudiced by the occurrence, and denied defendant's motion for a new trial. The ruling of the court was not reviewable. State v. Scott, 242 N.C. 595, 89 S.E.2d 153 (1955).

A ruling in respect to the impartiality of a juror presents no question of law for review. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

Defendant seeking to establish on appeal that the exercise of judicial discretion constituted reversible error must show harmful prejudice as well as clear abuse of discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

§ 9-15. Questioning jurors without challenge; challenges for cause.

(a) The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror, without having such inquiry treated as a challenge of such person, and it shall not be considered by the court that any person is challenged as a juror until the party shall formally state that such person is so challenged.

(b) It shall not be a valid cause for challenge that any juror, regular or supplemental, is not a freeholder or has not paid the taxes assessed against him.

(c) In civil cases if any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he shall be withdrawn from the trial panel, and may be withdrawn from the venire in the discretion of the presiding judge. In criminal cases challenges are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (1806, c. 694, P. R.; 1868-9, c. 9, s. 7; Code, s. 1728; Rev., s. 1960; 1913, c. 31, ss. 5, 6, 7; C. S., ss. 2316, 2325, 2326; 1933, c. 130; 1967, c. 218, s. 1; 1973, c. 95; 1977, c. 711, s. 11.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

CASE NOTES

I. General Consideration.
II. Questioning Prospective Jurors.
A. Nature and Scope of Inquiry.
B. Concerning Capital Punishment.
III. Challenges for Cause.
IV. Disqualified Jurors.

I. GENERAL CONSIDERATION.

A motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process. State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978).

Defendant seeking to establish on appeal that the exercise of judicial discretion constituted reversible error must show harmful prejudice as well as clear abuse of discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

II. QUESTIONING PROSPECTIVE JURORS.

A. Nature and Scope of Inquiry.

Purpose of Voir Dire. — The voir dire examination of jurors is a right secured to the defendant by the statutes and has a definite double purpose: first, to ascertain whether there exist grounds for challenge for cause; and, second, to enable counsel to exercise intelligently the peremptory challenges allowed by law. State v. Allred, 275 N.C. 554, 169 S.E.2d 833 (1969); State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972); State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974); State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976); In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343, cert. denied, 295 N.C. 90, 244 S.E.2d 263 (1978); State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706, cert. denied, 297 N.C. 302, 254 S.E.2d 923 (1979).

The purpose of the voir dire examination and the exercise of challenges, either peremptory or for cause, is to eliminate extremes of partiality and to assure both the defendant and the State that the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1207 (1976).

The primary purpose of the voir dire of prospective jurors is to select an impartial jury. State v. Lee, 292 N.C. 617, 234 S.E.2d 574

(1977); In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343 (1978).

Any party to an action, whether civil or criminal, is entitled to inquire into the fitness and competency of any prospective juror. State v. Wood, 20 N.C. App. 267, 201 S.E.2d 231 (1973).

The right of inquiry concerning a prospective juror's competency and fitness to serve may be exercised by or on behalf of the defendant as well as the State. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978).

Voir Dire Should Be Based on Questions Phrased in Witherspoon Language. — Since Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) has so clearly specified the ultimate questions that must be answered, the voir dire examination of prospective jurors should be based on questions phrased in Witherspoon language, because unless this course is followed, new trials will often be necessary in cases otherwise free from prejudicial error. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Prospective jurors may be asked questions which will elicit information not per se a ground for challenge in order that the party, propounding the question, may exercise intelligently his or its peremptory challenges. State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1206 (1976).

Questions Regarding Right to Make a Will. — In view of the possibility that many people, for one reason or another, do not agree with the statutory right of a person to make a will, propounders of a will should be allowed to question prospective jurors with respect to their feelings on that question. In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343, cert. denied, 295 N.C. 90, 244 S.E.2d 263 (1978).

Questioning of Jurors by Court or by Counsel. — Although this section assures a defendant of the right to have due inquiry made as to the competency and fitness of any person to serve as a juror, the actual questioning of prospective jurors to elicit the pertinent information may be conducted either by the court or by counsel for the State and counsel for the defendant. The trial judge, in his discretion, may decide which course to pursue in a particular case. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973); State v. Girley, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Prohibiting Ambiguous or Confusing Questions. — Discretion over the inquiry on voir dire was properly exercised when the trial court prohibited ambiguous or confusing hypothetical questions. State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Refusal of Court to Ask Question Requested by Counsel. — If the court, when it conducted the questioning, declined to ask a question requested by the defendant's counsel, an exception should have been noted so that an appellate court could consider the propriety, pertinence and substance of such question. This procedure avoids repetitive questioning without precluding or restricting any inquiry suggested and requested by defendant's counsel, and is not violative of this section or otherwise objectionable. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

Effect of District Attorney's Improper Statements During Voir Dire. — In a capital case, improper statements made by a district attorney in the presence of prospective jurors during their voir dire examination may well be as prejudicial as a similar statement made by him during argument to the jury. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

Regulation of Voir Dire Rests in Trial Judge's Discretion. — Counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision, and the regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

Regulation of the manner and the extent of the inquiry on voir dire rests largely in the trial judge's discretion. State v. Young, 287 N.C. 377, 214 S.E.2d 763 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

Counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion. State v. Boykin, 291 N.C. 264, 229 S.E.2d 914 (1976).

The manner and extent of the inquiry of prospective jurors are matters committed largely to the discretion of the trial judge and are subject to his close supervision. State v. Denny, 294 N.C. 294, 240 S.E.2d 437 (1978).

Judge's Discretion Subject to Review. — While the regulation of the manner and extent of the inquiry on voir dire rests largely in the trial judge's discretion, his exercise of discretion is not absolute and is subject to review on appeal. In re Will of Worrell, 35 N.C. App. 278, 241 S.E.2d 343, cert. denied, 295 N.C. 90, 244 S.E.2d 263 (1978).

B. Concerning Capital Punishment.

Examining Jurors Attitudes. — In order to ensure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment. State v. Honeycutt, 285 N.C. 174, 203 S.E.2d 844 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3205, 49 L. Ed. 2d 1207 (1976); State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

In a capital case both the State and the defendant may, on the voir dire examination of prospective jurors, make inquiry concerning a prospective juror's moral or religious scruples, his beliefs and attitudes toward capital punishment, to the end that both the defendant and the State may be ensured a fair trial before an unbiased jury. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

In many capital cases solicitors (now district attorneys) may ask prospective jurors whether they have moral or religious scruples against capital punishment, and if so, whether they are willing to consider all of the penalties provided by law, or are irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence. State v. Carey, 285 N.C. 497, 206 S.E.2d 213 (1974).

There was no error in permitting questions to be propounded to prospective jurors concerning their views about the death penalty. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Subject to Trial Judge's Control and Supervision. — The extent of the inquiries to prospective jurors concerning their attitudes toward capital punishment remains under the control and supervision of the trial judge. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

III. CHALLENGES FOR CAUSE.

The right to challenge is not given so as to allow a party to pick a jury, but so that he may obtain an impartial jury. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973).

Excluding Jurors for Opposition to Capital Punishment. — If a prospective juror states that under no circumstances could he vote for a verdict that would result in the imposition of the death penalty no matter how aggravated the case and regardless of the evidence shown, the trial court can properly dismiss the juror upon a challenge for cause. State v. Avery, 286 N.C. 459, 212 S.E.2d 142 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Jurors who indicated they were irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence were properly excused for cause. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

Where juror voiced general reservations about the death penalty, but made no affirmative, unequivocal statement that she was unwilling to consider the death penalty or that she was irrevocably committed to vote against it regardless of the facts and circumstances that might be revealed by the evidence, she was erroneously excused for cause. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

In a first-degree murder trial where prospective juror stated that knowing that the death penalty would be imposed he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt, the trial judge, in his discretion, and at the request of the prospective juror, in excusing the prospective juror did not commit prejudicial error. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

It is settled law that a challenge for cause should be sustained where the veniremen challenged states unmistakably that he would, by reason of the death penalty, automatically vote against conviction without regard to any evidence developed at trial. State v. Smith, 291 N.C. 505, 231 S.E.2d 663 (1977).

Veniremen may not be challenged for cause simply because they voice general objections to the death penalty or express conscientious or religious scruples against its infliction. State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977).

Erroneous allowance of an improper challenge for cause did not entitle the adverse party to a new trial, so long as only those who were competent and qualified to serve were actually impaneled upon the jury which tried his case. State v. Monk, 286 N.C. 509, 212 S.E.2d 125 (1975).

Excusal of Juror without Challenge by Party. — In spite of the last phrase of subsection (a) of this section, it is the right and duty of the court to see that a competent, fair and impartial jury is impaneled and, to that end, the court, in its discretion, may excuse a prospective juror without a challenge by either party. State v. Smith, 290 N.C. 248, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

IV. DISQUALIFIED JURORS.

Subsection (c) is designed to protect the prospective juror's adversary in his pending case rather than to protect parties to cases in which he might serve as a juror. State

v. Williams, 293 N.C. 102, 235 S.E.2d 248 (1977).

Subsection (c) subjects a litigant rather than a witness to disqualification as a juror when he has a suit pending and at issue in the court in which he is called to serve as a juror. State v. Williams, 293 N.C. 102, 235 S.E.2d 248 (1977).

§ 9-16. Exemption from civil arrest.

No sheriff or other officer shall arrest under civil process any juror during his attendance at or going to and returning from any session of the superior or district court. Any such arrest shall be invalid, and the defendant on motion shall be discharged. (1779, c. 157, s. 10, P. R.; R. C., c. 31, s. 31; Code, s. 1735; Rev., s. 1979, C. S., s. 2328; 1967, c. 218, s. 1.)

CASE NOTES

Section Does Not Repeal Common-Law Exemption. — This section does not by implication repeal the common-law exemption of nonresidents from service of process while in the State in attendance in court either as witnesses or as suitors. Cooper v. Wyman, 122 N.C. 784, 29 S.E. 947 (1898). See Greenlief v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).

§ 9-17. Jurors impaneled to try case furnished with accommodations; separation of jurors.

A jury, impaneled to try any cause, shall be put in charge of an officer of the court and shall be furnished with such accommodations as the court may order, and the accommodations shall be paid for by the parties or by the State, as ordered by the presiding judge. When sequestration of the jury is ordered in a criminal case, however, the State shall pay for all accommodations of jurors.

The presiding judge, in his discretion, may direct any jury to be sequestered while it has a case or issue under consideration. (1876-7, c. 173; Code, s. 1736; 1889, c. 44; Rev., s. 1978, C. S., s. 2327; 1947, c. 1007, s. 2; 1967, c. 218, s. 1; 1977, c. 711, s. 12.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

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No Federal Constitutional Issue Presented. — Petitioner's contention that he was denied a fair and impartial trial in that the jurors were not sequestered does not present a federal constitutional issue. It is a matter of state procedural law and does not reach constitutional proportions. Baldwin v. Blackledge, 330 F. Supp. 183 (E.D.N.C. 1971).

Whether or not a jury is to be sequestered is within the discretion of the trial court. There being no showing of an obvious abuse of discretion, the matter is not subject to review. Baldwin v. Blackledge, 330 F. Supp. 183 (E.D.N.C. 1971).

A motion for the sequestration of witnesses is addressed to the discretion of the court. State v. Monk, 291 N.C. 37, 229 S.E.2d 163 (1976).

Effect on Verdict of Refusal to Furnish Refreshments. — Where a jury retired at 11 A.M., to consider their verdict, which was returned at 3 P.M. such verdict could not be impeached on the grounds that the sheriff declined to give them refreshments, except water, until they agreed on a verdict, or until the judge should tell him to take them to dinner. Gaither v. Hascall-Richards Steam Generator Co., 121 N.C. 384, 28 S.E. 546 (1897).

Applied in State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

§ 9-18. Alternate jurors.

(a) Civil Cases. Whenever the presiding judge deems it appropriate, one or more alternate jurors may be selected in the same manner as the regular trial panel of jurors in the case. Each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have after the selection of the regular trial panel. Alternate jurors shall be sworn and seated near the jury with equal opportunity to see and hear the proceedings and shall attend the trial at all times with the jury and shall obey all orders and admonitions of the court to the jury. When the jurors are ordered kept together in any case, the alternate jurors shall be kept with them. An alternate juror shall receive the same compensation as other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury. If before that time any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. If more than one alternate juror has been selected, they shall be available to become a part of the jury in the order in which they were selected.

(b) Criminal Cases. Procedures relating to alternate jurors in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (1931, c. 103; 1939, c. 35; 1951, cc. 82, 1043; 1967, c. 218, s. 1; 1977, c. 406, ss. 3-5; c. 711, s. 13; 1979, c. 711, s. 2.)

Editor's Note. — Session Laws 1977, c. 406, s. 8, provides: "The provisions of this act shall apply to murders committed on or after the effective date of this act."

Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Legal Periodicals. — For a comment entitled, "An Historical Analysis of Mandatory Capital Punishment," see 7 N.C. Cent. L.J. 306 (1976).

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The essential attributes of trial by jury guaranteed by former N.C. Const., Art. I, § 13 (now see N.C. Const., Art. I, § 24), are the number of jurors, their impartiality and a unanimous verdict, the alternate not being technically a juror until a member of the jury has died or been discharged and the alternate is made a juror by order of the court, and the verdict being finally returned by the unanimous verdict of 12 good and lawful persons. State v. Dalton, 206 N.C. 507, 174 S.E. 422 (1934).

Requirements of this section and N.C. Const., Art. I, § 24 are mandatory. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Defendant Cannot Assent to Trial by More Than 12 Jurors. If a defendant in a felony trial cannot consent to a trial by fewer than 12 jurors, it is clear that he cannot assent to deliberations by more than 12. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

Participation of Alternate Juror in Deliberation is Error. — A decision that a deliberation by 13 jurors is error is compelled both by this section and by the appellate decisions of the State. State v. Alston, 21 N.C. App. 544, 204 S.E.2d 860 (1974).

Alternate Juror's Presence in Jury Room Reversible Error Per Se. — Where the alternate juror was not discharged when the jury retired as required by this section, and although the record showed that the court corrected its mistake after only three or four minutes had elapsed, and the alternate did not participate in the deliberation and verdict of the other 12, his brief visit to the jury room was reversible error per se. State v. Bindyke, 288 N.C. 608, 200 S.E.2d 521 (1975); State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

At any time an alternate juror is in the jury room during deliberations, he participates by his presence and, whether he says little or nothing, his presence will void the trial. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

The presence of an alternate juror, either during the entire period of deliberation

preceding the verdict, or his presence at any time during the deliberations of the 12 regular jurors, is a fundamental irregularity of constitutional proportions which requires a mistrial or vitiates the verdict, if rendered. And this is the result notwithstanding the fact that the defendant's counsel consented, or failed to object, to the presence of the alternate. State v. Rowe, 30 N.C. App. 115, 226 S.E.2d 231 (1976).

The presence of an alternate juror in the jury room during the jury's deliberations violates N.C. Const., Art. I, § 24 of the State Constitution and this section, and constitutes reversible error per se. State v. Turner, 48 N.C. App. 606, 269 S.E.2d 270 (1980).

If alternate juror's presence in jury room is inadvertent and momentary, and it occurs under circumstances from which it can be clearly seen or immediately determined that the jury has not begun its function as a separate entity, then the rule of per se reversible error is not applicable. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Inquiry into Effect of Presence of Alternate Juror. — If the judge, from his trial experience and knowledge of the circumstances of the particular case, believes it probable that the jury has not begun its consideration of the evidence, he may properly recall the jury and the alternate and, in open court, inquire of them whether there had been any discussion of the case. If the answer is "no," the alternate will be excused and the jury returned to consider its verdict. If the answer is "yes," there must be a mistrial. No inquiry into the extent or nature of the deliberations is permissible. State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Quoted in State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970).

Article 3.

Peremptory Challenges.

§ 9-19. Peremptory challenges in civil cases.

The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the prospective jurors in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court. (1796, c. 452, s. 2, P. R.; 1812, c. 833, P. R.; R. C., c. 31, s. 35; Code, s. 406; Rev., s. 1964; C. S., s. 2331; 1935, c. 475, s. 1; 1965, c. 1182; 1967, c. 218, s. 1.)

CASE NOTES

Peremptory Challenge Defined. — A peremptory challenge is a challenge which may be made or omitted according to the judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or being required to assign a reason therefor. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Reasons for Challenge Need Not Be Given. — A party's reason for peremptorily challenging cannot be inquired into. Dupree v. Virginia Home Ins. Co., 92 N.C. 417 (1885).

Not a Right to Select Jurors. — As in the case of challenges for cause, the right is given to challenge but such right does not constitute the right to select jurors. Ives v. Atlantic & N.C.R.R., 142 N.C. 131, 55 S.E. 74 (1906); Medlin v. Simpson, 144 N.C. 397, 57 S.E. 24 (1907).

A litigant cannot exercise more peremptory challenges than the number allowed to him by law. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Number of Plaintiffs or Defendants Immaterial. — Whether there are one or more plaintiffs or defendants, only eight peremptory challenges to the jury on either side are allowable. Bryan v. Harrison, 76 N.C. 360 (1877); State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

In a quo warranto proceeding, the general stautory right to eight peremptory challenges devolving upon the relators as all the parties on one side of the case was not annulled or impaired by their assertion that justice lay with one of the defendants or by the latter's concurrence in that assertion. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

Challenge After Acceptance. — Where a juror has been accepted it is error to permit a peremptory challenge. Dunn v. Wilmington & W.R.R., 131 N.C. 446, 42 S.E. 862 (1902).

§ 9-20. Civil cases having several defendants; challenges apportioned; discretion of judge.

When there are two or more defendants in a civil action, the presiding judge, if it appears that there are antagonistic interests between the defendants, may in his discretion apportion among the defendants the challenges now allowed by law, or he may increase the number of challenges to not exceeding six for each defendant or class of defendants representing the same interest. In either event, the same number of challenges shall be allowed each defendant or class of defendants representing the same interest. The decision of the judge as to the nature of the interests and number of challenges shall be final. (1905, c. 357; Rev., s. 1965; C. S., s. 2332; 1967, c. 218, s. 1.)

CASE NOTES

Decision of Trial Judge is Final. — This section, which creates the exception to the general rule laid down by § 9-19 regarding peremptory challenges, clothes with finality the decision of the trial judge as to how many challenges the several defendants will be allowed. State ex rel. Freeman v. Ponder, 234 N.C. 294, 67 S.E.2d 292 (1951).

§ 9-21. Peremptory challenges in criminal cases governed by Chapter 15A.

Peremptory challenges in criminal cases are governed by Article 72, Selecting and Impaneling the Jury, of Chapter 15A of the General Statutes. (22 Hen. VIII, c. 14, s. 6; 33 Edw. I, c. 4; 1777, c. 115, s. 85, P. R.; 1801, c. 592, s. 1, P. R.; 1812, c. 833, P. R.; 1826, c. 9; 1827, c. 10; R. S., c. 35, ss. 19, 21; R. C., c. 35, ss. 32, 33; 1871-2, c. 39; Code, ss. 1199, 1200; 1887, c. 53; Rev., ss. 3263, 3264; 1907, c. 415; 1913, c. 31, ss. 3, 4; C. S., ss. 4633, 4634; 1935, c. 475, ss. 2, 3; 1967, c. 218, s. 1; 1969, c. 205, s. 7; 1971, c. 75; 1977, c. 711, s. 14.)

Cross References. — For present provisions as to peremptory challenges in criminal cases, see § 15A-1217 and the note thereto.

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, effective July 1, 1978, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978."

Article 4.

Grand Jurors.

§§ 9-22 to 9-26: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — For present provisions as to grand juries, see §§ 15A-621 through 15A-630. And see the editor's note following the analysis to Chapter 15A.

§§ 9-27 to 9-31: Repealed by Session Laws 1967, c. 218, s. 1.

Chapter 10.

Notaries.

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10-1. Appointment and commission; term of office; revocation of commission.
10-2. To qualify before register of deeds; record of qualification.
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10-4. Register of deeds notary ex officio with respect to certain instruments; to use seal of office.
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10-17. Validation of certain instruments acknowledged prior to January 1, 1945.

§ 10-1. Appointment and commission; term of office; revocation of commission.

The Secretary of State may, from time to time, at his discretion, appoint one or more fit persons in every county to act as notaries public and shall issue to each a commission upon payment of a fee of ten dollars ($10.00). The commission shall show that it is for a term of five years and shall show the effective date and the date of expiration. The term of the commission shall be computed by including the effective date and shall end at midnight of the day preceding the anniversary of the effective date, five years thereafter. The commission shall be sent to the register of deeds of the county in which the appointee lives and a copy of the letter of transmittal to the register of deeds shall be sent to the appointee concerned. The commission shall be retained by the register of deeds until the appointee has qualified in the manner provided in G.S. 10-2.

Any commission so issued by the Secretary of State or his predecessor, shall be revocable by him in his discretion upon complaint being made against such notary public and when he shall be satisfied that the interest of the public will be best served by the revocation of said commission. Whenever the Secretary of State shall have revoked the commission of any notary public appointed by him, or his predecessor in office, it shall be his duty to file with the register of deeds in the county of such notary public a copy of said order and mail a copy of same to said notary public.

Any person holding himself out to the public as a notary public, or any person attempting to act in such capacity after his commission shall have been revoked by the Secretary of State, shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned, or both, in the discretion of the court. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3172; 1927, c. 117; 1959, c. 1161, s. 2; 1969, c. 563, s. 1; c. 912, s. 1; 1973, c. 680, s. 1.)

Cross References. — As to validation of defective acknowledgments before notaries public in certain conveyances, see §§ 47-52, 47-53, 47-102.

CASE NOTES

Origin. — The office of notary public has long been known both to the civil and to the common law. State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

In Loan Co. v. Turrell, 19 Ind. 469, it was said: "The office originated in the early Roman jurisprudence, and was known in England before the Conquest." State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Modern Status of Office. — The office of notary public is in most of the states a state office, although in few states it has been regarded as a county office, and its functions, once simple, have now a wider scope. State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Who Eligible. — It has been said that "at common law a minor is eligible to the position of notary public." State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

OPINIONS OF ATTORNEY GENERAL

Oath of Office for Notary Public. — The notary public to be duly qualified should now take the oath of office before the register of deeds, not the clerk of the superior court. See opinion of Attorney General to Mrs. Susan Lobinger, Governor's Office, 40 N.C.A.G. 605 (1969).

§ 10-2. To qualify before register of deeds; record of qualification.

Upon appearing before the register of deeds to which their commissions were delivered, the notaries shall be duly qualified by taking before the register an oath of office, and the oaths prescribed for officers. Following the administration of the oaths of office, the notary shall place his signature in a book designated as "The Record of Notaries Public." The Record of Notaries Public shall contain the name of the notary, the signature of the notary, the effective date and expiration date of the commission, the date the oath was administered, and the date of revocation if the commission is revoked by the Secretary of State. The information contained in The Record of Notaries Public shall constitute the official record of the qualification of notaries public, and the register of deeds shall deliver the commission to the notary following his qualification and notify the Secretary of State of such qualification. (Code, ss. 3304, 3305; Rev., ss. 2347, 2348; C. S., s. 3173; 1969, ch. 912, s. 2; 1973, c. 680, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Oath of Office for Notary Public. — The notary public to be duly qualified should now take the oath of office before the register of deeds, not the clerk of the superior court. See opinion of Attorney General to Mrs. Susan Lobinger, Governor's Office, 40 N.C.A.G. 605 (1969).

§ 10-3. Clerks notaries ex officio; may certify own seals.

The clerks of the superior court may act as notaries public, in their several counties, by virtue of their offices as clerks, and may certify their notarial acts under the seals of their respective courts. (1833, c. 7, ss. 1, 2; R. C., c. 75, s. 3; Code, s. 3306; Rev., s. 2349; C. S., s. 3174; 1973, c. 680, s. 1.)

CASE NOTES

A clerk of the superior court, is, by virtue of his office, a notary public, and the taking of acknowledgments must be referred to the exercise of his notarial authority. Lawrence v. Hodges, 92 N.C. 672 (1885).

§ 10-4. Register of deeds notary ex officio with respect to certain instruments; to use seal of office.

With respect to instruments offered for registration in their county, the register of deeds and his assistants and deputies may act as notaries public by virtue of their office, and may certify their notarial acts under the seal of the office of the register of deeds. (1969, c. 664, s. 1; 1973, c. 680, s. 1.)

CASE NOTES

Cited in DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

§ 10-5. Powers of notaries public.

(a) Subject to the exception stated in subsection (c), a notary public commissioned under the laws of this State acting anywhere in this State may:

(1) Take and certify the acknowledgment of a contract, release, or separation agreement between a husband or wife as prescribed by the provisions of G.S. 52-10 or 52-10.1, and take and certify the acknowledgment or proof of the execution or signing of any other instrument or writing;
(2) Take affidavits and depositions;
(3) Administer oaths and affirmations, including oaths of office, except when such power is expressly limited to some other public officer;
(4) Protest for nonacceptance or nonpayment, notes, bills of exchange and other negotiable instruments; and
(5) Perform such acts as the law of any other jurisdiction may require of a notary public for the purposes of that jurisdiction.

(b) Any act within the scope of subsection (a) performed in another jurisdiction by a notary public of that jurisdiction has the same force and effect in this State as fully as if such act were performed in this State by a notary public commissioned under the laws of this State.

(c) A notary public who, individually or in any fiduciary capacity, is a party to any instrument, cannot take the proof or acknowledgment of himself in such fiduciary capacity or of any other person thereto.

(d) A notary public who is a stockholder, director, officer, or employee of a corporation is not disqualified to exercise any power, which he is authorized by this section to exercise, with respect to any instrument or other matter to which such corporation is a party or in which it is interested unless he is individually a party thereto. (1866, c. 30; 1879, c. 128; Code, s. 3307; Rev., s. 2350; C. S., s. 3175; 1951, c. 1006, s. 1; 1967, c. 24, s. 22; 1973, c. 680, s. 1; 1977, c. 375, s. 5.)

Legal Periodicals. — For comment on the seal in North Carolina and the need for reform, see 15 Wake Forest L. Rev. 251 (1979).

CASE NOTES

Scope of Powers. — A notary public is recognized by the universal law of civilized and commercial nations; but his powers are confined to the authentication of commercial papers and to the protesting of bills of exchange and the like. Benedict, Hall & Co. v. Hall, 76 N.C. 113 (1877).

By statute in this State the powers of notaries public have been extended beyond those which were incident to the office by the universal law merchant, and pertained to the presentment of bills of exchange for acceptance or payment and the protest thereof for nonpayment or refusal to accept; they may now take and certify the acknowledgment or proof of powers of attorney, mortgages, deeds and other instruments of writing, etc. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Duty in Taking Acknowledgments. — The notary is required "to take and certify the acknowledgment or proof" and this imposes upon him the duty of ascertaining (1) that the persons who present themselves are the grantors in the deed; (2) that they acknowledge the executions of it; (3) that the wife signed the deed freely and voluntarily, and that she voluntarily assents thereto. Young v. Jackson, 92 N.C. 144 (1885); Darden v. Neuse & Trent River Steamboat Co., 107 N.C. 437, 12 S.E. 46 (1890); State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Acknowledgment Quasi Judicial Act. — An acknowledgment of a deed, taken before a notary public, is a judicial, or at least a quasi judicial, act. Long v. Crews, 113 N.C. 256, 18 S.E.499 (1893).

Protest as Evidence. — The protest of a notary establishes the facts stated in it in respect to each and all of these points to the full extent the notary could do it if he were examined as a witness and were believed. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

This was for convenience of commerce and to dispense with the necessity of bringing witnesses from a distance or of taking depositions to prove the facts certified to in the protest, the certificate being prima facie true. Elliott v. White, 51 N.C. 98 (1858); McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Certificate Prima Facie Evidence. — The certificate of the notary established prima facie that electors were sworn as required by statute when they signed the affidavits accompanying their absentee ballots. State ex rel. Owens v. Chaplin, 229 N.C. 797, 48 S.E.2d 37 (1948).

With the extension of the powers of notaries to take probate of deeds, the same quality attaches to their certificates of probate or acknowledgment; it is prima facie evidence of the truth of its pertinent recitals. McNeal Pipe & Foundry Co. v. Woltman, Keith & Co., 114 N.C. 178, 19 S.E. 109 (1894).

Not Disqualified to Act Because Employee of Grantee. — A notary public was not disqualified to take acknowledgment of grantors and privy examination of married women to conveyances of land when he was an employee of the grantee, without any interest in the land conveyed. Smith v. Ayden Lumber Co., 144 N.C. 47, 56 S.E. 555 (1907).

Incurable Incompetency. — Where a notary public was interested in a deed of trust, he was disqualified to take the acknowledgment, his attempted action was a nullity, and such defect could not be cured by probate upon such acknowledgment before the clerk and registration. Long v. Crews, 113 N.C. 256, 18 S.E. 499 (1893).

§ 10-6. May exercise powers in any county.

Notaries public have full power and authority to perform the functions of their office in any and all counties of the State, and full faith and credit shall be given to any of their official acts wheresoever the same shall be made and done. (1891, c. 248; Rev., s. 2351; C. S., s. 3176; 1973, c. 680, s. 1.)

CASE NOTES

A notary public resident out of the State has no authority to take affidavits to be used in the courts of this State. Benedict, Hall & Co. v. Hall, 76 N.C. 113 (1877).

§ 10-7. Certificates of official character.

The Secretary of State and the register of deeds in the county in which the notary public qualified may certify to the official character and authority of such notary public. (1973, c. 680, s. 1.)

CASE NOTES

Cited in Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945).

§ 10-8. Fees of notaries.

(a) Notaries public shall be allowed the following fees:

(1) Taking and certifying the acknowledgment or proof of the execution or signing of any instrument or writing $1.00

(2) Taking affidavits 1.00

(3) Administering oaths (except that oaths of office shall be administered to public officials without charge) 1.00

(b) Notwithstanding the above schedule, notary fees for acknowledging signatures on documents required by the Division of Motor Vehicles shall be in accordance with the schedule of fees set forth in G.S. 20-42(a). (Code, s. 3749; 1889, c. 446; 1895, c. 296; 1903, c. 734; Rev., s. 2800; C. S., s. 3178; 1973, c. 680, s. 1; 1977, c. 429, ss. 1, 2; 1981, c. 872.)

Effect of Amendments. — The 1981 amendment designated the former provisions of this section as subsection (a), and added subsection (b).

CASE NOTES

Fees Created by Statute. — The fees of notaries public are created and regulated by statute. Price & Luca Cider & Vinegar Co. v. Carroll, 124 N.C. 555, 32 S.E. 959 (1899).

§ 10-9. Official acts of notaries public; signatures; appearance of names; notarial stamps or seals; expiration of commissions.

Official acts of notaries public in the State of North Carolina shall be attested:

(1) By their proper signatures;

(2) By the readable appearance of their names, either from their signatures or otherwise;

(3) By the clear and legible appearance of their notarial stamps or seals;

(4) By a statement of the date of expiration of their commissions;

provided, that the failure to comply with the provisions of subdivisions (2) and (4) shall not invalidate their official acts. (Rev., s. 2352; C. S., s. 3179; 1953, c. 836; 1961, c. 733; 1967, c. 984; 1973, c. 680, s. 1.)

Local Modification. — Guilford: 1955, c. 1057.

Cross References. — As to validation of deeds and probate and registration thereof where notarial seals have been omitted, see §§ 47-102 and 47-103.

CASE NOTES

Courts Take Judicial Notice. — It was said in Pierce v. Indseth, 106 U.S. 546, 1 S. Ct. 418, 27 L. Ed. 254 (1882): "The court will take judicial notice of the seals of notaries public, for they are officers recognized by the commercial law of the world." State ex rel. Attorney Gen. v. Knight, 169 N.C. 333, 85 S.E. 418 (1915).

Name in Seal. — The statute authorizing a notary public to take acknowledgment of deeds does not require that his name or any name shall be used in the notarial seal, and the seal appended to the certificate is presumably his in the absence of evidence to the contrary; hence, where the fact of the execution of deed by a notary public was adjudged to have been proved by such seal and certificate, it was not rebutted by the mere fact that the notary signed his name, "Geo. Theo. Somner" and the seal had on it the name of "Theo. Somner." Deans v. Pate, 114 N.C. 194, 19 S.E. 146 (1894).

Failure to Attest by Seal. — A motion for judgment for want of an answer was properly allowed when the complaint was duly verified and what purported to be the verification of the answer was attested only by a person signing his name with the letters "N. P." added thereto, but without an official seal. Tucker v. Inter-States Life Ass'n, 112 N.C. 796, 17 S.E. 532 (1893).

The acknowledgment of a deed before a notary public in due form is not defective because not attested by his notarial seal. Peel v. Corey, 196 N.C. 79, 144 S.E. 559 (1928).

OPINIONS OF ATTORNEY GENERAL

Notarial Stamp Need Not Contain the Word "Stamp". — See opinion of Attorney General to Mr. Mark Stewart, Guilford County Register of Deeds, 40 N.C.A.G. 604 (1970), issued prior to the 1973 revision of this Chapter.

It Is Essential That Notary Specify Expiration Date of His Commission. — See opinion of Attorney General to Mr. Alex T. Wood, Register of Deeds, Franklin County, 41 N.C.A.G. 225 (1971), issued prior to the 1973 revision of this Chapter.

§ 10-10. Notarial stamp or seal.

A notary public shall provide and keep an official stamp or seal which shall clearly show and legibly reproduce under photographic methods, when embossed, stamped, impressed or affixed to a document, the name of the notary, the name of the county in which appointed and qualified, the words "North Carolina" or an abbreviation thereof, and the words "Notary Public." It shall be the duty of a notary public to replace a seal which has become so worn that it can no longer clearly show or legibly reproduce under photographic methods the information required by this section. Provided, that a notary public appointed prior to July 1, 1973, who has adopted and is using a seal which does not meet the requirements of this section, shall be entitled to continue to use such seal until the expiration of his current commission. (1973, c. 680, s. 1.)

§ 10-11. Acts of minor notaries validated.

All acts of notaries public for the State of North Carolina who were not yet 21 years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet 21 years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233; 1973, c. 680, s. 1.)

§ 10-12. Acts of certain notaries prior to qualification or after expiration of commission validated.

(a) All acknowledgments taken and other official acts done by any person who has heretofore been appointed or reappointed as a notary public, but who at the time of acting had failed to qualify as provided by law, shall, notwithstanding, be in all respects valid and sufficient; and property conveyed by instruments in which the acknowledgments were taken by such notary public are hereby validated and shall convey the properties therein purported to be conveyed as intended thereby.

(b) All acknowledgments taken and other official acts done by any person who has heretofore been appointed as a notary public, but whose commission has expired at the time of acting, shall be in all respects valid and sufficient. Instruments conveying property acknowledged by this notary public are validated and convey the properties they purport to convey. (1945, c. 665; 1973, c. 680, s. 1; 1977, c. 734, s. 1; 1979, c. 226, s. 2; 1981, c. 164, s. 1.)

Editor's Note. — This section was reenacted without change by s. 2 of Session Laws 1979, c. 226, ss. 3 and 4 of which reads:

"Nothing herein contained shall affect pending litigation."

"Section 2 of this act shall apply only to those acts performed on or before the effective date of this act." The act was ratified March 29, 1979 and made effective on ratification.

Effect of Amendments. — The 1981 amendment designated the former provisions of this section as subsection (a), inserted "or reappointed" following "heretofore been appointed" near the beginning of subsection (a), and added subsection (b).

Session Laws 1981, c. 164, ss. 3 and 4, provide that nothing contained in the act shall affect pending litigation, and that the act shall apply only to those acts performed on or before the effective date of the act.

§ 10-13. Acts of notaries public in certain instances validated.

The acts of any person heretofore performed after appointment as a notary public and prior to qualification as a notary public or upon reappointment and prior to qualification:

(1) In taking any acknowledgment, or

(2) In notarizing any instrument,

are all hereby declared to be valid and of the same legal effect as if such person had qualified as a notary public prior to performing any such acts. (1947, c. 313; 1949, c. 1; 1965, c. 37; 1969, c. 716, s. 1; 1971, c. 229, s. 1; 1973, c. 680, s. 1; 1977, c. 734, s. 1; 1979, c. 226, s. 2.)

Editor's Note. — This section was reenacted without change by s. 2 of Session Laws 1979, c. 226, ss. 3 and 4 of which read:

"Nothing herein contained shall affect pending litigation."

"Section 2 of this act shall apply only to those acts performed on or before the effective date of this act." The act was ratified March 29, 1979 and made effective on ratification.

§ 10-14. Validation of acknowledgment wherein expiration of notary's commission erroneously stated.

All deeds, deeds of trust, mortgages, conveyances, affidavits, and all other paper writings similar or dissimilar to those enumerated herein, whether or not permitted or required to be recorded or filed under the laws of this State heretofore or hereafter executed, bearing an official act of a notary public in which the date of the notary's commission is erroneously stated, are, together with all subsequent acts or actions taken thereon, including but not limited to

probate and registration, hereby declared in all respects to be valid to the extent as if the correct expiration date had been stated and shall be binding on the parties of such paper writings and their privies; and such paper writings, together with their certificates may, if otherwise competent, be read in evidence as a muniment of title for all intents and purposes in any of the courts of this State: provided, that at the date of such official act the notary's commission was actually in force. (1953, c. 702; 1961, c. 734; 1973, c. 680, s. 1.)

§ 10-15. Validation of instruments which do not contain readable impression of notary's name.

All deeds, deeds of trust, mortgages, conveyances, affidavits and all other paper writings similar or disimilar to those enumerated herein, whether or not permitted or required to be recorded or filed under the laws of this State heretofore executed, bearing the official act of a notary public as attested by his notarial seal, but which seal does not contain a readable impression of the notary's name are, together with all subsequent acts or actions taken thereon, including but not limited to probate and registration, hereby declared in all respects to be valid to the same extent as if a seal containing a readable impression of the notary's name had been affixed thereto, and shall be binding on the parties of such paper writings and their privies; and such paper writings, together with their certificates, if otherwise competent, may be read in evidece as a muniment of title for all intents and purposes in any of the courts of this State. (1961, c. 483; 1973, c. 680, s. 1.)

§ 10-16. Acts of notaries with seal containing name of another state validated.

The notarial acts of any person heretofore duly commissioned as a notary public in this State, who used in performing such acts a seal correctly containing the name of the notary and the proper county but mistakenly containing the abbreviation for the State of Georgia instead of North Carolina, are hereby validated and given the same legal effect as if such misprint or incorrect designation of the State had not appeared on the seal or seal imprint so used. (1969, c. 83; 1973, c. 680, s. 1.)

§ 10-16.1. Act of notaries with seal omitting name of this State validated.

The notarial acts of any person heretofore duly commissioned as a notary public in this State, who used in performing such acts a seal correctly containing the name of the notary, but the words "North Carolina" or an abbreviation "N. C." were omitted, are hereby validated and given the same legal effect as if such correct designation of the State had appeared on the seal or seal imprints so used. This section shall apply to notarial acts prior to July 1, 1979. (1979, c. 643, s. 1; 1981, c. 164, s. 2.)

Effect of Amendments. — The 1981 amendment reenacted this section without change.

Session Laws 1981, c. 164, ss. 3 and 4, provide that nothing contained in the act shall affect pending litigation, and the act shall apply on to those acts performed on or before the effective date of the act.

§ 10-17. Validation of certain instruments acknowledged prior to January 1, 1945.

Where any person has taken an acknowledgment as a notary public of a person acting through another by virtue of the execution of a power of attorney and by said person acting in his individual capacity and said notary public has failed to include within his certificate the acknowledgment of said person in his capacity as attorney-in-fact, and such acknowledgment has been otherwise duly probated and recorded, then such acknowledgment is hereby declared to be sufficient and valid: provided, this section shall apply only to those deeds and other instruments acknowledged prior to January 1, 1945. (1969, c. 951, s. 1; 1973, c. 680, s. 1.)

Chapter 11.

Oaths.

Article 1.

General Provisions.

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Article 2.

Forms of Official and Other Oaths.

11-11. Oaths of sundry persons; forms.

Article 1.

General Provisions.

§ 11-1. Oaths to be administered with solemnity.

Whereas, lawful oaths for the discovery of truth and establishing right are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God, as the omniscient witness of truth and the just and omnipotent avenger of falsehood, such oaths, therefore, ought to be taken and administered with the utmost solemnity. (1777, c. 108, s. 2, P. R.; R. C., c. 76, s. 1; Rev., s. 2353; C. S., s. 3188.)

Legal Periodicals. — For article entitled, "Toward a Codification of the Law of Evidence in North Carolina", see 16 Wake Forest L. Rev. 669 (1980).

CASE NOTES

The "solemnity" applies not only to the substance of the oath, but to the form and manner of taking it and of administering it. State v. Davis, 69 N.C. 383 (1873).

Double Sanction to Oath of Witness. — The law requires two guarantees of the truth of what a witness is about to state; he must be in the fear of punishment by the laws of man, and he must also be in the fear of punishment by the laws of God, if he states what is false; in other words, there must be a temporal and also a religious sanction to his oath. Shaw v. Moore, 49 N.C. 25 (1856).

Sufficiency of Belief. — A person who believes in the obligation of an oath on the Bible; who believes in God and Jesus Christ, and that God will punish in this world, all violators of his law, and that the sinner will inevitably be punished in this world for each and every sin committed; but there will be no punishment after death, and that in another world all will be happy and equal to the angels, is competent to be sworn. Shaw v. Moore, 49 N.C. 25 (1856).

In Omychund v. Barker, 1 Atk. 19, and Wiles, 538, it was decided that a Gentoo, who was an infidel, who did not believe in either the Old or New Testament, but who believed in a God, as the Creator of the Universe, and that he is a rewarder of those who do well, and an avenger of those who do ill, according to the common law, may be sworn in that form which is the most sacred and obigatory upon his religious sense. The case establishes the rule to be, that an infidel is competent to be sworn, provided he believes in the existence of a Supreme Being, who punishes the wicked, without reference to the time of punishment. Shaw v. Moore, 49 N.C. 25 (1856).

Finding of the Judge Conclusive. — The finding of the judge as to the competency of a witness to take oath is conclusive, and not reviewable. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Objection to Manner of Administering after Verdict. — Where a juror was sworn in the presence of the defendant, and his counsel let him acquiesce in the manner in which the oath was taken, to object after the verdict would simply make a trial not a decision upon the merits but a series of pitfalls for the State. Not having spoken when he was called upon to speak, the prisoner should not be heard after the verdict has gone against him. State v. Ward, 9 N.C 443 (1823); Briggs v. Byrd, 34 N.C. 377 (1851); State v. Patrick, 48 N.C. 443 (1856); State v. Boon, 82 N.C. 637 (1880); State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

Failure to Administer. — In State v. Gee, 92 N.C. 756 (1885), where a witness was not sworn at all, the court held that this was not ground of objection after verdict. State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

Objection to Oath of Incompetent after Verdict. — Where a juror, was incompetent to be sworn because an atheist (State v. Davis, 80 N.C. 412 (1879)) and the objection was not discovered till after verdict, setting aside the verdict rested in the discretion of the trial judge. State v. Lamber, 93 N.C. 618 (1885); State v. Council, 129 N.C. 511, 39 S.E. 814 (1901).

§ 11-2. Administration of oath upon the Gospels.

Judges and other persons who may be empowered to administer oaths, shall (except in the cases in this Chapter excepted) require the party sworn to lay his hand upon the Holy Evangelists of Almighty God, in token of his engagement to speak the truth, as he hopes to be saved in the way and method of salvation pointed out in that blessed volume; and in further token that, if he should swerve from the truth, he may be justly deprived of all the blessings of the Gospel, and made liable to that vengeance which he has imprecated on his own head. (1777, c. 108, s. 2, P. R.; R. C., c. 76, s. 1; Code, s. 3309; Rev., s. 2354; C. S., s. 3189; 1941, c. 11; 1971, c. 381, s. 9.)

CASE NOTES

Application to Witnessess. — Every witness, except as otherwise provided, must be sworn in the matter stated in this section. State v. Davis, 69 N.C. 383 (1873).

Sufficiency of Juror's Oath. — An oath administered to a juror in the manner prescribed by statute is sufficient; the juror need not repeat the words "so help me God." State v. Paylor, 89 N.C. 539 (1883).

Ministerial Act. — The administration of an oath is a ministerial act and may be done by anyone in the presence and by the direction of the court, but is the act of the court. State v. Knight, 84 N.C. 789 (1881).

Partially Directory. — As to the form of the oath, when it is prescribed by statute, the statute is to be construed in some sense directory only, so far at least that a departure from the words, in matter not of substance but of form merely, does not exempt the person taking it from the pains of perjury. State v. Mazon, 90 N.C. 676 (1884).

Same—Validity of Irregular Oath. — To hold invalid an oath that did not follow the very words of the statute could prove disastrous to the public interests. State v. Mazon, 90 N.C. 676 (1884).

Same—Juror's Oath in Capital Cases. — Although the omission of the words "you swear" at the commencement of the oath of jurors in a capital case looks awkward and mars the comeliness of judicial proceedings, it does not vitiate the oath. State v. Owen, 72 N.C. 605 (1875).

The manner of swearing is merely a form adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity. State v. Pitt, 166 N.C. 268, 80 S.E. 1060 (1914).

Presumption. — The administration of an oath to a witness is an official act of the court; and it being shown affirmatively that an oath was administered to the defendant in open court on the Bible, a presumption arises that it was rightly done. State v. Mace, 86 N.C. 668 (1882).

Willful Violation. — The general rule is that a willful violation of such an oath is a material matter is perjury, and no other is. State v. Davis, 69 N.C. 383 (1873).

When Deputy Clerk May Administer.— The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff in an action of claim and delivery. Jackson v. Buchanan, 89 N.C. 74 (1883).

A deputy sheriff is not authorized to administer oath to homestead appraisers. Oates v. Munday, 127 N.C. 439, 37 S.E. 457 (1900).

Cited in State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

§ 11-3. Administration of oath with uplifted hand.

When the person to be sworn shall be conscientiously scrupulous of taking a book oath in manner aforesaid, he shall be excused from laying hands upon, or touching the Holy Gospel; and the oath required shall be administered in the following manner, namely: He shall stand with his right hand lifted up towards heaven, in token of his solemn appeal to the Supreme God, and also in token that if he should swerve from the truth he would draw down the vengeance of heaven upon his head, and shall introduce the intended oath with these words, namely:

I, A.B., do appeal to God, as a witness of the truth and the avenger of falsehood, as I shall answer the same at the great day of judgment, when the secrets of all hearts shall be known (etc., as the words of the oath may be). (1777, c. 108, s. 3, P. R.; R. C., c. 76, s. 2; Code, s. 3310; Rev., s. 2355; C. S., s. 3190.)

CASE NOTES

Conscientious Scruples. — If the usual form of oaths upon the Holy Evangelists is dispensed with and an "appeal" or "affirmation" is substituted, it must appear that the person sworn had conscientious scruples, else the "appeal" or "affirmation" is invalid. State v. Davis, 69 N.C. 383 (1873); Pearre v. Folb, 123 N.C. 239, 31 S.E. 475 (1898).

Presumption as to Witness. — When a witness comes before a tribunal to be sworn it is to be presumed that he has settled the point with himself in what manner he will be sworn, and he should make it known to the officer of the court; and should he be sworn with uplifted hand, though not conscientiously scrupulous of swearing on the Gospels, and depose falsely, he subjects himself to the pains and penalties of perjury. State v. Whisenhurst, 9 N.C. 458 (1823).

Presumption as to Manner. — Where it appeared that the registrar administered the prescribed oath to electors, but that he did not swear them on the Bible, it would be inferred, in the absence of direct proof to the contrary, that the oath was taken with uplifted hand, as specified by this section, and was accepted as a valid mode of administering it, by both the registrar and the elector. Administering the oath in such manner was sufficient to meet the requirements of the election law. State ex rel. DeBerry v. Nicholson, 102 N.C. 465, 9 S.E. 545 (1889).

Cited in State v. Beal, 199 N. C. 278, 154 S.E. 604 (1930).

§ 11-4. Affirmation of Quakers and others.

The solemn affirmation of Quakers, Moravians, Dunkers and Mennonites, made in the manner heretofore used and accustomed, shall be admitted as evidence in all civil and criminal actions; and in all cases where they are required to take an oath to support the Constitution of the State, or of the United States, or an oath of office, they shall make their solemn affirmation in the words of the oath beginning after the word "swear"; which affirmation shall be effectual to all intents and purposes. (1777, c. 108, s. 4, P. R.; c. 115, s. 42, P. R.; 1819, c. 1019, P. R.; 1821, c. 1112, P. R.; R. C., c. 76, s. 3; Code, s. 3311; Rev., s. 2356; C. S., s. 3191.)

CASE NOTES

Cited in State v. Davis, 69 N.C. 383 (1873); State v. Beal, 199 N.C. 278, 154 S.E. 604 (1930).

§ 11-5. Oaths of corporations.

In all cases where a corporation is appointed administrator, executor, collector, or to any other fiduciary position, of which fiduciary an oath is required by law, such oath may be taken by such corporation by and through any officer or agent of said corporation who is authorized by law to verify pleadings in behalf of such corporation; and any oath so taken shall be valid as the oath of such corporation. Any oath heretofore taken in the manner aforesaid in behalf of a corporation as such fiduciary is hereby validated as the oath of such corporation. (1919, c. 89, ss. 1, 2; C. S., s. 3192.)

§ 11-6. Oath to support Constitution of United States; all officers to take.

All members of the General Assembly, and all officers who shall be elected or appointed to any office of trust or profit within the State, shall, agreeably to act of Congress, take the following oath or affirmation:

I, A.B., do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States; so help me, God.)

Which oath shall be taken before they enter upon the execution of the duties of the office. (1791, c. 342, s. 2, P. R.; R. C., c. 76, s. 5; Code, s. 3313; Rev., s. 2357; C. S., s. 3193.)

Cross References. — As to penalty for failure to take oath before entering on the duties of office, see § 128-5. As to oaths required of public officers, see N.C. Const., Art. VI, § 7.

CASE NOTES

Oath Incidental. — The oath required of public officers is merely incidental to and constitutes no part of the office. State ex rel. Clark v. Stanley, 66 N.C. 59 (1872).

Failure to Take Oath. — Public officers who have not taken the required oaths of office are not entitled to the salaries attached to such offices. Wiley v. Worth, 61 N.C. 171 (1867).

§ 11-7. Oath or affirmation to support State Constitution; all officers to take.

Every member of the General Assembly, and every person who shall be chosen or appointed to hold any office of trust or profit in the State, shall, before taking his seat or entering upon the execution of the office, take and subscribe the following oath or affirmation:

I, A.B., do solemnly and sincerely swear (or affirm) that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me, God.

Where such person shall be of the people called Quakers, Moravians, Mennonites or Dunkers, he shall take and subscribe the following affirmation:

I, A.B., do solemnly and sincerely declare and affirm that I will truly and faithfully demean myself as a peaceful citizen of North Carolina; that I will be subject to the powers and authorities that are or may be established for the good government thereof, not inconsistent with the Constitution of the State and Constitution of the United States, either by yielding an active or passive obedience thereto, and that I will not abet or join the enemies of the State, by any means, in any conspiracy whatever, against the State; that I will disclose

and make known to the legislative, executive or judicial powers of the State all treasonable conspiracies which I shall know to be made or intended against the State. (1781, c. 342, s. 1, P. R.; R. C., c. 76, s. 4; Code, s. 3312; Rev., s. 2358; C. S., s. 3194.)

§ 11-7.1. Who may administer oaths of office.

(a) Except as otherwise specifically required by statute, an oath of office may be administered by:

(1) A justice, judge, magistrate, clerk, assistant clerk, or deputy clerk of the General Court of Justice, a retired justice or judge of the General Court of Justice, or any member of the federal judiciary;
(2) The Secretary of State;
(3) A notary public;
(4) A register of deeds;
(5) A mayor of any city, town, or incorporated village;
(6) The chairman of a committee of the House or Senate of the General Assembly, or either of the cochairmen of a joint committee.

(b) The administration of an oath by any judge of the Court of Appeals prior to March 7, 1969, is hereby validated. (1953, c. 23; 1969, c. 44, s. 25; c. 499; c. 713, s. 1; 1971, c. 381, s. 10; 1977, c. 344, s. 2; 1979, c. 757; 1981, c. 682, s. 2.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or judge" following "retired justice" near the middle of subdivision (1) of subsection (a).

§ 11-8. When deputies may administer.

In all cases where any civil officer, in the discharge of his duties, is permitted by the law to administer an oath, the deputy of such officer, when discharging such duties, shall have authority to administer it, provided he is a sworn officer; and the oath thus administered by the deputy shall be as obligatory as if administered by the principal officer, and shall be attended with the same penalties in case of false swearing. (1836, c. 27, s. 2; R. C., c. 76, s. 7; Code, s. 3316; Rev., s. 2359; C. S., s. 3195.)

§ 11-9. Administration by certain officers.

The chairman of the board of county commissioners and the chairman of the board of education of the several counties may administer oaths in any matter or hearing before their respective boards. (1889, c. 529; 1899, c. 89; Rev., s. 2362; C. S., s. 3196.)

CASE NOTES

Cited in Royal Cotton Mill Co. v. Textile Workers Union of America, 234 N.C. 545, 67 S.E.2d 755 (1951).

§ 11-10. When county surveyors may administer oaths.

The county surveyors of the several counties are empowered to administer oaths to all such persons as are required by law to be sworn in making partition of real estate, in establishing boundaries and in surveying vacant lands under warrants. (1881, c. 144; Code, s. 3314; Rev., s. 2361; C. S., s. 3197; 1959, c. 879, s. 4.)

ARTICLE 2.

Forms of Official and Other Oaths.

§ 11-11. Oaths of sundry persons; forms.

The oaths of office to be taken by the several persons hereafter named shall be in the words following the names of said persons respectively:

Administrator

You swear (or affirm) that you believe A. B. died without leaving any last will and testament; that you will well and truly administer all and singular the goods and chattels, rights and credits of the said A. B., and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in you, you will well and truly perform, according to law, and with your best skill and ability; so help you, God.

Attorney at Law

I, A. B., do swear (or affirm) that I will truly and honestly demean myself in the practice of an attorney, according to the best of my knowledge and ability; so help me, God.

Attorney General, State Solicitors and County Attorneys

I, A. B., do solemnly swear (or affirm) that I will well and truly serve the State of North Carolina in the office of Attorney General (solicitor for the State or attorney for the State in the county of . . . . . .); I will, in the execution of my office, endeavor to have the criminal laws fairly and impartially administered, so far as in me lies, according to the best of my knowledge and ability; so help me, God.

Auditor

I, A. B., do solemnly swear (or affirm) that I will well and truly execute the trust reposed in me as auditor, without favor or partiality, according to law, to the best of my knowledge and ability; so help me, God.

Book Debt Oath

You swear (or affirm) that the matter in dispute is a book account; that you have no means to prove the delivery of such articles, as you propose to prove by your own oath, or any of them, but by yourself; and you further swear that the account rendered by you is just and true; and that you have given all just credits; so help you, God.

Book Debt Oath for Administrator

You, as executor or administrator of A. B., swear (or affirm) that you verily believe this account to be just and true, and that there are no witnesses, to your knowledge, capable of proving the delivery of the articles therein charged; and that you found the book or account so stated, and do not know of any other or further credit to be given than what is therein given; so help you, God.

Clerk of the Supreme Court

I, ..., do solemnly swear that I will discharge the duties of the office of clerk of the Supreme Court without prejudice, affection, favor, or partiality, according to law and to the best of my skill and ability, so help me, God.

Clerk of the Superior Court

I, A. B., do swear (or affirm) that, by myself or any other person, I neither have given, nor will I give, to any person whatsoever, any gratuity, fee, gift or reward, in consideration of my election or appointment to the office of clerk of the superior court for the county of . . . . . .; nor have I sold, or offered to sell, nor will I sell or offer to sell, my interest in the said office; I also solemnly swear that I do not, directly or indirectly, hold any other lucrative office in the State; and I do further swear that I will execute the office of clerk of the superior court for the county of . . . . . without prejudice, favor, affection or partiality, to the best of my skill and ability; so help me, God.

Commissioners Allotting a Year's Provisions

You and each of you swear (or affirm) that you will lay off and allot to the petitioner a year's provisions for herself and family, according to law, and with your best skill and ability; so help you, God.

Commissioners Dividing and Allotting Real Estate

You and each of you swear (or affirm) that, in the partition of the real estate now about to be made by you, you will do equal and impartial justice among the several claimants, according to their several rights, and agreeably to law; so help you, God.

Commissioner of Wrecks

I, A. B., do solemnly swear (or affirm) that I will truly and faithfully discharge the duties of a commissioner of wrecks, for the district of . . . . . ., in the county of . . . . . ., according to law; so help me, God.

Cotton Weigher for Public

I, ..., public weigher for the city of . . . . . (or as the case may be), do solemnly swear that I will justly, impartially and without any deduction, except as may be allowed by law, weigh all cotton that may be brought to me for that purpose, and tender a true account thereof to the parties concerned, if required so to do; so help me, God.

Entry-Taker

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of entry-taker for the county of . . . . . according to law; so help me, God.

Executor

You swear (or affirm) that you believe this writing to be and contain the last will and testament of A. B., deceased; and that you will well and truly execute the same by first paying his debts and then his legacies, as far as the said estate shall extend or the law shall charge you; and that you will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in you, and according to law; so help you, God.

Grand Jury—Foreman of

You, as foreman of this grand inquest for the body of this county, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the State's counsel, your fellows' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave anyone unpresented for fear, favor or affection, reward or the hope of reward; but you shall present all things truly, as they come to your knowledge, according to the best of your understanding; so help you, God.

Grand Jurors

The same oath which your foreman hath taken on his part, you and each of you shall well and truly observe and keep on your part; so help you, God.

Grand Jury—Officer of

You swear (or affirm) that you will faithfully carry all papers sent from the court to the grand jury, or from the grand jury to the court, without alteration or erasement, and without disclosing the contents thereof; so help you, God.

Jury—Officer of

You swear (or affirm) that you will keep every person sworn on this jury in some private and convenient place when in your charge. You shall not suffer any person to speak to them, neither shall you speak to them yourself, unless it be to ask them whether they are agreed in their verdict, but with leave of the court; so help you, God.

Oath for Petit Juror

You do solemnly swear (affirm) that you will truthfully and without prejudice or partiality try all issues in civil or criminal actions that come before you and give true verdicts according to the evidence, so help you, God.

Justice, Judge, or Magistrate of the General Court of Justice

I, ..., do solemnly swear (affirm) that I will administer justice without favoritism to anyone or to the State; that I will not knowingly take, directly or indirectly, any fee, gift, gratuity or reward whatsoever, for any matter or thing done by me or to be done by me by virtue of my office, except the salary and allowances by law provided; and that I will faithfully and impartially discharge all the duties of . . . . . of the . . . . . Division of the General Court of Justice to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God.

Register of Deeds

I, A. B., do solemnly swear (or affirm) that I will faithfully and truly, according to the best of my skill and ability, execute the duties of the office of register of deeds for the county of . . . . . ., in all things according to law; so help me, God.

Secretary of State

I, A. B., do swear (or affirm) that I will, in all respects, faithfully and honestly execute the office of Secretary of State of the State of North Carolina, during my continuance in office, according to law; so help me, God.

Sheriff

I, A. B., do solemnly swear (or affirm) that I will execute the office of sheriff of . . . . . county to the best of my knowledge and ability, agreeably to law; and that I will not take, accept or receive, directly or indirectly, any fee, gift, bribe, gratuity or reward whatsoever, for returning any man to serve as a juror or for making any false return on any process to me directed; so help me, God.

Standard Keeper

I, A. B., do swear (or affirm) that I will not stamp, seal or give any certificate for any steelyards, weights or measures, but such as shall, as near as possible, agree with the standard in my keeping; and that I will, in all respects, truly and faithfully discharge and execute the power and trust by law reposed in me, to the best of my ability and capacity; so help me, God.

State Treasurer

I, A. B., do swear (or affirm) that, according to the best of my abilities and judgment, I will execute impartially the office of State Treasurer, in all things according to law, and account for the public taxes; and I will not, directly or indirectly, apply the public money to any other use than by law directed; so help me, God.

Stray Valuers

You swear (or affirm) that you will well and truly view and appraise the stray, now to be valued by you, without favor or partiality, according to your skill and ability; so help you, God.

Surveyor for a County

I, A. B., do solemnly swear (or affirm) that I will well and impartially discharge the several duties of the office of surveyor for the county of . . . . . ., according to law; so help me, God.

Treasurer for a County

I, A. B., do solemnly swear (or affirm) that, according to the best of my skill and ability, I will execute impartially the office of treasurer for the county of . . . . . ., in all things according to law; that I will duly and faithfully account for all public moneys that may come into my hands, and will not, directly or indirectly, apply the same, or any part thereof, to any other use than by law directed; so help me, God.

Witness to Depose before the Grand Jury

You swear (or affirm) that the evidence you shall give to the grand jury, upon this bill of indictment against A. B., shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Capital Trial

You swear (or affirm) that the evidence you shall give to the court and jury in this trial, between the State and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in a Criminal Action

You swear (or affirm) that the evidence you shall give to the court and jury in this action between the State and A. B. shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness in Civil Cases

You swear (or affirm) that the evidence you shall give to the court and jury in this cause now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth; so help you, God.

Witness to Prove a Will

You swear (or affirm) that you saw C. D. execute (or heard him acknowledge the execution of) this writing as his last will and testament; that you attested it in his presence and at his request; and that at the time of its execution (or at the time the execution was acknowledged) he was, in your opinion, of sound mind and disposing memory; so help you, God.

Witness before a Legislative Committee or Commission

You swear (or affirm) that the testimony you shall give to the committee (or commission) shall be the truth, the whole truth, and nothing but the truth; so help you, God.

General Oath

Any officer of the State or of any county or township, the term of whose oath is not given above, shall take an oath in the following form:

I, A. B., do swear (or affirm) that I will well and truly execute the duties of the office of . . . . . according to the best of my skill and ability, according to

law; so help me, God. (R. C., c. 76, s. 6; 1874-5, c. 58, s. 2; Code, ss. 3057, 3315; 1903, c. 604; Rev., s. 2360; C. S., s. 3199; 1947, c. 71; 1959, c. 879, s. 5; 1967, c. 218, s. 2; 1969, c. 1190, ss. 50, 51; 1971, c. 381, s. 11; 1977, c. 344, s. 3.)

CASE NOTES

Disclosures Not Prohibited by Grand Jurors' Oath. — The grand jurors' oath of secrecy does not prohibit the disclosure in court of proceedings before the grand jury whenever the ends of justice require it. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

Action of the grand jury in returning two fictitious bills of indictment charging undercover agents with narcotics violations, including the undercover agent who was the principal witness against defendant, was improper, but did not necessarily taint all processes of that grand jury so as to require as a matter of law that a bill of indictment charging defendant with transportation of marijuana be quashed. State v. Long, 14 N.C. App. 508, 188 S.E.2d 690 (1972).

The desire of a prospective juror to affirm rather than take an oath is not, of itself, cause for challenge in this State. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Harris, 283 N.C. 46, 194 S.E.2d 796, cert. denied, 414 U.S. 850, 94 S. Ct. 143, 38 L. Ed. 2d 99 (1973).

Jury Need Not Be Resworn for Prosecution of Less than Capital Offense. — Where, upon an indictment charging homicide, the solicitor announced that he was not seeking a higher verdict than murder in the second degree, the prosecution was no longer for a capital offense, and it was not required that the jury be again sworn to try the particular prosecution, but under the provisions of this section it was sufficient that the jurors and all others summoned as jurors for the session of court were administered oath to truly try all issues which would come before the jury during the term. State v. Smith, 268 N.C. 659, 151 S.E.2d 596 (1966), cert. denied, 386 U.S. 1032, 87 S. Ct. 1481, 18 L. Ed. 2d 593 (1967).

Cited in In re Will of Covington, 252 N.C. 551, 114 S.E.2d 261 (1960); State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979).

Chapter 12.

Statutory Construction.

Sec.
12-1. [Repealed.]
12-2. Repeal of statute not to affect actions.
12-3. Rules for construction of statutes.
12-3.1. Fees and charges by agencies.
12-4. Construction of amended statute.

§ 12-1: Repealed by Session Laws 1957, c. 783, s. 3.

§ 12-2. Repeal of statute not to affect actions.

The repeal of a statute shall not affect any action brought before the repeal, for any forfeitures incurred, or for the recovery of any rights accruing under such statute. (1830, c. 4; R. C., c. 108, s. 1; 1879, c. 163; 1881, c. 48; Code, s. 3764; Rev., s. 2830; C. S., s. 3948.)

CASE NOTES

Section Not Obligatory. — As the laws of our legislature do not bind another, except insofar as they may be absolute contracts, this section must be taken as merely a rule of construction having no application where the intention of the legislature clearly and explicitly appears to the contrary. Dyer v. Ellington, 126 N.C. 941, 36 S.E. 177 (1900).

General Rule — Prospective Effect. — The general rule is that a statute will be given prospective effect only, unless the law in question clearly forbids such a construction. Corporation of Elizabeth City v. Commissioners of Pasquotank, 146 N.C. 539, 60 S.E. 416 (1908); Mann v. Allen, 171 N.C. 219, 88 S.E. 235 (1916); Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Same — Remedial Legislation. — In case of a remedial legislation, the general rule is not so insistent, and such statutes are not infrequently given retrospective effect where the language permits and such a construction will best promote the meaning and purpose of the legislature. Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Maxim "Leges Posteriores Priores Contrarias Abrogant". — To give operation to the maxim, leges posteriores priores contrarias abrogant, the latter law must be in conflict with the former; therefore, when a later statute is almost in ipsissimis verbis with a former one, there is no repeal of the former. Kesler v. Smith, 66 N.C. 154 (1872).

Repeals by implication are not favored by the law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Action Commenced before Repeal. — By express terms of this section, the repeal of a statute does not affect an action theretofore commenced under it. Smith v. Morganton Ice Co., 159 N.C. 151, 74 S.E. 961 (1912).

Same — For Penalty or Forfeiture. — Under the provisions of this section a suit for a forfeiture or penalty is not discontinued by a repeal of the statute giving the penalty. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); Epps v. Smith, 121 N.C. 157, 28 S.E. 359 (1897); Lexington Grocery Co. v. Southern R.R., 136 N.C. 396, 48 S.E. 801 (1904).

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against interferences. Where it springs from contract, or from the principles of the common law, it is not competent for the legislature to take it away. Williams v. Atlantic Coast Line R.R., 153 N.C. 360, 69 S.E. 402 (1910).

Limitation of Actions. — While the legislature has the power to extend or reduce the time in which an action may be brought, this is subject to the restriction that when the limitation is shortened, a reasonable time must be given for the commencement of an action before the statute works a bar. Strickland v. Draughan, 91 N.C. 103 (1884).

Repeal after Services Rendered. — Where a statute was in force when certain services were rendered, it was held that the plaintiff's right had become absolute, and no subsequent repeal could invalidate it. Copple v. Commissioners, 138 N.C. 127, 50 S.E. 574 (1905).

Subject Matter Destroyed by Statute Pending Appeal. — Where, pending an appeal, the subject matter of the action is destroyed or a statute giving the cause of action is repealed, the appellate court will not go into consideration of the abstract question as to which party ought to have prevailed, in order to

adjudicate the costs but the judgment below as to costs will be allowed to stand. Wikel v. Board of Comm'rs, 120 N.C. 451, 27 S.E. 117 (1897); Brinson v. Duplin County, 173 N.C. 137, 91 S.E. 708 (1917).

Right of Informer. — An informer had, in a certain sense, an inchoate right when he brought his suit, but he had no vested right to the penalty until judgment. Hence, until his right became vested, it could not be destroyed by the legislature. Dyer v. Ellington, 126 N.C. 941, 36 S.E. 177 (1900).

Action to Recover Arrearages of Taxes. — An action pending to recover arrearages of taxes, brought under an act authorizing the collection of unpaid taxes for past years, was not affected by the repeal of such statute. City of Wilmington v. Cronly, 122 N.C. 388, 30 S.E. 9 (1898).

Modes of Procedure. — Statutes which change modes of procedure may govern suits pending at the time of their enactment. Sumner v. Miller, 64 N.C. 688 (1870).

Mere Court Procedure. — The rule that statutes may be construed to have retrospective effect does not prevail when they concern mere matters of court procedure before action instituted, or the substitution or designation of new parties deemed necessary to a proper determination of a controversy or authorized to maintain and enforce a recognized or existent right. Waddill v. Masten, 172 N.C. 582, 90 S.E. 694 (1916).

Changing Rules of Evidence. — An act of the legislature changing the rules of evidence cannot be construed as operating retrospectively so as to affect existing rights. Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893).

General Rule in Criminal Actions. — The repeal of a statute pending a prosecution for an offense which it creates arrests the prosecution and withdraws all authority to pronounce judgment, even after conviction. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889).

Where a repealing statute contains a saving clause as to crimes committed prior to the repeal or as to pending prosecutions, the offender may be tried and punished under the old law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Same — Legislative Authority to Increase Punishment. — The legislature has no more authority to give a retroactive effect to a statute making the punishment for an offense already created more severe, than to subject persons to punishment under a criminal statute passed after the commission of the act for which they may be indicted. The provision of the federal Constitution, which forbids the enactment by a state of any ex post facto law, could, in either event, be invoked for the protection of the person charged. State v. Williams, 97 N.C. 455, 2 S.E. 55 (1887); State v. Ramsour, 113 N.C. 642, 18 S.E. 707 (1893).

§ 12-3. Rules for construction of statutes.

In the construction of all statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly, or repugnant to the context of the same statute, that is to say:

(1) Singular and Plural Number, Masculine Gender, etc. — Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; and every word importing the plural number only shall extend and be applied to one person or thing, as well as to several persons or things; and every word importing the masculine gender only shall extend and be applied to females as well as to males, unless the context clearly shows to the contrary.

(2) Authority, to Three or More Exercised by Majority. — All words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority.

(3) "Month" and "Year". — The word "month" shall be construed to mean a calendar month, unless otherwise expressed; and the word "year," a calendar year, unless otherwise expressed; and the word "year" alone shall be equivalent to the expression "year of our Lord." When a statute refers to a period of one or more months and the last month does not have a date corresponding to the initial date, the period shall expire on the last day of the last month.

(4) Leap Year, How Counted. — In every leap year the increasing day and the day before, in all legal proceedings, shall be counted as one day.

(5) "Oath" and "Sworn". — The word "oath" shall be construed to include "affirmation," in all cases where by law an affirmation may be substituted for an oath, and in like cases the word "sworn" shall be construed to include the word "affirmed."

(6) "Person" and "Property". — The word "person" shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary. The words "real property" shall be coextensive with lands, tenements and hereditaments. The words "personal property" shall include moneys, goods, chattels, choses in action and evidences of debt, including all things capable of ownership, not descendable to heirs at law. The word "property" shall include all property, both real and personal.

(7) "Preceding" and "Following". — The words "preceding" and "following," when used by way of reference to any section of a statute, shall be construed to mean the section next preceding or next following that in which such reference is made; unless when some other section is expressly designated in such reference.

(8) "Seal". — In all cases in which the seal of any court or public office shall be required by law to be affixed to any paper issuing from such court or office, the word "seal" shall be construed to include an impression of such official seal, made upon the paper alone, as well as an impression made by means of a wafer or of wax affixed thereto.

(9) "Will". — The term "will" shall be construed to include codicils as well as wills.

(10) "Written" and "in Writing". — The words "written" and "in writing" may be construed to include printing, engraving, lithographing, and any other mode of representing words and letters: Provided, that in all cases where a written signature is required by law, the same shall be in a proper handwriting, or in a proper mark.

(11) "State" and "United States". — The word "state," when applied to the different parts of the United States, shall be construed to extend to and include the District of Columbia and the several territories, so called; and the words "United States" shall be construed to include the said district and territories and all dependencies.

(12) "Imprisonment for One Month," How Construed. — The words "imprisonment for one month," wherever used in any of the statutes, shall be construed to mean "imprisonment for thirty days."

(13) "Governor," "Senator," "Solicitor," "Elector," "Executor," "Administrator," "Collector," "Juror," and "Auditor". — The words "Governor," "Senator," "district attorney," "elector," "executor," "administrator," "collector," "juror," "auditor," and any other words of like character shall when applied to the holder of such office, or occupant of such position, be words of common gender, and they shall be a sufficient designation of the person holding such office or position, whether the holder be a man or woman. (21 Hen. III; R. S., c. 31, s. 113; R. C., c. 31, s. 108; c. 108; Code, s. 3765; Rev., s. 2831; C. S., s. 3949; 1921, c. 30; 1973, c. 47, s. 2; 1977, c. 446, s. 4.)

CASE NOTES

I. General Consideration.
II. Determination of Intent and Meaning.
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III. Similar and Related Acts.
A. In General.
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C. Amendatory and Repealing Acts.
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A. In General.
B. Criminal Statutes.
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A. Construction.
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VI. Definitions.

I. GENERAL CONSIDERATION.

Words Given Ordinary Meaning. — When construing a statute the words used therein will be given their ordinary meaning, unless it appears from the context that they should be taken in a different sense. Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915).

Void for Vagueness. — If a statute be so vague in its terms as to convey no definite meaning to the court or a ministerial officer, it is void. State v. Partlow, 91 N.C. 550 (1884).

Words Cannot Be Construed Away. — The court has no power or right to strike out words or to construe them away. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

Specific Words Followed by General Words. — Where particular and specific words or acts, the subject of a statute, are followed by general words, the latter must, as a rule, and by a proper interpretation, be confined to acts and things of the same kind. State v. Craig, 176 N.C. 740, 97 S.E. 400 (1918).

Proviso. — As a general rule in the construction of statutes, a proviso will be considered as a limitation upon the general words preceding, and as excepting something therefrom, but this rule is not absolute, and the meaning of the proviso will be ascertained by the language used in it. Traders Nat'l Bank v. Lawrence Mfg. Co., 96 N.C. 298, 3 S.E. 363 (1887).

Proviso Prevails over Purview. — Where a proviso in a statute was directly contrary to the purview of the statute, the proviso was good and not the purview, because the proviso spoke the later intention of the legislature. Orinoco Supply Co. v. Masonic & E. Star Home, 163 N.C. 513, 79 S.E. 964 (1913).

II. DETERMINATION OF INTENT AND MEANING.

A. In General.

When Statute Is Clear. — It is not allowable to interpret what has no need of interpretation, or, where the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes should be read and understood according to the natural and most obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. Hamilton v. Rathbone, 175 U.S. 414, 20 S. Ct. 155, 44 L. Ed. 2d 219 (1899); Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908); State v. Carpenter, 173 N.C. 767, 92 S.E. 373 (1917).

Where the language of a statute is clear and unambiguous there is no room for judicial construction and the courts must give it its plain and definite meaning; the courts are without power to interpolate, or superimpose, provisions and limitations not contained therein. Begley v. Employment Security Comm'n, 50 N.C. App. 432, — S.E.2d — (1981).

When Court May Interpolate Necessary Words. — When it is necessary to carry out the clear meaning of a statute, and to make it sensible and effective, the court may interpolate the words necessary thereto, which were evidently omitted, as appears from the context, or silently understand them to be incorporated in it. Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905); Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915).

Where Language Is of Doubtful Meaning. —In interpreting a statute where the language is of doubtful meaning, the court will reject an interpretation which would make the statute harsh, oppressive, inequitable and unduly restrictive of primary private rights. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

A statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Law Existing at Time of Enactment. — To discover the true meaning of a statute, consideration should be given the law as it existed at the time of its enactment, the public policy as declared in judicial opinions and legislative acts, the public interest, and the purpose of the act in question. Kendall v. Stafford, 178 N.C. 461, 101 S.E. 15 (1919).

Objects Embraced. — The meaning of a statute in respect to what it has reference and the objects it embraces, as well as in other respects, is to be ascertained by appropriate means and indicia, such as the purposes

appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in pari materia, the preamble, the title, and other like means. State v. Partlow, 91 N.C. 550 (1884).

Misdescription or Misnomer. — The question was fully considered by the Supreme Court in Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905), and the court there said: "A misdescription or misnomer in a statute will not vitiate the enactment or render it inoperative, provided the means of identifying the person or thing intended, apart from the erroneous description, are clear, certain, and convincing." Under this rule we may call to our aid anything in the act itself, or even in the alleged erroneous description, which sufficiently points to something else as furnishing certain evidence of what was meant, though the reference to the extraneous matter may not in itself be full and accurate. The rule, even when literally or strictly construed, does not require that the erroneous description shall be altogether rejected in making the search for the true meaning; but it may be used in connection with anything outside of the statute to which it refers and which itself, when examined, makes the meaning clear. The erroneous description may in this way be helped out by extraneous evidence. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

The title of a statute is no part thereof. State v. Welsh, 10 N.C. 404 (1824). But it may be construed when the meaning is doubtful. State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896).

It cannot control the text when it is clear. Blue v. McDuffie, 44 N.C. 131 (1852); Jones v. Hartford Ins. Co., 88 N.C. 499 (1883); Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886); State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896). This is especially true as to the headings of a section in the Code. Cram v. Cram, 116 N.C. 288, 21 S.E. 197 (1895); In re Chisholm's Will, 176 N.C. 211, 96 S.E. 1031 (1918).

B. Legislative Intent.

Motive and Purpose of Legislature. — If the language of a statute is doubtful, and the intention of the legislature is clear, the former will be construed in the latter; but where the language is plain, the courts cannot look into the motive or purpose of the legislature in the enactment of the law. State v. Eaves, 106 N.C. 752, 11 S.E. 370 (1890).

A statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the legislature did not intend any of its provisions to be surplusage. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Where a literal reading of a statute will lead to absurd results, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

Same — Understanding of Individual. — Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And courts are not at liberty to accept the understanding of any individual as to the legislative intent. State v. Boon, 1 N.C. (Taylor) 103 (1801); Drake v. Drake, 15 N.C. 110 (1833); Adams v. Turrentine, 30 N.C. 147 (1847); State v. Melton, 44 N.C. 49 (1852); Blue v. McDuffie, 44 N.C. 131 (1852); State v. Partlow, 91 N.C. 550 (1884).

Same — Affidavit of Individual Legislators. — In interpreting a statute it was not permissible to show its intent and meaning by affidavit of legislators, for such had to be gathered from the act itself. Goins v. Trustees, 169 N.C. 736, 86 S.E. 629 (1915).

Effectuation of Purpose. — Where the language used is ambiguous, or admits of more than one meaning, it is to be taken in such a sense as will conform to the scope of the act and effectuate its objects. State v. Partlow, 91 N.C. 550 (1884); Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905).

Harmonizing Context. — It is the duty of the court to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

As to Whether Statute Mandatory or Directory. — There is no absolutely formal test for determining whether a statutory provision is to be considered mandatory or directory. The meaning and intention of the legislature must govern; and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it in the one way or the other. Spruill v. Davenport, 178 N.C. 364, 100 S.E. 527 (1919).

The use of inapt, inaccurate or improper terms or phrases will not invalidate the statute, provided the real meaning of the legislature can be gathered from the context or from the general purpose and tenor of the enactment. Fortune v. Commissioners, 140 N.C. 322, 52 S.E. 950 (1905).

Mistakes or Omissions. — Legislative enactments are not to be defeated on account of mistakes or omissions, any more than other writings, provided the intention of the legislature can be collected from the whole statute. If the mistake renders the intention doubtful, the courts will look to the title and preamble as well

as the body or purview of the act for assistance in arriving at it, and not until all these fail can the act be held inoperative. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Impossible Requirements. — In the construction of a statute the court will avoid attributing to the legislature the intention to punish the failure to do an impossible thing. Garrison v. Southern Ry., 150 N.C. 575, 64 S.E. 578 (1909).

III. SIMILAR AND RELATED ACTS.

A. In General.

Words and Phrases in One Statute Read in a Subsequent Act. — Words and phrases, the meaning of which in a statute have been ascertained, when read in a subsequent statute, are to be understood in the same sense. And where the terms of a statute which has received judicial construction are used in a later statute, whether passed by the legislature of the same state or county, or by that of another, that construction is to be given to the later statute. It is presumed that the legislature which passed the latter statute knew the judicial construction which had been placed on the former one, and such a construction becomes a part of the law. Bridgers v. Taylor, 102 N.C. 86, 8 S.E. 893 (1889).

Permissible to Look at Other Statutes. — To ascertain the mischief which an act of the legislature was intended to remove, it is permissible, in the interpretation thereof, to consider other statutes, related to the particular subject, or to one under construction. Abernethy v. Board of Comm'rs, 169 N.C. 631, 86 S.E. 577 (1915); In re Hickerson, 235 N.C. 716, 71 S.E.2d 129 (1952).

It is not permissible, if it can be reasonably avoided, to put such a construction upon a law as will raise a conflict between different parts of it, but effect should be given to each and every clause and provision. But when there is no way of reconciling conflicting clauses of a statute and nothing to indicate which the legislature regarded as of paramount importance, force should be given to those clauses which would make the statute in harmony with the other legislation on the same subject, and which would tend most completely to secure the rights of all persons affected by such legislation. State Bd. of Agriculture v. White Oak Buckle Drainage Dist., 177 N.C. 222, 98 S.E. 597 (1919).

B. Statutes in Pari Materia.

Statutes relating to the same subject matter should should be construed in connection with each other as together constituting one law, giving effect to all parts of the statute when possible; and the history of the legislation may be considered in the effort to ascertain the uniform and consistent purpose of the legislature. Allen v. Town of Reidsville, 178 N.C. 513, 101 S.E. 267 (1919).

Same — Apparent Conflict. — Where two statutes on the same subject, or on related subjects, are apparently in conflict with each other they are to be reconciled, by construction, so far as may be, on any fair hypothesis, and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act. Peoples Bank v. Loven, 172 N.C. 666, 90 S.E. 948 (1916); State Bd. of Agriculture v. White Oak Buckle Drainage Dist., 177 N.C. 222, 98 S.E. 597 (1919).

Acts of Same Session of Legislature. — All acts of the same session of the legislature upon the same subject matter are considered as one act, and must be construed together, under the doctrine of "in pari materia." They should be considered in pari materia, whether passed at the same session or not. State ex rel. Wilson v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

Where there are different statutes in pari materia, though made at different times, or even where they have expired, and not referring to each other, they shall be taken and considered together as one system, and as explanatory of each other. State ex rel. Wilson v. Jordan, 124 N.C. 683, 33 S.E. 139 (1899).

Act Declaratory of Intent of Previous Act. — An act of the legislature declaratory of the intent of a previous act will not control the judiciary in the contruction of the first act in actions prior to the declaratory act. Rodwell v. Harrison, 132 N.C. 45, 43 S.E. 540 (1903).

Private and Local Acts. — Private as well as local acts are, as a whole, and in every clause, unaffected by any repugnant provision of the general law. State v. Womble, 112 N.C. 862, 17 S.E. 491 (1893).

C. Amendatory and Repealing Acts.

When Act Purports to Be Amendatory. — Where a statute refers to a prior legislative enactment, and in the caption and body of the act purports to be amendatory, substituting and amending different sections, the legislative intent cannot be construed to repeal the former act. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Amended and Amending Acts Construed Together. — Where an amendment to an existing statute is enacted, the proper method of arriving at their true intent and meaning is by construing them together. Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916); Township Rd. Comm'n v. Board of Comm'rs, 178 N.C. 61, 100 S.E. 122 (1919).

When Amendatory Act Refers to Wrong Section. — If a section in an amendatory act refers to a section of the act amended by number, and the section referred to does not express

the legislative intent, but another section is found which does express that intent, the reference will be treated as being made to the latter section. Toomey v. Goldsboro Lumber Co., 171 N.C. 178, 88 S.E. 215 (1916).

Erroneous Statement of Date. — An act of the legislature subsequent to and in amendment of a former act of the same session and correcting an ambiguity therein, is not invalidated by the fact that the date of ratification of the amended act is erroneously stated, provided it sufficiently appears beyond cavil, what prior act is referred to. State v. Woolard, 119 N.C. 779, 25 S.E. 719 (1896).

Rules for Construing Repealing Acts. — In Winslow v. Morton, 118 N.C. 486, 24 S.E. 417 (1896), it was said: Upon a perusal of the authorities it appears that the courts have universally given their sanction to the following rules of construction: (1) That the law does not favor a repeal of an older statute by a later one by mere implication. State ex rel. County Trustee v. Woodside, 30 N.C. 104 (1847); Simonton v. Lanier, 71 N.C. 498 (1874). (2) The implication, in order to be operative, must be necessary, and if it arises out of repugnancy between the two acts the later abrogates the older only to the extent that it is inconsistent and irreconcilable with it. A later and older statute will, if it is possible and reasonable to do so, be always construed together, so as to give effect not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modifications of its meaning, where such seems to have been the legislative purpose. A law will not be deemed repealed because some of its provisions are repeated in a subsequent statute, except insofar as the latter plainly appears to have been intended by the legislature as a substitute. State v. Custer, 65 N.C. 339 (1871). (3) Where a later or revising statute clearly covers the whole subject matter of antecedent acts, and it plainly appears to have been the purpose of the legislature to give expression in it to the whole law on the subject, the latter is held to be repealed by a necessary implication.

When Acts Irreconcilably Inconsistent. — A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction. State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889).

Repeal of Act Giving Forfeiture. — The repeal of an act of assembly giving a forfeiture for an offense is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. Governor v. Howard, 5 N.C. 465 (1810).

Repeal of Repealing Act. — The repeal of a statute repealing a former statute leaves the latter in force. Brinkley v. Swicegood, 65 N.C. 626 (1871).

Implied Repeal by Lessening Degree of Crime. — It is perfectly settled as a rule of construction that if, by the common or statute law, an offense, for example, be a felony, and subsequent statute by an enactment merely affirmatively lessen its grade or mitigate the punishment, the latter is to that extent an implied repeal of the former. State v. Upchurch, 31 N.C. 454 (1849).

IV. STATUTES STRICTLY CONSTRUED.

A. In General.

In Derogation of Common Law. — A statute in derogation of the common law must be strictly construed. Swift & Co. v. Tempelos, 178 N.C. 487, 101 S.E. 8 (1919).

Acts Limiting Rights to Contract. — Statutes restricting or disabling persons capable of contracting in the making of contracts, being in derogation of common right, and especially those penal in their nature, must be strictly construed. W.C. Marriner & Bro. v. John L. Roper Co., 112 N.C. 164, 16 S.E. 906 (1893).

Acts Restricting Private Acts. — Statutes which restrict the private rights of persons or the use of property in which the public has no concern should be strictly construed. Nance v. Southern Ry., 149 N.C. 366, 63 S.E. 116 (1908).

Statutes depriving courts of jurisdiction once attached are strictly construed, and every requirement of such statute must be met before the court will yield its jurisdiction. State v. Sullivan, 110 N.C. 513, 14 S.E. 796 (1892).

Statutes providing for forfeitures should be strictly construed and not extended beyond the meaning of the words employed. Skinner v. Thomas, 171 N.C. 98, 87 S.E. 976 (1916).

Ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws. News & Observer Publishing Co. v. Interim Bd. of Educ., 29 N.C. App. 37, 223 S.E.2d 580 (1976).

Local Lien Law. — In Orinoco Supply Co. v. Masonic & E. Star Home, 163 N.C. 513, 79 S.E. 964 (1913), it was held that a lien law applicable to certain counties only, was local in its nature, and being contrary to the general lien laws of the State, had to be strictly construed.

A remedial statute should be liberally construed, according to its intent, so as to advance the remedy and repress the evil. Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914).

B. Criminal Statutes.

Rule for Construction of Penal Statutes. — Penal statutes must be strictly construed, and the plaintiff, before he is entitled to recover the penalty, must bring his case strictly within the language and meaning of the statute. They

must be construed sensibly, as all other instruments, but not liberally, so as to stretch their meaning beyond what the words will warrant. Coble v. Schoffner, 75 N.C. 42 (1876); State v. Godfrey, 97 N.C. 507, 1 S.E. 779 (1887); Sears v. Whitaker, 136 N.C. 37, 48 S.E. 517 (1904); Alexander v. Atlantic Coast Line R.R., 144 N.C. 93, 56 S.E. 697 (1907); Hamlet Grocery Co. v. Southern Ry., 170 N.C. 241, 87 S.E. 57 (1915).

Rule Explained. — The rule that a penal statute must be strictly construed, means no more than that the court, in ascertaining the meaning of such a statute, cannot go beyond the plain meaning of the words and phraseology employed in search of an intention not certainly implied by them, and when there is a reasonable doubt as to the meaning of the words used in the statute, the court will not give them such an interpretation as to impose the penalty, nor will the purpose of the statute be extended by implication, so as to embrace cases not clearly within its meaning. Hines & Battle v. Wilmington & W.R.R., 95 N.C. 434 (1886).

Supplying Omission and Strained Constructions. — As a matter of policy it is more dangerous for the appellate court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminals should go unpunished. State v. Massey, 103 N.C. 356, 9 S.E.2d 632 (1889).

Whether a criminal intent is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design. State v. Abrams, 29 N.C. App. 144, 223 S.E.2d 516 (1976).

A statute will not be construed to operate retrospectively so as to take away a penalty or condone a crime unless such intention is clearly expressed. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

V. CONSTRUCTION IN ACCORD WITH CONSTITUTION.

A. Construction.

General Rule. — Whenever an act of the legislature can be so construed and applied as to avoid conflict with the Constitution, and give it the force of law, such construction will be adopted by the court. State v. Pool, 74 N.C. 402 (1876).

Construction so as to Avoid Constitutional Question. — If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, the courts should construe the statute so as to avoid the constitutional question. In re Arcadia Diary Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

Presumption in Favor of Validity. — Every presumption is in favor of the validity of an act of the legislature and all doubts are resolved in support of the act. Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267 (1905).

When the constitutionality of a statute is challenged, "every presumption is to be indulged in favor of its validity." Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Existence of Facts Preserving Constitutionality Presumed. — If the constitutionality of a statute depends on the existence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. This rule does not apply if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise. Martin v. North Carolina Hous. Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

Valid and Invalid Portions of Same Act. — Where there are distinct and valid provisions of a statute, with unconstitutional provisions, the two portions of the law being separate and it appearing from a perusal of the statute that the legislature intended the valid portion to be effective independently of the invalid part, the valid provisions may be enforced. Archer v. Joyner, 173 N.C. 75, 91 S.E. 699 (1917).

If the invalid portions can be separated from the rest, and if, after their excision, there remains a complete, intelligible, and valid statute capable of being executed, and conforming to the general purpose and intent of the legislature as shown in the act, the same will not be adjudged unconstitutional in toto, but sustained to that extent. Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916).

That position, however, is not allowed to prevail when the parts of the statute are so connected and dependent, the one upon the other, that to eliminate one will work substantial change to the portion which remains. If the unconstitutional clause cannot be rejected without causing the statute to enact what the legislature did not intend, the whole statute must fall. Riggsbee v. Town of Durham, 94 N.C. 800 (1886); State ex rel. Greene v. Owen, 125 N.C. 212, 34 S.E. 424 (1899); Keith v. Lockhart, 171 N.C. 451, 88 S.E. 640 (1916). See State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

Resort to Implication. — Courts may resort to an implication to sustain an act, but not to destroy it. Lowery v. School Trustees, 140 N.C. 33, 52 S.E. 267 (1905).

B. Effect.

Liability of Public Officer under Unconstitutional Act. — An individual officeholder is not required to be wiser than the whole people represented in their General

Assembly; therefore, he is not indictable for obeying an unconstitutional legislative act; nor is he indictable for refusing to perform certain duties under a former law repealed by a subsequent unconstitutional statute, until at least after a decision by competent authority. State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

When Court Reverses Itself Decision Not Retroactive. — Where property rights are acquired in accordance with a decision of the Supreme Court, in the interpretation of a statute, which is subsequently overruled, the effect of the later decision will not be retroactive in effect . S.W. Fowle & Son v. Ham, 176 N.C. 12, 96 S.E. 639 (1918).

VI. DEFINITIONS.

Subdivision (1) of this section was intended to avoid the very awkward expressions, "such person or persons," "he, she, or they," "himself or themselves," to be met with in some badly drawn statutes. Von Glahn v. Harris, 73 N.C. 323 (1875).

"Person" Extends to "Persons". — The word "person" is construed to extend to "persons" under the authority of subdivision (1) of this section. State v. Wilkerson, 98 N.C. 696, 3 S.E. 683 (1887); State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904).

Authority to Three or More. — The authority granted by a statute to a board of property appraisers was not terminated by the death of one of its five members so long as three or more of them remained. Ballard v. City of Charlotte, 235 N.C. 484, 70 S.E.2d 575 (1952).

Month. — The lunar month, when spoken of in statutes, consists of twenty-eight days; a calendar month contains the number of days ascribed to it in the calendar, varying from twenty-eight to thirty-one. State v. Upchurch, 72 N.C. 146 (1875). In this respect our statute has adopted the computation of the civil instead of the common law. Satterwhite v. Burwell, 51 N.C. 92 (1858); Adcock v. Town of Fuquay Springs, 194 N.C. 423, 140 S.E. 24 (1927).

The term "thirty days" and the term "one month" are not synonymous, although where the particular calendar month is composed of exactly thirty days the number of days involved happen to be the same. Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

The words "twelve months," in the absence of any legislative definition of the word "month" and the word "year," will be interpreted to mean twelve calendar, not lunar, months. Muse v. London Assurance Corp., 108 N.C. 240, 13 S.E. 94 (1891); Green v. Patriotic Order Sons of America, 242 N.C. 78, 87 S.E.2d 14 (1955); Kennedy v. Pilot Life Ins. Co., 4 N.C. App. 77, 165 S.E.2d 676 (1969).

Does Not Affect Constitution. — The provisions of subdivision (6) of this section could not affect the meaning of the terms employed in the Constitution; indeed, it purports to apply only to statutes, and to them, when the meaning is manifestly otherwise than as therein provided and defined. Redmond v. Commissioners of Tarboro, 106 N.C. 122, 10 S.E. 845 (1890).

"Property" Used in Limited Sense. — While the term "property," in its broadest and most general signification, embraces all kinds of property, including choses in action, rights and credits, and the like things, it is very often and conveniently used in its limited sense, and this is so notwithstanding the statutory provision. Redmond v. Commissioners of Tarboro, 106 N.C. 122, 10 S.E. 845 (1890).

The word "estate" has a broader meaning than the word "property." The latter word could not include choses in action, unless there be something in the context which would require it to receive this interpretation, except by force of the definition contained in this section. Vaughan v. Town of Murfreesboro, 96 N.C. 317, 2 S.E. 676 (1887).

A chose in action is property, and embraced in the terms of subdivision (6) of this section. Winfree v. Bagley, 102 N.C. 515, 9 S.E. 198 (1889).

A promissory note or due bill being an "evidence of debt" is embraced in the term "personal property." State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Money. — While the word "property" in its legal sense ordinarily includes money, yet where it can be seen from other parts of a will in which it is used that it was not intended, that interpretation will be given it by the court with which the testator had evidently employed it. Patterson v. Wilson, 101 N.C. 584, 8 S.E. 229 (1888).

§ 12-3.1. Fees and charges by agencies.

(a) In the construction of a statute, unless that construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute, the legislative grant of authority to an agency to make and promulgate rules shall not be construed as a grant of authority to the agency to establish by rule a fee or a charge for the rendering of any service or fulfilling of any duty to the public, unless the statute expressly provides for the grant of authority to establish a fee or charge for that specific service.

(b) For purposes of this section:

"Agency" means every agency, institution, board, commission, bureau, department, division, council, member of the Council of State, or officer of the legislative, executive or judicial branches of State government. "Agency" does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivisions, the University of North Carolina, community colleges, technical institutes, industrial education centers, hospitals, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.

"Rule" means every rule, regulation, ordinance, standard, and amendment thereto adopted by any agency and includes rules and regulations regarding substantive matters, standards for products, procedural rules for complying with statutory or regulatory authority or requirements and executive orders of the Governor.

(c) This section does not apply to rules establishing fees or charges to State, federal or local governmental units, nor to any reasonable fee or charge for copying, transcripts of public hearings, State publications, registration fees covering the cost of a conference or workshop, or user fees covering the cost of providing data processing services. (1979, c. 559, s. 1; 1981, c. 695, ss. 1, 2.)

Editor's Note. — Session Laws 1979, c. 559, s. 2, provides: "This act shall become effective May 1, 1981, and shall apply to all rules then in existence or adopted thereafter."

Effect of Amendments. — The 1981 amendment deleted "or" preceding "State publications" near the end of subsection (c), and added "registration fees covering the cost of a conference or workshop, or user fees covering the cost of providing data processing services" at the end of subsection (c).

§ 12-4. Construction of amended statute.

Where a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law since their enactment, and the new provisions as having been enacted at the time of the amendment.

Whenever the General Assembly (i) enacts a bill which purports to amend an existing general statute by deleting, adding, or substituting specific words or figures, and (ii) such bill also purports to set out the wording of the amended statute, or a portion thereof, as it will read after the amendment is accomplished, and (iii) there is a variance between the latter and the former, then, in such case, the latter shall control and be presumed to express the amendatory intent of the General Assembly. (1868-9, c. 270, s. 22; 1870-1, c. 111; Code, s. 3766; Rev., s. 2832; C. S., s. 3950; 1971, c. 115.)

Legal Periodicals. — See 12 N.C.L. Rev. 262.

CASE NOTES

Discovering Legislative Intent of Original Enactment Through Amendatory Legislation.—An amendment to an act may be resorted to for the discovery of the legislative intention in the enactment amended, as where the act amended is ambiguous. Taylor v. Crisp, 286 N.C. 488, 212 S.E.2d 381 (1975).

Amending Act Presumed Not to Repeal. — Where a statute only undertakes to amend one already on the statute books, it will be presumed that it did not intend to repeal it, unless there is an express repealing clause. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887); State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

Repeals by implication are not favored by the law. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Amendment of a statute operates from its enactment, leaving in force the portions which are not altered. Nichols v. Board of Councilmen, 125 N.C. 13, 34 S.E. 71 (1899).

Nonconflicting Portions of Original Act Remain in Force. — Where a statute is amended, all portions of the original act which are not in conflict with the provisions of the amendment remain in the force with the same meaning and effect that they had before the amendment. Rice v. Rigsby, 259 N.C. 506, 131 S.E.2d 469 (1963); Begley v. Employment Security Comm'n, 50 N.C. App. 432, — S.E.2d — (1981).

Bill of Indictment. — If a statute creating an offense is amended in any important particular, a bill of indictment for an offense committed before the act was amended, but which was found after the passage of the amending act, should charge the offense under the old act, and contain an averment that the offense was committed before the amendment was passed. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887).

Misdemeanor Made Punishable by Fine or Imprisonment. — A public-local law making an act a misdemeanor was not repealed by a statute making the same offense for the first time punishable by "a fine or imprisonment in the discretion of the court," and a felony for the second offense; the latter statute expressly stating in the heading of the chapter that it was amendatory, and for the better enforcement, of the former statute, and that it was to take effect from and after its ratification; and where the prohibited offense had been committed prior to the enactment of the latter act, it was punishable under the prior law. State v. Mull, 178 N.C. 748, 101 S.E. 89 (1919).

Where amendatory legislation carries a saving clause as to prior offenses, the law as it stood at the time of the offense is applied to the prosecution and sentencing of the violator. State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975).

Reenactment Contemporaneous with Repeal.—It was held in State v. Williams, 117 N.C. 753, 23 S.E. 250 (1895), that: "The reenactment by the legislature of a law in the terms of a former law at the same time it repeals the former law, is not, in contemplation of law, a repeal, but it is a reaffirmance of the former law, whose provisions are thus continued without any intermission." State v. Sutton, 100 N.C. 474, 6 S.E. 687 (1888); State ex rel. Walser v. Bellamy, 120 N.C. 212, 27 S.E. 113 (1897); State v. Southern Ry., 125 N.C. 666, 34 S.E. 527 (1899).

Cited in State v. Pardon, 272 N.C. 72, 157 S.E.2d 698 (1967).

Chapter 13.

Citizenship Restored

Sec.
13-1. Restoration of citizenship.
13-2. Issuance and filing of certificate or order of restoration.
13-3. Issuance, service and filing of warrant of unconditional pardon.
13-4. Endorsement of warrant, service and filing of conditional pardon.
13-5 to 13-10. [Repealed.]

§ 13-1. Restoration of citizenship.

Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights restored upon the occurrence of any one of the following conditions:

(1) The unconditional discharge of an inmate by the State Department of Correction or the North Carolina Department of Correction, of a probationer by the State Department of Correction, or of a parolee by the Department of Correction; or of a defendant under a suspended sentence by the court.

(2) The unconditional pardon of the offender.

(3) The satisfaction by the offender of all conditions of a conditional pardon.

(4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon. (1971, c. 902; 1973, c. 251; c. 1262, s. 10; 1977, c. 813, s. 1.)

Cross References.—As to loss of rights of citizenship for persons convicted of felonies, see N.C. Const., Art. II, § 24 (1) (n); Art. VI, § 8.

Legal Periodicals. — For a note on the constitutionality of denying voting rights to convicted criminals, see 50 N.C.L. Rev. 903 (1972).

CASE NOTES

Legislative Intent. — The 1971 General Assembly, in rewriting this Chapter, intended to substantially relax the requirements necessary for a convicted felon to have his citizenship restored. These requirements were further relaxed by the 1973 amendments to this Chapter. State v. Currie, 284 N.C. 562, 202 S.E.2d 153 (1974).

Statute Revising This Chapter Given Retroactive Application. — Chapter 251, Session Laws of 1973, which revised this Chapter, must be given retroactive application in order to be constitutionally valid. State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973), aff'd, 284 N.C. 562, 202 S.E.2d 153 (1974).

Though the 1973 revision of this section was enacted after a defendant was indicted for felonious possession of a firearm, it was applicable. State v. Williams, 20 N.C. App. 639, 202 S.E.2d 284 (1974).

Loss of citizenship does not form a part of the judgment of the court, but follows as a consequence of such judgment. State v. Jones, 82 N.C. 685 (1880).

Cited in Young v. Southern Mica Co., 237 N.C. 644, 75 S.E.2d 795 (1953).

§ 13-2. Issuance and filing of certificate or order of restoration.

The agency, department, or court having jurisdiction over the inmate, probationer, parolee or defendant at the time his rights of citizenship are restored under the provisions of G.S. 13-1(1) shall immediately issue a certificate or order in duplicate evidencing the offender's unconditional discharge and specifying the restoration of his rights of citizenship.

The original of such certificate or order shall be promptly transmitted to the clerk of the General Court of Justice in the county where the official record of the case from which the conviction arose is filed. The clerk shall then file the certificate or order without charge with the official record of the case.

In the case of a person convicted of a crime against the United States, whose rights to citizenship have been restored according to G.S. 13-1, the following provisions shall apply:

(1) It shall be the duty of the clerk of the court in the county where such person resides, upon a showing by such person or his representative that the conditions of G.S. 13-1 have been met, to issue the certificate described in this section. For purposes of this section, the fulfillment of the conditions of G.S. 13-1 shall be considered met upon the presentation to the clerk of any paper writing from the agency of the United States government which had jurisdiction over such person, which shows that the conditions of G.S. 13-1 have been met.

(2) The certificate described in this section shall be filed by the clerk of the General Court of Justice in the county in which such person resides as though it were a civil action bearing such person's name.

(3) The provisions of this section apply equally to conditional and unconditional pardons by the President of the United States, as well as unconditional discharges by the agency of the United States having jurisdiction over said person. (1971, c. 902; 1973, c. 251; 1977, c. 813, s. 2.)

Legal Periodicals. — For a note on the constitutionality of denying voting rights to convicted criminals, see 50 N.C.L. Rev. 903 (1972).

CASE NOTES

Quoted in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973).

§ 13-3. Issuance, service and filing of warrant of unconditional pardon.

In the event the rights of citizenship are restored by an unconditional pardon as specified in G.S. 13-1(2), the Governor, under the provisions of G.S. 147-23, shall issue his warrant therefor specifying the restoration of rights of citizenship to the offender; and the officer to whom the Governor issues his warrant to effect the release of the offender shall deliver a copy of the warrant to the offender under the provisions of G.S. 147-25. The original warrant bearing the officer's return as specified in G.S. 147-25 shall be filed by the clerk of the General Court of Justice without charge in the county where the official record of the case from which the conviction arose is filed. (1971, c. 902; 1973, c. 251.)

Legal Periodicals. — For a note on the constitutionality of denying voting rights to convicted criminals, see 50 N.C.L. Rev. 903 (1972).

CASE NOTES

Stated in State v. Currie, 284 N.C. 562, 202 S.E.2d 153 (1974).

Cited in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973).

§ 13-4. Endorsement of warrant, service and filing of conditional pardon.

When the offender has satified all of the conditions of a conditional pardon, and his rights of citizenship have been restored under the provisions of G.S. 13-1(3), the Governor shall issue an endorsement to the original warrant which specified the conditions of the pardon. Such endorsement shall acknowledge that the offender has satisfied all of the conditions of the pardon.

The Governor shall then deliver the endorsement to the officer specified in G.S. 147-25 for service and delivery to the clerk. Service and delivery to the clerk and filing by the clerk shall be done in accordance with the provisions of G.S. 13-3 so that the endorsement reflecting satisfaction of all conditions of the pardon will be served and recorded as if it were a warrant of unconditional pardon. (1973, c. 251.)

§§ 13-5 to 13-10: Repealed by Session Laws 1971, c. 902.

Chapter 14.

Criminal Law.

SUBCHAPTER I. GENERAL PROVISIONS.

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14-12.14. Placing exhibit while wearing mask, hood, or other disguise.
14-12.15. Punishment for violation of Article.

Article 5.

Counterfeiting and Issuing Monetary Substitutes.

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14-16. Receiving or passing unauthorized substitutes for money.
14-16.1 to 14-16.5. [Reserved.]

Article 5A.

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Article 53.

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14-409.5. Dealer to keep record of sales.
14-409.6. Weapons to be listed for taxes.
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SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Felonies and Misdemeanors.

§ 14-1. Felonies and misdemeanors defined.

A felony is a crime which:
(1) Was a felony at common law;
(2) Is or may be punishable by death;
(3) Is or may be punishable by imprisonment in the State's prison; or
(4) Is denominated as a felony by statute.

Any other crime is a misdemeanor. (1891, c. 205, s. 1; Rev., s. 3291; C. S., s. 4171; 1967, c. 1251, s. 1.)

Cross References. — As to statute of limitations for misdemeanors, see § 15-1.

Legal Periodicals. — For article on punishment for crime in North Carolina, see 17 N.C.L. Rev. 205.

For a brief comparison of criminal law sanctions in two civil rights cases, see 43 N.C.L. Rev. 667 (1965).

For case law survey as to criminal law and procedure, see 44 N.C.L. Rev. 970 (1966); 45 N.C.L. Rev. 910 (1967).

CASE NOTES

Section Constitutional. — This section was held to be constitutional in State v. Lytle, 138 N.C. 738, 51 S.E. 66 (1905).

Common-Law Provisions. — Up to the time this section was passed the somewhat arbitrary common-law rule was followed as to what crimes were felonies, and what were misdemeanors and under that, conspiracy, and even such grave crimes as perjury and forgery, were misdemeanors. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899), aff'd, Mallett v. North Carolina, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901); State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910). See State v. Hill, 91 N.C. 561 (1884).

Punishment Determines Classification of Offenses. — By this section, North Carolina adopted the rule, then almost universally prevalent, by which the nature of the punishment determined the classification of offenses; those which could be punished capitally or by imprisonment in the penitentiary were felonies (as to which there was no statute of limitations), and all others were misdemeanors, as to which prosecutions in this State were barred by two years. State v. Mallett, 125 N.C. 718, 34 S.E. 651 (1899), aff'd, Mallett v. North Carolina, 181 U.S. 589, 21 S. Ct. 730, 45 L. Ed. 1015 (1901).

The measure of punishment is the test of the nature of a crime, whether felony or misdemeanor. State v. Hyman, 164 N.C. 411, 79 S.E. 284 (1913); Jones v. Brinkley, 174 N.C. 23, 93 S.E. 372 (1917).

Offense Need Not Be Specified. — It is not necessary to prescribe that an act is a misdemeanor or felony, as the punishment affixed determines that. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

Penitentiary Unknown to Common Law. — The penitentiary, being a modern device, unknown to the common law, punishment in the penitentiary could not be imposed by the common law. State v. McNeill, 75 N.C. 15 (1876).

The use of the word "penitentiary," in prescribing the punishment for one convicted under a criminal statute has the same legal significance as the words "State's prison," both meaning the place of punishment in which convicts sentenced to imprisonment and hard labor are confined by the authority of law. State v. Burnett, 184 N.C. 783, 115 S.E. 57 (1922).

Concurrence of General and Local Laws. — This State's general prohibition statutes, prohibiting the manufacture or sale of intoxicating liquors, expressly provided that they would not have the effect of repealing local or special statutes upon the subject, but they would continue in full force and in concurrence with the general law except where otherwise provided by law; and where the local law applicable made the offense a misdemeanor, punishable by imprisonment, in the county jail or penitentiary not exceeding two years, etc., the person convicted thereunder was guilty of a felony, by this section, and the two-year statute of limitations was not a bar to the prosecution. State v. Burnett, 184 N.C. 783, 115 S.E. 57 (1922).

Conspiracy. — A conspiracy to commit a felony is a felony and a conspiracy to commit a misdemeanor is a misdemeanor. State v. Abernethy, 220 N.C. 226, 17 S.E.2d 25 (1941), holding that a conspiracy to interfere with election officials in the discharge of their duties is a misdemeanor.

An assault with intent to commit rape is a felony. State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

Suicide. — At common law suicide was a felony, and attempted suicide was a misdemeanor, punishable by fine and imprisonment. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

An attempt to commit suicide is a indictable misdemeanor in North Carolina. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Applied in State v. Johnson, 227 N.C. 587, 42 S.E.2d 685 (1947); State v. Miller, 237 N.C. 427, 75 S.E.2d 242 (1953); State v. Roberts, 276 N.C. 98, 171 S.E.2d 440 (1970).

Cited in State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943); State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946); State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968); Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

§ 14-1.1. Punishment for felonies occurring on and after July 1, 1981.

(a) For felonies that occur on or after the effective date of Article 81A of Chapter 15A [July 1, 1981] of the General Statutes, the following punishments shall be applicable:

(1) A Class A felony shall be punishable by death or life imprisonment as provided by Article 100 of Chapter 15A of the General Statutes;
(2) A Class B felony shall be punishable by life imprisonment;
(3) A Class C felony shall be punishable by imprisonment up to 50 years, or by life imprisonment, or a fine, or both imprisonment and fine;
(4) A Class D felony shall be punishable by imprisonment up to 40 years, or a fine or both;
(5) A Calss E felony shall be punishable by imprisonment up to 30 years, or a fine or both;
(6) A Class F felony shall be punishable by imprisonment up to 20 years, or a fine or both;
(7) A Class G felony shall be punishable by imprisonment up to 15 years, or a fine or both;
(8) A Class H felony shall be punishable by imprisonment up to 10 years, or a fine or both;
(9) A Class I felony shall be punishable by imprisonment up to five years, or a fine or both;
(10) A Class J felony shall be punishable by imprisonment up to three years, or a fine or both.

(b) A felony not assigned by statute to any felony class shall be punishable as a Class J felony. (1979, c. 760, s. 1; 1979, 2nd Sess., c. 1316, s. 1; 1981, c. 662, s. 2.)

Cross References. — As to presumptive punishment for felonies, effect of prior felony convictions, and aggravating or mitigating factors, see § 15A-1340.4.

Editor's Note. — Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, rewrote this section. The amendment deleted provisions in subdivisions (2) through (10) of subsection (a) setting maximum fines. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

The 1981 amendment, effective July 1, 1981, substituted "by life imprisonment, or a fine, or both imprisonment and fine" for "a fine or both" at the end of subdivision (3) of subsection (a).

§ 14-2. Punishment of felonies occurring before July 1, 1981.

Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punished by fine, by imprisonment for a term not exceeding 10 years, or by both, in the discretion of the court. This section shall not apply to persons convicted of felonies that occur on or after the effective date of Article 81A of Chapter 15A of the General Statutes [July 1, 1981], but G.S. 14-1.1 shall apply to such persons. (R. C., c. 34, s. 27; Code, s. 1096; Rev., s. 3292; C. S., s. 4172; 1967, c. 1251, s. 2; 1973, c. 1201, s. 6; 1977, c. 711, s. 15; 1979, c. 760, s. 1.)

Editor's Note. — Session Laws 1977, c. 711, s. 39, as amended by Session Laws 1977, 2nd Sess., c. 1147, s. 32, provides: "This act shall become effective July 1, 1978, and applies to all matters addressed by its provisions without regard to when a defendant's guilt was established or when judgment was entered against him, except that the provisions of this act regarding parole shall not apply to persons sentenced before July 1, 1978." The 1977 act deleted a provision that a sentence of life imprisonment should be considered a sentence of 80 years.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, added the second sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For case law survey as to excessive punishment, see 45 N.C.L. Rev. 910 (1967).

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under this section as it stood before the effective date of the 1979 amendment.

Section Places Ceiling on Court's Power to Punish. — The maximum provided in this section and § 14-3 places a ceiling on the court's power to punish by imprisonment when a ceiling is not otherwise fixed by law. Jones v. Ross, 257 F. Supp. 798 (E.D.N.C. 1966).

Specific Punishment. — A provision in a statute to the effect that punishment shall be in the discretion of the court and the defendant may be fined or imprisoned, or both, is not equivalent to a "specific punishment" within the meaning of this section, and such punishment is controlled by this section. State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963).

A statutory penalty of fine or imprisonment in the discretion of the court is not a specific punishment, and therefore in the case of felonies the punishment is limited by this section to not more than ten years imprisonment. State v. Grice, 265 N.C. 587, 144 S.E.2d 659 (1965).

Punishment "in the discretion of the court" is not specific punishment and hence is governed by the limits (ten years for felonies and two years for misdemeanors) prescribed in this section and § 14-3. State v. Adams, 266 N.C. 406, 146 S.E.2d 505 (1966).

A statute prescribing punishment "by fine or imprisonment in the State's prison, or both, in the discretion of the court," does not prescribe "specific punishment" within the meaning of that term as used in this section. State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (1971); State v. Sligh, 27 N.C. App. 668, 219 S.E.2d 801 (1975).

Excessive Sentence Cannot be Sustained. — See In re Sellers, 234 N.C. 648, 68 S.E.2d 308 (1951).

Excessive Judgment Vacated and Remanded. — See State v. Marsh, 234 N.C. 101, 66 S.E.2d 684 (1951).

Credit for Pretrial Detention. — A prisoner should be given credit for time spent in custody prior to commitment where he has been given a maximum sentence. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Same — Failure to Give Credit Violates Constitution. — North Carolina's failure to give a prisoner credit for time served before trial where he has received a maximum sentence violates the Constitution in two ways. First, it constitutes multiple punishment for a single offense, thereby offending the double jeopardy clause of the Fifth Amendment which is applicable to the states through the Fourteenth Amendment. Second, the fact that only those accused who are unable to raise bail are subjected to extra pretrial incarceration when their prison time exceeds the statutory maximum is an invidious discrimination against the poor in violation of the equal protection clause of the Fourteenth Amendment. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

The state's refusal to give a prisoner credit for pretrial detention is an unconstitutional discrimination on the basis of wealth prohibited by the Fourteenth Amendment. Wealthy defendants (except where no bail is allowed) are able to remain out of prison until conviction and sentencing; the poor stay behind bars. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Same — Pretrial Custody Added to Sentence Cannot Exceed Statutory Maximum Punishment. — The time a prisoner spends in

custody prior to trial when added to the sentence to be served upon commitment cannot total more than the statutory maximum punishment for the crime involved. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Same — New Conviction. — The constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully "credited" in imposing sentence upon a new conviction for the same offense. Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971).

Where Felony and Misdemeanor Counts Consolidated for Judgment. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Applied in State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967); State v. Price, 8 N.C. App. 94, 173 S.E.2d 644 (1970); State v. Batts, 8 N.C. App. 551, 174 S.E.2d 704 (1970); State v. Goode, 16 N.C. App. 188, 191 S.E.2d 241 (1972); State v. Huffman, 16 N.C. App. 653, 192 S.E.2d 621 (1972); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. McNeil, 28 N.C. App. 125, 220 S.E.2d 401 (1975).

Quoted in State v. Efird, 271 N.C. 730, 157 S.E.2d 538 (1967); State v. Gosnell, 38 N.C. App. 679, 248 S.E.2d 756 (1978).

Stated in State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910 (1972); State v. Daniels, 300 N.C. 105, 265 S.E.2d 217 (1980); State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980).

Cited in State v. Ritter, 199 N.C. 116, 154 S.E. 62 (1930); State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946); State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969); State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Washington, 11 N.C. App. 441, 181 S.E.2d 260 (1971); State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972); State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668 (1973); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Martin, 30 N.C. App. 166, 226 S.E.2d 682 (1976); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Richardson, 295 N.C. 309, 245 S.E.2d 754 (1978); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979); State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979).

§ 14-2.1. Punishment of felonies; second or subsequent offenses; convictions occurring before July 1, 1981.

Notwithstanding the provisions of G.S. 15-197, or any other provisions of law, any person who has been previously convicted of a felony where a deadly weapon was used in the commission of the crime in the courts of this State, upon conviction of a second felony where a deadly weapon was used in the commission of the crime within seven years of the date of the previous felony conviction, provided that the previous felony did not occur within 10 days of the second felony, shall be sentenced to imprisonment for a minimum period of seven years and shall, in every instance, serve the first seven calendar years of his sentence without benefit of parole, probation, suspended sentence, or any other judicial or administrative remedy for release from incarceration. Such term will be computed allowing credit for good behavior, credit for time served while incarcerated awaiting trial, and such other provisions as the Secretary of Correction might make pursuant to G.S. 148-11. Upon completion of service of such term, the prisoner will be eligible to have his case considered for parole if the requisites of G.S. 148-58 regarding time served have been satisfied. The power of the Governor to grant commutations, pardons, and reprieves, and the power of the courts to grant appropriate relief under Article 22 of the General Statutes Chapter 15 will not be affected by the provisions of this section.

For the purpose of this section, the record or records of the prior felony conviction shall be admissible in evidence after conviction and before sentencing, but only for the purpose of proving that said person has been

convicted of a previous felony. A judgment of a conviction or plea of guilty to such felony offense certified to a superior court of this State from the custodian of records of any other court of this State under the same name as that by which the defendant is charged shall be prima facie evidence that the identity of such person is the same as the defendant so charged and shall be prima facie evidence of the facts so certified.

For the purpose of this section, felonies committed before a person attains the age of 21 years shall not constitute a previous felony conviction.

Pleas of guilty to or convictions of felony offenses prior to September 1, 1977, shall not be felony offenses within the meaning of this Article. Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon. This section shall not apply to persons convicted of felonies that occur on or after the effective date of Article 81A of Chapter 15A of the General Statutes [July 1, 1981], but G.S. 15A-1340.5 shall apply to such persons. (1977, c. 1131, s. 1; 1979, c. 760, s. 4.)

Editor's Note. — Sections 15-197 and 148-58, and all but one section of Chapter 15, Article 22, referred to in this section, have been repealed. For present provisions as to parole, see § 15A-1370.1 et seq. For present provisions as to post-trial relief, see § 15A-1411 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, added the last sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-2.2. Sentencing of person convicted of repeated felony using deadly weapon.

Notwithstanding any other provision of law, any person who has been previously convicted in the courts of this State within seven years of a felony in which a deadly weapon was used, provided that the previous felony did not occur within 10 days of the second or subsequent felony, in which a deadly weapon was used, shall serve a term for the second or subsequent felony of not less than seven years in prison, excluding gain time granted under G.S. 148-13. Any person sentenced under this section shall receive a sentence of at least 14 years in the State's prison and shall be entitled to credit for good behavior under G.S. 15A-1340.7. The sentencing judge may not sentence a person sentenced under this section as a committed youthful offender and may not suspend the sentence and place the person sentenced on probation. Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

For the purpose of this section, the record or records of the prior felony conviction shall be admissible in evidence after conviction and before sentencing, but only for the purpose of proving that the person has been convicted of a previous felony. A judgment of a conviction or plea of guilty or no contest to such felony offense certified to a superior court in this State from the custodian of records of any other court of this State under the same name as that by which the defendant is charged shall be prima facie evidence that the identity of such person is the same as the defendant so charged and shall be prima facie evidence of the facts so certified.

For the purposes of this section, a felony committed before a person attains the age of 18 years does not constitute a previous felony conviction.

Pleas of guilty or no contest to or convictions of felony offenses prior to September 1, 1977, are not felony offenses within the meaning of this section. Any felony offense to which a pardon has been extended does not for the purpose of this section constitute a felony. The burden of proving a pardon rests with the defendant and the State is not required to disprove a pardon. (1979, c. 760, s. 2; 1979, 2nd Sess., c. 1316, s. 34.)

Editor's Note. — The above section was enacted by Session Laws 1979, c. 760, s. 2, as § 15A-1340.5. The 1979 act was originally made effective July 1, 1980, but was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316, s. 47; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1931, c. 179. The section was transferred and renumbered § 14-2.2 by Session Laws 1979, 2nd Sess., c. 1316, s. 34, effective July 1, 1981 and applicable to offenses committed on or after that date. The 1979, 2nd Sess., act also amended the section by inserting "in which a deadly weapon was used" following "subsequent felony" in the first sentence of the first paragraph and adding the second, third and fourth paragraphs. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

§ 14-2.3. Forfeiture of gain acquired through felonies.

(a) Except as is otherwise provided in Article 3 of Chapter 31A, in the case of any violation of a general statute constituting a felony other than a nonwillful homicide, any money or other property or interest in property acquired thereby shall be forfeited to the State of North Carolina, including any profits, gain, remuneration, or compensation directly or indirectly collected by or accruing to any felon.

(b) An action to recover such property shall be brought by either a District Attorney or the Attorney General pursuant to G.S. 1-532. The action must be brought within three years from the date of the conviction for the felony.

(c) Nothing in this section shall be construed to require forfeiture of any money or property recovered by law-enforcement officers pursuant to the investigation of a felony when the money or property is readily identifiable by the owner or guardian of the property or is traceable to him. (1981, c. 840, s. 1.)

Editor's Note. — Session Laws 1981, c. 840, s. 2, provides: "This act shall become effective October 1, 1981, and shall apply to all felonies committed on or after that date."

§ 14-3. Punishment of misdemeanors, infamous offenses, offenses committed in secrecy and malice or with deceit and intent to defraud.

(a) Except as provided in subsection (b), every person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding two years, or by both, in the discretion of the court.

(b) If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except where the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony. (R. C., c. 34, s. 120; Code, s. 1097; Rev., s. 3293; C. S., s. 4173; 1927, c. 1; 1967, c. 1251, s. 3; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 2.)

Cross References. — As to uttering worthless check, see §§ 14-106 and 14-107. As to statute of limitations for misdemeanors, see § 15-1.

For statute providing the maximum punishment for felonies, effective July 1, 1981, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote subsection (b), so as to make a misdemeanor offense committed in secrecy and malice or with deceit and intent to defraud a Class H felony, where no other specific punishment was provided. The amendment also added a new second sentence to subsection (b), making the same provision for an attempt to commit burglary, crime against nature, or any felony where the attempt was made in secrecy or malice or with deceit and intent to defraud. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, again rewrote subsection (b), restoring the language of the subsection as it stood prior to the 1979 amendment but substituting "Class H felony" for "a felony and punishable as prescribed in § 14-2" at the end of the subsection. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For case law survey as to excessive punishment, see 45 N.C.L. Rev. 910 (1967).

As to lack of clear test as to what constitutes infamous offense, see 28 N.C.L. Rev. 103.

CASE NOTES

I. General Consideration.
II. Particular Offenses.

I. GENERAL CONSIDERATION.

Constitutionality. — The punishment provisions of subsection (a) of this section are not unconstitutional. State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970).

Section Places Ceiling on Court's Power to Punish. — The maximum provided in this section and § 14-2 places a ceiling on the court's power to punish by imprisonment when a ceiling is not otherwise fixed by law. Jones v. Ross, 257 F. Supp. 798 (E.D.N.C. 1966).

This section has reference to misdemeanors other than those created by Article 3 of Chapter 20 of the General Statutes, which relates to motor vehicles. State v. Massey, 265 N.C. 579, 144 S.E.2d 649 (1965).

This section does not mean that the court may not place offenders on probation, or make use of other State facilities and services in proper cases. State v. Willis, 255 N.C. 473, 121 S.E.2d 854 (1961).

Common-Law Offenses. — Misdemeanors made punishable as at common law, or punishable by fine or imprisonment, or both, can be punished by fine, or imprisonment in the county jail, or both. State v. McNeill, 75 N.C. 15 (1876); State v. Powell, 94 N.C. 920 (1886); State v. Brown, 253 N.C. 195, 116 S.E.2d 349 (1960).

If a statute prohibits a matter of public grievance, or commands a matter of public convenience, all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, notwithstanding the fact that no punishment is prescribed in the statute. State v. Bloodworth, 94 N.C. 918 (1886).

Discretion of Trial Judge. — Where the extent of the punishment is referred to the discretion of the trial judge, his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Willer, 94 N.C. 904 (1886); State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

The fact that others tried on similar charges are given shorter sentences is not ground for legal objection, the punishment imposed in a particular case, if within statutory limits, being within the sound discretion of the trial judge. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (1971).

The grade or class of a crime is determined by the punishment prescribed therefor and not the nomenclature of the statute, a felony being a crime punishable by death or imprisonment in the State prison, and while all misdemeanors for which no punishment is prescribed are punishable as misdemeanors at common law, where the offense is infamous, or done in secrecy or malice, or with deceit and intent to defraud, it is punishable by imprisonment in the county jail or State prison, under this section, and is a felony. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

Punishment "in the discretion of the court" is not specific punishment and, hence, is governed by the limits (ten years for felonies and two years for misdemeanors) prescribed in this section and § 14-2. State v. Adams, 266 N.C. 406, 146 S.E.2d 505 (1966).

Where Felony and Misdemeanor Counts Consolidated for Judgment. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where Statute Repealed before Judgment. — Where a statute prescribing the punishment for a crime is expressly and unqualifiedly repealed after such crime has been committed, but before final judgment, though after conviction, no punishment can be imposed. State v. Cress, 49 N.C. 421 (1857); State v. Nutt, 61 N.C. 20 (1866); State v. Long, 78 N.C. 571 (1878); State v. Massey, 103 N.C. 356, 9 S.E. 632 (1889); State v. Biggers, 108 N.C. 760, 12 S.E. 1024 (1891); State v. Perkins, 141 N.C. 797, 53 S.E. 735 (1906).

Excessive Punishment. — The word "or," in criminal statutes, cannot be interpreted to mean "and," when the effect is to aggravate the offense or increase the punishment. And so where a statute provides that a party guilty of the offense created by it shall be fined or imprisoned, the court has no power to both fine and imprison. State v. Walters, 97 N.C. 489, 2 S.E. 539 (1887).

A sentence of imprisonment for five years in the county jail and a recognizance of $500.00 to keep the peace for five years after the expiration thereof upon a defendant convicted of assault and battery, is excessive and therefore unconstitutional. State v. Driver, 78 N.C. 423 (1878).

The maximum punishment for a general misdemeanor is two years. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

A misdemeanor punishable in the discretion of the court means a maximum of two years. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969).

Same — Not Cruel or Unusual. — It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. State v. Driver, 78 N.C. 423 (1878); State v. Miller, 94 N.C. 904 (1886); State v. Farrington, 141 N.C. 844, 53 S.E. 954 (1906).

Where Common-Law Offense Altered by Statute. — Where the grade of a common-law offense has been made higher by statute, the indictment must conclude against the statute, but when the punishment has been mitigated, it may conclude at common law. State v. Lawrence, 81 N.C. 522 (1879).

Effect of Consent of Defendant. — No consent of the defendant can confer a jurisdiction which is denied to the court by the law, and any punishment imposed, other than that prescribed for the offense, is illegal. In re Schenck, 74 N.C. 607 (1876).

Applied in State v. Mounce, 226 N.C. 159, 36 S.E.2d 918 (1946); State v. Thompson, 3 N.C. App. 231, 164 S.E.2d 391 (1968); State v. Batiste, 5 N.C. App. 511, 168 S.E.2d 510 (1969); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Shirley, 12 N.C. App. 440, 183 S.E.2d 880 (1971); State v. Wade, 14 N.C. App. 414, 188 S.E.2d 714 (1972); State v. Lewis, 17 N.C. App. 117, 193 S.E.2d 455 (1972); State v. Toler, 18 N.C. App. 149, 196 S.E.2d 295 (1973); Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973); State v. Puryear, 30 N.C. App. 719, 228 S.E.2d 536 (1976).

Cited in State v. Wilson, 216 N.C. 130, 4 S.E.2d 440 (1939); State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968); State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); In re Wilson, 3 N.C. App. 136, 164 S.E.2d 56 (1968); State v. Cleaves, 4 N.C. App. 506, 166 S.E.2d 861 (1969); State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970); State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971); State v. Oakley, 15 N.C. App. 224, 189 S.E.2d 605 (1972); State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975); State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254 (1975); Wheaton v. Hagan, 435 F. Supp. 1134 (M.D.N.C. 1977); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978).

II. PARTICULAR OFFENSES.

Assaults. — Upon the ruling in State v. Rippy, 127 N.C. 516, 37 S.E. 148 (1900), overruled on other grounds, State v. Blackmon, 260 N.C. 352, 132 S.E.2d 880 (1963), § 14-33, bearing directly on the case of assaults, with or without intent to kill, making provision for punishment of such offenses, is to be regarded as specific, within the meaning of this section, and entirely withdraws the case of assault from the operation of this section. State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

Conspiracy to Charge with Infanticide. — A conspiracy to charge one with infanticide, being only a common-law misdemeanor, is not punishable by imprisonment in the penitentiary. State v. Jackson, 82 N.C. 565 (1880).

Conspiracy to violate the liquor law is a misdemeanor and punishable as at common

law, that is, by fine or imprisonment, or both. State v. Brown, 253 N.C. 195, 116 S.E.2d 349 (1960).

Larceny. — The punishment upon conviction of the misdemeanor of larceny may not exceed two years. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Where an indictment charges larceny of property of the value of $200.00 (now $400.00) or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Attempt to Obtain Property by False Pretense. — Any attempt to obtain property by false pretense necessarily is done with intent to deceive. By its plain language subsection (b) of this section makes any attempt to obtain property by false pretenses a felony. State v. Page, 32 N.C. App. 478, 232 S.E.2d 460, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977).

Destruction of Public Records. — A plea of guilty to an indictment charging defendant with wilfully, feloniously, secretly, and maliciously giving aid and assistance to his codefendant by manufacturing evidence, altering and destroying original records in the office of the Secretary of Revenue, is a confession of a felony under this section, although § 14-76 designates such offense as a misdemeanor. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

Infamous Offenses. — A statute, which names the punishment for all misdemeanors, where no specific punishment is prescribed, and provides that if the offense be "infamous," it shall be punished as a felony, necessarily refers to the degrading nature of the offense, and not to the measure of punishment. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

Subsection (b) and the reported cases leave some lack of certainty as to what crimes may be designated and punished as infamous. State v. Keen, 25 N.C. App. 567, 214 S.E.2d 242 (1975).

Same — An attempt to commit burglary constitutes a felony and is punishable by imprisonment in the State prison for a term not in excess of ten years, since it is an infamous offense or done in secrecy and malice, or both, within the purview of the statute. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

Same — Attempted Robbery. — An attempt to commit common-law robbery is an infamous crime. State v. McNeely, 244 N.C. 737, 94 S.E.2d 853 (1956).

An attempt to commit robbery with firearms is an infamous offense. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

While at common law an attempt to commit a felony was a misdemeanor, the Supreme Court has held that an attempt to commit the offense of common-law robbery is an infamous crime, and by virtue of subsection (b) has been converted into a felony. State v. Bailey, 4 N.C. App. 407, 167 S.E.2d 24 (1969).

An attempt to commit robbery is an infamous crime. State v. Best, 11 N.C. App. 286, 181 S.E.2d 138, cert. denied, 279 N.C. 350, 182 S.E.2d 582 (1971).

Same — Solicitation to Commit Murder. — Since it appears to be settled that conspiracy to murder is an infamous offense and punishable as a felony, and that solicitation to commit murder is but one step away from conspiracy to murder, sentence of not less than five nor more than 10 years was authorized by law. State v. Keen, 25 N.C. App. 567, 214 S.E.2d 242 (1975).

Same — Assault upon Female Child. — In a prosecution charging assault with intent to commit rape, where at the conclusion of the State's evidence defendant tendered a plea of guilty of an assault upon a female, and the court accepted defendant's plea and found as a fact that the female referred to was a child nine years of age and defendant was thirty-four years of age, and also, that the assault was aggravated, shocking and outrageous, the accepted plea was for a misdemeanor under § 14-33 and not for an "infamous offense" punishable as a felony, and judgment that the defendant be confined to the State's prison for not less than eight nor more than 10 years, was a violation of this section. State v. Tyson, 223 N.C. 492, 27 S.E.2d 113 (1943).

Same — Attempt to Commit Crime against Nature. — While an attempt to commit a felony is a misdemeanor, when such misdemeanor is infamous, or done in secrecy and malice, or with deceit and intent to defraud, it is punishable by imprisonment in the State's prison, and is made a felony by this section, and an attempt to commit the crime against nature is infamous and is punishable by imprisonment in the State's prison as a felony within the definition of this section. State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938); State v. Mintz, 242 N.C. 761, 89 S.E.2d 463 (1965).

An attempt to commit the crime against nature is an infamous act within the meaning of this section and is punishable as a felony. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Same — Solicitation to commit a crime against nature cannot be construed as an attempt to commit a crime against nature; solicitation to commit a crime against nature is therefore not an "infamous misdemeanor" under this section; and the superior court therefore did not have original jurisdiction of such a charge. State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980).

§ 14-4. Violation of local ordinances misdemeanor.

If any person shall violate an ordinance of a county, city, or town, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars ($50.00), or imprisoned for not more than 30 days. (1871-2, c. 195, s. 2; Code, s. 3820; Rev., s. 3702; C. S., s. 4174; 1969, c. 36, s. 2.)

Local Modification. — Jacksonville: 1979, c. 511.

CASE NOTES

In General. — While the town or city government has no right to make criminal law, the legislature has made the violation of ordinances a criminal offense. Board of Educ. v. Town of Henderson, 126 N.C. 689, 36 S.E. 158 (1900); State v. Higgs, 126 N.C. 1014, 35 S.E. 473 (1900), overruled on other grounds, Small v. Councilmen of Edenton, 146 N.C. 527, 60 S.E. 413 (1908); State v. Barrett, 243 N.C. 686, 91 S.E.2d 917 (1956).

Section makes violation of municipal ordinance a criminal offense. Walker v. City of Charlotte, 262 N.C. 697, 138 S.E.2d 501 (1964).

The violation of a valid municipal ordinance is a misdemeanor. Frosty Ice Cream, Inc. v. Hord, 263 N.C. 43, 138 S.E.2d 816 (1964).

The legislature in enacting this section made criminal what would otherwise be civil penalties for violations of ordinances. Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980).

Prior to Section Violation Not Punishable. — Prior to the passage of this section there was no way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. State v. Parker, 75 N.C. 249 (1876); School Dirs. v. City of Asheville, 137 N.C. 503, 50 S.E. 279 (1905).

Jurisdiction. — The superior court has no original jurisdiction to try indictments for violation of town ordinances. State v. White, 76 N.C. 15 (1877); State v. Threadgill, 76 N.C. 17 (1877).

Costs of Prosecutions. — The criminal offenses created by the violation of town ordinances under this section are State prosecutions, in the name of the State, or for violation of the criminal law of the State, and at the expense of the State (State v. Higgs, 126 N.C. 1014, 35 S.E. 473 (1900)), overruled on other grounds, Small v. Councilmen of Edenton, 146 N.C. 527, 60 S.E. 413 (1908), and the city cannot be charged with the costs of such prosecutions. Board of Educ. v. Town of Henderson, 126 N.C. 689, 36 S.E. 158 (1900).

Ordinance Must Conform to State Law. — It is uniformly held that a town ordinance in violation of a valid State statute appertaining to the question is void. Shaw v. Kennedy, 4 N.C. 591 (1817); State v. Austin, 114 N.C. 855, 19 S.E. 919 (1894); State v. Beacham, 125 N.C. 652, 34 S.E. 447 (1899); State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

And Violation of Invalid Ordinance No Offense. — The violation of a valid ordinance is, under the provision of this section, a misdemeanor, but it is not a criminal offense to disregard one enacted without authority. State v. Hunter, 106 N.C. 796, 11 S.E. 366 (1890), overruled on other grounds, State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954); State v. Webber, 107 N.C. 962, 12 S.E. 598 (1890).

Acting contrary to the provisions of a municipal ordinance is made a misdemeanor by this section. Notwithstanding the all-inclusive language of the statute, guilt must rest on the violation of a valid ordinance. If the ordinance is not valid, there can be no guilt. State v. McGraw, 249 N.C. 205, 105 S.E.2d 659 (1958).

Same — Burden on State. — Where the State fails to show that the original act of incorporation authorized the enactment of an ordinance, it fails to make out the case, for the legislature never intended to make the violation of a void ordinance an indictable misdemeanor. State v. Threadgill, 76 N.C. 17 (1877).

Upon the prosecution of a criminal action for the violation of a city ordinance, under this section the State must show that the ordinance in question was a valid one, as well as the violation as charged in the warrant. State v. Hunter, 106 N.C. 796, 11 S.E. 366 (1890), overruled on other grounds, State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954); State v. Snipes, 161 N.C. 242, 76 S.E. 243 (1912); State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

Failure to Prescribe Penalty. — The violation of a valid town ordinance is made a misdemeanor by this section, and the defense that the ordinance did not prescribe a penalty therefor is untenable. State v. Razook, 179 N.C. 708, 103 S.E. 67 (1920).

Where Fine Provided It Must Be Certain. — An ordinance which imposes a fine is invalid if it is not certain as to the amount of the fine. State v. Irvin, 126 N.C. 989, 35 S.E. 430 (1900).

Provision for Arrest Void. — When a municipal ordinance imposed a penalty for its violation, and provided that the offender should be "arrested and fined $25.00 upon conviction thereof," it was held that so much of the ordinance as provided for the arrest was void, but the other provisions were valid. State v. Earhardt, 107 N.C. 789, 12 S.E. 426 (1890).

Conviction for Fighting No Bar to Prosecution for Assault. — A conviction of violating a city ordinance punishing the disturbance of the good order and quiet of the town by fighting is not a bar to a prosecution by the State for an assault. State v. Taylor, 133 N.C. 755, 46 S.E. 5 (1903).

Personal Notice to Offender Sufficient. — The requirement of the charter of a city or town that its ordinances shall be printed and published, is to bring such ordinances to the attention of the public, and where personal notice has been given to an offender thereunder who afterwards commits the offense prohibited, the requirement of publication, etc., is not necessary for a conviction. State v. Razook, 179 N.C. 708, 103 S.E. 67 (1920).

Defects in Warrant May Be Waived. — Ordinarily defects in the form of a warrant for violating a city ordinance may be waived, and usually it is so considered when a plea of not guilty is entered by the defendants. State v. Prevo, 178 N.C. 740, 101 S.E. 370 (1919).

Form of Indictment. — It is not necessary, in indictments for violations of city ordinances, to set out the ordinance in the warrant. It is sufficient to refer to it by such indicia, as point it out with sufficient certainty. State v. Merritt, 83 N.C. 677 (1880); State v. Cainan, 94 N.C. 880 (1886).

In an indictment under an ordinance for loud and boisterous swearing, it is not necessary to set out the words used by the defendant. State v. Cainan, 94 N.C. 880 (1886).

Fines Used to Maintain Public Schools. — All the fines collected upon prosecutions for violations of the criminal laws of the State, whether for violations of ordinances made criminal by this section, or by other criminal statutes belong to the common school fund of the county; they are thus appropriated by the North Carolina Constitution, and cannot be diverted or withheld from this fund without violating the State Constitution. Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980).

Same — Parking Violations. — Moneys voluntarily paid by motorists to a city upon citations for violations of a city overtime parking ordinance constitute a penalty or fine collected for breach of a State penal law and should be used exclusively for maintaining free public schools in the county pursuant to N.C. Const., Art. IX, § 7, since violation of a city ordinance is also a violation of this section which makes the violation of a local ordinance a misdemeanor. Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980).

Applied in State v. Walker, 265 N.C. 482, 144 S.E.2d 419 (1965); Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975).

Quoted in part in State v. Wilkes, 233 N.C. 645, 65 S.E.2d 129 (1951).

Stated in Eastern Carolina Tastee Freez, Inc. v. City of Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

Cited in State v. Fox, 262 N.C. 193, 136 S.E.2d 761 (1964); Walker v. North Carolina, 262 F. Supp. 102 (W.D.N.C. 1966); USW v. Bagwell, 383 F.2d 492 (4th Cir. 1967); Bell v. Page, 271 N.C. 396, 156 S.E.2d 711 (1967); Walker v. City of Charlotte, 276 N.C. 166, 171 S.E.2d 431 (1970); Clarke v. Kerchner, 11 N.C. App. 454, 181 S.E.2d 787 (1971); State v. Clemmons, 17 N.C. App. 112, 193 S.E.2d 290 (1972); Pharo v. Pearson, 28 N.C. App. 171, 220 S.E.2d 359 (1975); Wheaton v. Hagan, 435 F. Supp. 1134 (M.D.N.C. 1977); Cauble v. City of Asheville, 45 N.C. App. 152, 263 S.E.2d 8 (1980).

Article 2.

Principals and Accessories.

§§ 14-5, 14-5.1: Repealed by Session Laws 1981, c. 686, s. 2, effective July 1, 1981.

Cross References. — For present provisions as to punishment of accessories before the fact, see § 14-5.2.

Editor's Note. — Session Laws 1981, c. 686, ss. 3 and 4, provide: "Sec. 3. This act does not apply to any offense committed before the effective date of this act, and any such offense is punishable under the laws in effect at the time such offense was committed.

"Sec. 4. This act shall become effective on July 1, 1981, and is applicable to all offenses committed on and after that date."

§ 14-5.2. Accessory before fact punishable as principal felon.

All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. However, if a person who heretofore would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, coconspirators, or accessories to the crime, he shall be guilty of a Class B felony. (1981, c. 686, s. 1.)

Editor's Note. — Session Laws 1981, c. 686, ss. 3 and 4, provide: "Sec. 3. This act does not apply to any offense committed before the effective date of this act, and any such offense is punishable under the laws in effect at the time such offense was committed.

"Sec. 4. This act shall become effective on July 1, 1981, and is applicable to all offenses committed on and after that date."

Legal Periodicals. — For note on presence as a factor in aiding and abetting, see 35 N.C.L. Rev. 284 (1957).

CASE NOTES

Editor's Note. — The annotations under this section are from cases decided under former § 14-5.

I. General Consideration.
II. Accessories Before the Fact.
III. Elements of Former Offense.
IV. Presence At Scene.
V. Practice and Procedure.
A. In General.
B. Indictment.
C. Evidence.
D. Instructions.

I. GENERAL CONSIDERATION.

Underlying Principle. — It is a well-established principle, that where two agree to do an unlawful act, each is responsible for the act of the other, provided it be done in pursuance of the original understanding, or in furtherance of the common purpose. State v. Simmons, 51 N.C. 21 (1858).

What Constitutes One a Party to an Offense. — A person is a party to an offense if he either actually commits the offense or does some act which forms a part thereof, or if he assists in the actual commission of the offense or of any act which forms part thereof, or directly or indirectly counsels or procures any person to commit the offense or to do any act forming a part thereof. To constitute one a party to an offense it has been held to be essential that he be concerned in its commission in some affirmative manner, as by actual commission of the crime or by aiding and abetting in its commission and it has been regarded as a general proposition that no one can be properly convicted of a crime to the commission of which he has never expressly or impliedly given his assent. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

History of Offense at Common Law. — Accessory before the fact was a common-law offense. State v. Sauls, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

At common law an accessory before the fact could only be convicted when tried at the same time with the principal, and after conviction of the principal, or after the principal had been tried, convicted and sentenced. State v. Duncan, 28 N.C. 98 (1845); State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888).

But the rule that an accessory could not be tried and convicted before the principal had no application as between two principals in first and second degrees. State v. Jarrell, 141 N.C. 722, 53 S.E. 137 (1906).

II. ACCESSORIES BEFORE THE FACT.

Who Is Accessory before the Fact. — An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled, commanded or encouraged the principal to commit it. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972); State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

An accessory before the fact is one who furnishes the means to carry on the crime, whose acts bring about the crime through the agency of or in connection with the perpetrators, who is a confederate, who instigates a crime. State v. Sauls, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

For a defendant, not actually or constructively present at the scene, to be criminally responsible for the acts of others as an accessory before the fact, it must be shown that he counseled, or procured, or commanded the others to perpetrate the crime. State v. Sauls, 29 N.C. App. 457, 224 S.E.2d 702, rev'd on other grounds, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

To render one guilty as an accessory before the fact, he must have had the requisite criminal intent; and it has been said that he must have the same intent as the principal. It is well settled, however, that he need not necessarily have intended the particular crime committed by the principal; an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded. State v. Hewitt, 33 N.C. App. 168, 234 S.E.2d 468 (1977).

An accessory before the fact is one who procures, counsels, commands or encourages the principal to commit a crime. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

In this State, one who procures another to commit murder is an accessory before the fact to murder. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

The concept of accessory before the fact has been held to presuppose some arrangement with respect to the commission of the crime in question. State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976).

There May Be Accessories before the Fact to Murder in Both Degrees. — Since malice, express or implied, is a constituent element of murder in any degree, there may be accessories before the fact to the crime of murder in both degrees. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Admittedly the concept of accessory before the fact presupposes some arrangement between the accessory and the principal with respect to the commission of the crime. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which imports a specific intent to do an unlawful act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

There may, of course, be accessories before the fact in all kinds of murder with deliberation, or premeditation, or malice aforethought, including murder in the second degree, which involves malice. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

III. ELEMENTS OF FORMER OFFENSE.

Elements Generally. — The elements necessary to be proved under former § 14-5 in order to sustain a conviction for accessory before the fact were: (1) that defendant counseled, procured or commanded the principal to commit the offense; (2) that defendant was not present when the principal committed the offense; and (3) that the principal committed the offense. State v. Sauls, 291 N.C. 253, 230 S.E.2d 390 (1976), cert. denied, 431 U.S. 916, 97 S. Ct. 2178, 53 L. Ed. 2d 226 (1977).

There were several things that must have concurred in order to justify the conviction of one as an accessory before the fact: (1) That he advised and agreed, or urged the parties or in some way aided them to commit the offense. (2) That he was not present when the offense was committed. (3) That the principal committed the crime. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961); State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969); State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974), appeal dismissed, 287 N.C. 261, 214 S.E.2d 434 (1975), cert. denied, 423 U.S. 1080, 96 S. Ct. 868, 47 L. Ed. 2d 91 (1976); State v. Branch, 288 N.C. 514, 220 S.E.2d 495 (1975), cert. denied, 433 U.S. 907, 97 S. Ct. 2971, 53 L. Ed. 2d 1091 (1977).

Proof of three elements was necessary to sustain a conviction for accessory before the fact. It must have been shown (1) that the defendant counseled, procured, commanded or encouraged the principal to commit the crime, (2) that he was not present when the crime was committed, and (3) that the principal committed the crime. State v. Philyaw, 291 N.C. 312, 230 S.E.2d 370 (1976); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978).

What Constitutes Counseling, Procuring and Commanding. — At a meeting of a board

of commissioners of a town, at which the mayor presided, a report of the cemetery committee was adopted, recommending that, unless parties, who had taken lots in the town cemetery and had not paid for them, should pay the amount due within 60 days on notice, the bodies buried in such lots should be removed to the free part of such cemetery. And, in reply to a question of one of the commissioners as to the legal right to remove the bodies, the mayor said: "The way is open, go ahead and remove them." It was held, that the mayor was individually guilty of counseling, procuring and commanding an act within the meaning of former § 14-5, making accessory before the fact a substantive crime. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

The term "counsel" as used in former § 14-5 describes the offense of a person who, not actually doing the felonious act, by his will contributed to it or procured it to be done. State v. Hewitt, 33 N.C. App. 168, 234 S.E.2d 468 (1977).

The meaning of the word "command," as applied to the case of principal and accessory is, where a person, having control over another, as a master over his servant, orders a thing to be done. State v. Mann, 2 N.C. 4 (1791).

IV. PRESENCE AT SCENE.

When Defendant Is "Present". — In order to determine whether a defendant is present, the court must determine whether "he is near enough to render assistance if need be and to encourage the actual perpetration of the felony." State v. Glaze, 37 N.C. App. 155, 245 S.E.2d 575 (1978).

Constructive Presence. — The actual distance of a person from the place where a crime is perpetrated is not always material in determining whether the person is constructively present. A person is deemed to be constructively present if he is near enough to render assistance if need be and to encourage the actual perpetration of the felony. State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972).

Evidence tending to show that defendant drove the automobile that carried men to a store, that to the knowledge of defendant the men entered the store, armed, that defendant stayed with the car, that later they were together when police stopped them and that defendant told police where they could find the stolen money, was sufficient to support an inference that defendant was constructively present at the time of the robbery. State v. Torain, 20 N.C. App. 69, 200 S.E.2d 665 (1973), cert. denied, 284 N.C. 622, 202 S.E.2d 278 (1974).

V. PRACTICE AND PROCEDURE.

A. In General.

Prior Conviction of Principals Unnecessary. — Under the provisions of former § 14-5 it was not required that the principals be first convicted of the charge of murder to convict the accessories thereto, either before or after the fact, upon sufficient evidence. State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888); State v. Walton, 186 N.C. 485, 119 S.E. 886 (1923).

It is not necessary to first convict principals in order to convict an accessory to a crime. State v. Partlow, 272 N.C. 60, 157 S.E.2d 688 (1967).

But Guilt of Principal Must Be Established beyond Reasonable Doubt. — In order to warrant the conviction of an accessory, the guilt of the principal must be established to the same degree of certainty as if he himself were on trial, that is, beyond a reasonable doubt. State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

No Conviction of Accessory Where Principal Acquitted. — Former § 14-5 did not change the common-law rule that an acquittal of the principal is an acquittal of the accessory. State v. Jones, 101 N.C. 719, 8 S.E. 147 (1888).

Effect of Acquittal of One of Several Principals. — Where there are three charged as principals with murder, the acquittal of one of them, the others having fled the jurisdiction of the court, does not of itself acquit the prisoners on trial as accessories before or after the fact, when the evidence of their guilt of the offense charged is sufficient both as to them as accessories and the principals directly charged with the murder. State v. Walton, 186 N.C. 485, 119 S.E. 886 (1923).

New Trial Where Conviction of Principal Vacated. — Where the conviction of the principal has been vacated by an order for a new trial, a new trial as to the alleged abettor defendant must also be ordered. State v. Spencer, 18 N.C. App. 499, 197 S.E.2d 232 (1973).

Sentences Imposed Need Not Be Equal. — There is no rule of law that sentences imposed upon defendants for a crime jointly committed by them must be equal. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

B. Indictment.

What Indictment Must Aver. — It is not necessary to allege maliciousness in the indictment. State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978).

C. Evidence.

The record of the conviction of a principal felon is admissible on the trial of the accessory, and is conclusive evidence of the conviction of the principal, and prima facie evidence of his guilt. State v. Chittem, 13 N.C. 49 (1828).

But not until judgment has been rendered on the verdict. State v. Duncan, 28 N.C. 98 (1845).

Sufficiency for Conviction. — Testimony that the accused had asked the one convicted of the murder of her husband to kill him, and that he accomplished the act the morning afterwards, at the place she designated, is sufficient for a conviction of murder, as an accessory before the fact. State v. Jones, 176 N.C. 702, 97 S.E. 32 (1918).

D. Instructions.

Instruction on Conspiracy. — Evidence sufficient to show defendant's involvement in a criminal conspiracy does not itself establish defendant's liability as a party to the substantive felony committed as a result of the conspiracy; it is reversible error for the court to so instruct the jury. State v. Small, 301 N.C. 407, 272 S.E.2d 128 (1980).

§ 14-6: Repealed by Session Laws 1981, c. 686, s. 2, effective July 1, 1981.

Cross References. — For present provisions as to punishment of accessories before the fact, see § 14-5.2.

Editor's Note. — Session Laws 1981, c. 686, ss. 3 and 4, provide: "Sec. 3. This act does not apply to any offense committed before the effective date of this act, and any such offense is punishable under the laws in effect at the time such offense was committed.

"Sec. 4. This act shall become effective on July 1, 1981, and is applicable to all offenses committed on and after that date."

§ 14-7. Accessories after the fact; trial and punishment.

If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and shall be punished as a Class H felon. The offense of such person may be inquired of, tried, determined and punished by any court which shall have jurisdiction of the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed without the limits of the State; and in case the principal felony shall have been committed within the body of any county, and the act by reason whereof any person shall have become accessory shall have been committed within the body of any other county, the offense of such person guilty of a felony as aforesaid may be inquired of, tried, determined, and punished in either of said counties: Provided, that no person who shall be once duly tried for such felony shall be again indicted or tried for the same offense. (1797, c. 485, s. 1, P. R.; 1852, c. 58; R. C., c. 34, s. 54; Code, s. 978; Rev., s. 3289; C. S., s. 4177; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class H felon" for "by imprisonment in the State's prison or county jail for not less than four months nor more than ten years, and may also be fined in the discretion of the court" at the end of the first sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

In General. — An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been committed, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment knowing, at the time, the person so aided has committed a felony. State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942); State v. Williams, 17 N.C. App. 39, 193 S.E.2d 452 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

An accessory after the fact under this section is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists such other, the felon, or in any manner aids him to escape arrest or punishment. State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

"Accessory after the Fact" Is a Substantive Crime. — Accessory after the fact is a substantive crime. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Armed robbery under § 14-87 differs in fact and in law from accessory after the fact under this section. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

The offense of being an accessory after the fact to manslaughter is a substantive felony offense. State v. Martin, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

And Not a Lesser Degree of the Principal Crime. — See State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Hence, Participant in Felony Cannot Be Accessory. — A participant in a felony may no more be an accessory after the fact than one who commits larceny may be guilty of receiving the goods which he himself had stolen. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Nor Can Acquittal as Accessory Bar Prosecution for Principal Crime. — An acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Elements of Crime. — On a charge of accessory after the fact to robbery the State must show: (1) robbery, (2) the accused knew of it and (3) possessing that knowledge, he assisted the robber in escaping detection, arrest and punishment. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964); State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

To convict parents of the accused son as accessories to the crime of rape, the State had the burden of proving beyond a reasonable doubt these essentials of the offense charged, namely: (1) That the son had actually committed the alleged crime of rape; (2) that the parents knew that the son had committed the alleged crime of rape; and (3) that the parents assisted the son in his efforts to avoid detection, arrest and punishment. State v. Overman, 284 N.C. 335, 200 S.E.2d 604 (1973).

To constitute a person an accesory after the fact to manslaughter, these essentials must appear: (1) manslaugher must have been committed; (2) the accused must know that manslaughter has been committed by the person received, relieved or assisted; (3) the accessory must render assistance to the felon personally. State v. Martin, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

One cannot become an accessory after the fact until the offense has become an accomplished fact. Thus, a person cannot be convicted as an accessory after the fact to a murder because he aided the murderer to escape, when the aid was rendered after the mortal wound was given but before death ensued, as a murder is not complete until the death results. State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948).

The crime of accessory after the fact has its beginning after the principal offense has been committed. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

It is not necessary that the aid given by the accessory after the fact be effective to enable the felon to escape all or a part of his punishment. State v. Martin, 30 N.C. App. 166, 226 S.E.2d 682 (1976).

Effect of Directed Verdict to Principal Offense. — Since the crime of accessory after the fact has its beginning after the principal offense has been committed, a directed verdict of not guilty of armed robbery does not decide the issue of whether the defendant joined the criminal scheme after the robbery was complete. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

A directed verdict of not guilty of armed robbery only removes the issues of whether defendant participated as a principal robber or

whether he aided and abetted in the commission of the robbery. The possibility remains that after the robbery was committed, the defendant assisted the felons by transporting them in his car from the scene of the crime. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

A directed verdict of not guilty of armed robbery foreclosed the State from subsequent prosecutions of defendant for armed robbery or for any lesser included offenses of armed robbery. But, accessory after the fact of armed robbery is not a lesser included offense of armed robbery. Therefore, general double jeopardy motions would not bar the trial of defendant on charges of accessory after the fact to armed robbery. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, appeal dismissed, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

A receiver of stolen goods is not an accessory after the fact. State v. Tyler, 85 N.C. 569 (1881).

Husband of Accessory Not Competent Witness. — The husband of one charged as an accessory is not a competent witness in favor of the one charged as the principal felon. State v. Ludwick, 61 N.C. 401 (1868).

Instructions. — The trial court did not err in failing to instruct as to one defendant on the offenses of accessory before and accessory after the fact to the crimes of armed robbery and murder where the evidence showed that both defendants were present at the scene and were acting together in the commission of the armed robbery, and that the murders occurred in furtherance of their common purpose to commit this crime or as a natural consequence thereof. State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).

Applied in State v. Poole, 25 N.C. App. 715, 214 S.E.2d 774 (1975).

Cited in State v. Carrington, 35 N.C. App. 53, 240 S.E.2d 475 (1978).

Article 2A.

Habitual Felons.

§ 14-7.1. Persons defined as habitual felons.

Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. For the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed. Provided, however, that federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors shall not be considered felonies for the purposes of this Article. For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony. Pleas of guilty to or convictions of felony offenses prior to July 6, 1967, shall not be felony offenses within the meaning of this Article. Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon. (1967, c. 1241, s. 1; 1971, c. 1231, s. 1.)

Editor's Note. — This Article was repealed by Session Laws 1979, c. 760, s. 4. The repeal, however, never went into effect. The repealing act was originally made effective July 1, 1980, but was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179; and Session Laws 1981, c. 179, s. 10, repealed Session Laws 1979, c. 760, s. 4.

Legal Periodicals. — For a survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

CASE NOTES

Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

Cited in State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

§ 14-7.2. Punishment.

When any person is charged by indictment with the commission of a felony under the laws of the State of North Carolina and is also charged with being an habitual felon as defined in G.S. 14-7.1, he must, upon conviction, be sentenced and punished as an habitual felon, as in this Chapter provided, except in those cases where the death penalty or a life sentence is imposed. (1967, c. 1241, s. 2; 1981, c. 179, s. 11.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or a life sentence" near the end of the section.

CASE NOTES

Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

§ 14-7.3. Charge of habitual felon.

An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony. An indictment which charges a person with being an habitual felon must set forth the date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place. No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period. (1967, c. 1241, s. 3.)

CASE NOTES

One basic purpose behind this Chapter is to provide notice to defendant that he is being prosecuted for some substantive felony as a recidivist. Failure to provide such notice where the State accepts a guilty plea on the substantive felony charge may well vitiate the

plea itself as not being knowingly entered with full understanding of the consequences. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

Separate Indictment Charging Defendant as Habitual Felon Contemplated. — Properly construed, this Chapter clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

Defective Indictment. — Since it is clear from the indictment that prior to its return all the substantive felony proceedings upon which it is based had been prosecuted to completion and there was no pending felony prosecution to which the habitual felon proceeding could attach as an ancillary proceeding, the indictment on motion of the defendant should have been dismissed for failure of the bill to charge a cognizable offense. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

§ 14-7.4. Evidence of prior convictions of felony offenses.

In all cases where a person is charged under the provisions of this Article with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. (1967, c. 1241, s. 4; 1981, c. 179, s. 12.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted the present second and third sentences for the former second sentence, which read: "A judgment of a conviction or plea of guilty to a felony offense certified to a superior court of this State from the custodian of records of any state or federal court under the same name as that by which the defendant is charged with habitual felon shall be prima facie evidence that the identity of such person is the same as the defendant so charged and shall be prima facie evidence of the facts so certified."

§ 14-7.5. Verdict and judgment.

When an indictment charges an habitual felon with a felony as above provided and an indictment also charges that said person is an habitual felon as provided herein, the defendant shall be tried for the principal felony as provided by law. The indictment that the person is an habitual felon shall not be revealed to the jury unless the jury shall find that the defendant is guilty of the principal felony or other felony with which he is charged. If the jury finds the defendant guilty of a felony, the bill of indictment charging the defendant as an habitual felon may be presented to the same jury. Except that the same jury may be used, the proceedings shall be as if the issue of habitual felon were a principal charge. If the jury finds that the defendant is an habitual felon, the trial judge shall enter judgment according to the provisions of this Article. If the jury finds that the defendant is not an habitual felon, the trial judge shall pronounce judgment on the principal felony or felonies as provided by law. (1967, c. 1241, s. 5.)

Legal Periodicals. — For a survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

CASE NOTES

It is clear that the proceeding by which the State seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony. The Chapter does not authorize a proceeding independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 1977.

§ 14-7.6. Sentencing of habitual felons.

When an habitual felon as defined in this Article shall commit any felony under the laws of the State of North Carolina, he must, upon conviction or plea of guilty under indictment as herein provided (except where the death penalty or a sentence of life imprisonment is imposed) be sentenced as a Class C felon. Notwithstanding any other provision of law, a person sentenced under this Article shall serve a term of not less than seven years in prison, excluding gain time granted under G.S. 148-13. A person sentenced under this Article shall receive a sentence of at least 14 years in the State's prison and shall be entitled to credit for good behavior under G.S. 15A-1340.7. The sentencing judge may not suspend the sentence and may not place the person sentenced on probation. Sentences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder. (1967, c. 1241, s. 6; 1981, c. 179, s. 13.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote this section.

CASE NOTES

Being an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime. The status itself, standing alone, will not support a criminal sentence. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

The only reason for establishing that an accused is an habitual felon is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status. The effect of such a proceeding is to enhance the punishment of those found guilty of crime who are also shown to have been convicted of other crimes in the past. State v. Allen, 292 N.C. 431, 233 S.E.2d 585 (1977).

SUBCHAPTER II. OFFENSES AGAINST THE STATE.

ARTICLE 3.

Rebellion.

§ 14-8. Rebellion against the State.

If any person shall incite, set on foot, assist or engage in a rebellion or insurrection against the authority of the State of North Carolina or the laws thereof, or shall give aid or comfort thereto, every person so offending in any of the ways aforesaid shall be guilty of a felony, and shall be punished as a Class G felon. (Const., art. 4, s. 5; 1861, c. 18; 1866, c. 64; 1868, c. 60, s. 2; Code, s. 1106; Rev., s. 3437; C. S., s. 4178; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "and shall be punished as a Class G felon" for "and, shall be punished by imprisonment in the State's prison for not more than fifteen years and by a fine of not more than ten thousand dollars" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-9. Conspiring to rebel against the State.

If two or more persons shall conspire together to overthrow or put down, or to destroy by force, the government of North Carolina, or to levy war against the government of the State, or to oppose by force the authority of such government, or by force or threats to intimidate, or to prevent, hinder or delay the execution of any law of the State, or by force or fraud to seize or take possession of any firearms or other property of the State, against the will or contrary to the authority of such State, every person so offending in any of the ways aforesaid shall be punished as a Class H felon. (1868, c. 60, s. 1; Code, s. 1107; Rev., s. 3438; C. S., s. 4179; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and shall be imprisoned not more than ten years in the State's prison and be fined not exceeding five thousand dollars" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

CASE NOTES

In General. — It is a rule well established that all who engage in a conspiracy, as well as those who participate after it is formed, are equally liable, and the acts and declarations of each in furtherance of the common illegal design are admissible against all. State v. Jackson, 82 N.C. 565 (1880).

§ 14-10. Secret political and military organizations forbidden.

If any person, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or resisting the laws, shall join or in any way connect or unite himself with any oath-bound secret political or military organization, society or association of whatsoever name or character; or shall form or organize or combine and agree with any other person or persons to form or organize any such organization; or as a member of any secret political or military party or organization shall use, or agree to use, any certain signs or grips or passwords, or any disguise of the person or voice, or any disguise whatsoever for the advancement of its object,

and shall take or administer any extrajudicial oath or other secret, solemn pledge, or any like secret means; or if any two or more persons, for the purpose of compassing or furthering any political object, or aiding the success of any political party or organization, or circumventing the laws, shall secretly assemble, combine or agree together, and the more effectually to accomplish such purposes, or any of them, shall use any certain signs, or grips, or passwords, or any disguise of the person or voice, or other disguise whatsoever, or shall take or administer any extrajudicial oath or other secret, solemn pledge; or if any persons shall band together and assemble to muster, drill or practice any military evolutions except by virtue of the authority of an officer recognized by law, or of an instructor in institutions or schools in which such evolutions form a part of the course of instruction; or if any person shall knowingly permit any of the acts and things herein forbidden to be had, done or performed on his premises, or on any premises under his control; or if any person being a member of any such secret political or military organization shall not at once abandon the same and separate himself entirely therefrom, every person so offending shall be guilty of a misdemeanor, and shall be fined not less than ten ($10.00) nor more than two hundred dollars ($200.00), or be imprisoned, or both, at the discretion of the court. (1868-9, c. 267; 1870-1, c. 133; 1871-2, c. 143; Code, s. 1095; Rev., s. 3439; C. S., s. 4180.)

Cross References. — For subsequent statutes relating to prohibited secret societies and activities, see §§ 14-12.2 through 14-12.15.

CASE NOTES

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

Article 4.

Subversive Activities.

§ 14-11. Activities aimed at overthrow of government; use of public buildings.

It shall be unlawful for any person, by word of mouth or writing, willfully and deliberately to advocate, advise or teach a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof shall be overthrown or overturned by force or violence or by any other unlawful means. It shall be unlawful for any public building in the State, owned by the State of North Carolina, any political subdivision thereof, or by any department or agency of the State or any institution supported in whole or in part by State funds, to be used by any person for the purpose of advocating, advising or teaching a doctrine that the government of the United States, the State of North Carolina or any political subdivision thereof should be overthrown by force, violence or any other unlawful means. (1941, c. 37, s. 1.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 466.

§ 14-12. Punishment for violations.

Any person or persons violating any of the provisions of this Article shall, for the first offense, be guilty of a misdemeanor and be punished accordingly, and for the second offense shall be punished as a Class H felon. (1941, c. 37, s. 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and punished accordingly" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-12.1. Certain subversive activities made unlawful.

It shall be unlawful for any person to:

(1) By word of mouth or writing advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning the government of the United States or a political subdivision of the United States by force or violence; or,

(2) Print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means; or,

(3) Organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means.

Any person violating the provisions of this section shall be punished as a Class H felon.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrine that the government of the United States or a political subdivision of the United States should be overthrown by force, violence or any unlawful means, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, shall be punished as a Class H felon.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes, by another who had no authority from him to make the publication and whose act was disavowed by him as soon as known.

No person shall be employed by any department, bureau, institution or agency of the State of North Carolina who has participated in any of the activities described in this section, and any person now employed by any department, bureau, institution or agency and who has been or is engaged in any of the activities described in this section shall be forthwith discharged.

Evidence satisfactory to the head of such department, bureau, institution or agency of the State shall be sufficient for refusal to employ any person or cause for discharge of any employee for the reasons set forth in this paragraph. (1947, c. 1028; 1953, c. 675, s. 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and upon conviction shall be fined or imprisoned, or both, in the discretion of the court" at the end of the second paragraph and for "guilty of a felony and punishable by a fine or imprisonment, or both in the discretion of the court" at the end of the third paragraph. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

ARTICLE 4A.

Prohibited Secret Societies and Activities.

§ 14-12.2. Definitions.

The terms used in this Article are defined as follows:

(1) The term "secret society" shall mean any two or more persons organized, associated together, combined or united for any common purpose whatsoever, who shall use among themselves any certain grips, signs or password, or who shall use for the advancement of any of their purposes or as a part of their ritual any disguise of the person, face or voice or any disguise whatsoever, or who shall take any extrajudicial oath or secret solemn pledge or administer such oath or pledge to those associated with them, or who shall transact business and advance their purposes at secret meeting or meetings which are tiled and guarded against intrusion by person not associated with them.

(2) The term "secret political society" shall mean any secret society, as hereinbefore defined, which shall at any time have for a purpose the hindering or aiding the success of any candidate for public office, or the hindering or aiding the success of any political party or organization, or violating any lawfully declared policy of the government of the State or any of the laws and constitutional provisions of the State.

(3) The term "secret military society" shall mean any secret society, as hereinbefore defined, which shall at any time meet, assemble or engage in a venture when members thereof are illegally armed, or which shall at any time have for a purpose the engaging in any venture by members thereof which shall require illegal armed force or in which illegal armed force is to be used, or which shall at any time muster, drill or practice any military evolutions while illegally armed. (1953, c. 1193, s. 1.)

Legal Periodicals. — For comment on this Article, see 31 N.C.L. Rev. 401 (1953).

§ 14-12.3. Certain secret societies prohibited.

It shall be unlawful for any person to join, unite himself with, become a member of, apply for membership in, form, organize, solicit members for, combine and agree with any person or persons to form or organize, or to encourage, aid or assist in any way any secret political society or any secret military society or any secret society having for a purpose the violating or circumventing the laws of the State. (1953, c. 1193, s. 2.)

§ 14-12.4. Use of signs, grips, passwords or disguises or taking or administering oath for illegal purposes.

It shall be unlawful for any person to use, agree to use, or to encourage, aid or assist in the using of any signs, grips, passwords, disguise of the face, person or voice, or any disguise whatsoever in the furtherance of any illegal secret political purpose, any illegal secret military purpose, or any purpose of violating or circumventing the laws of the State; and it shall be unlawful for any person to take or administer, or agree to take or administer, any extrajudicial oath or secret solemn pledge to further any illegal secret political purpose, any illegal secret military purpose, or any purpose of violating or circumventing the laws of the State. (1953, c. 1193, s. 3.)

§ 14-12.5. Permitting, etc., meetings or demonstrations of prohibited secret societies.

It shall be unlawful for any person to permit or agree to permit any members of a secret political society or a secret military society or a secret society having for a purpose the violating or circumventing the laws of the State to meet or to hold any demonstration in or upon any property owned or controlled by him. (1953, c. 1193, s. 4.)

§ 14-12.6. Meeting places and meetings of secret societies regulated.

Every secret society which has been or is now being formed and organized within the State, and which has members within the State shall forthwith provide or cause to be provided for each unit, lodge, council, group of members, grand lodge or general supervising unit a regular meeting place in some building or structure, and shall forthwith place and thereafter regularly keep a plainly visible sign or placard on the immediate exterior of such building or structure or on the immediate exterior of the meeting room or hall within such building or structure, if the entire building or structure is not controlled by such secret society, bearing upon said sign or placard the name of the secret society, the name of the particular unit, lodge, council, group of members, grand lodge or general supervising unit thereof and the name of the secretary, officer, organizer or member thereof who knows the purposes of the secret society and who knows or has a list of the names and addresses of the members thereof, and as such secretary, officer, organizer or member dies, removes, resigns or is replaced, his or her successor's name shall be placed upon such sign or placard; any person or persons who shall hereafter undertake to form and organize any secret society or solicit membership for a secret society within the State shall fully comply with the foregoing provisions of this section before forming and organizing such secret society and before soliciting memberships therein; all units, lodges, councils, groups of members, grand lodge and general supervising units of all secret societies within the State shall hold all of their

secret meetings at the regular meeting place of their respective units, lodges, councils, group of members, grand lodge or general supervising units or at the regular meeting place of some other unit, lodge, council, group of members, grand lodge or general supervising unit of the same secret society, and at no other place unless notice is given of the time and place of the meeting and the name of the secret society holding the meeting in some newspaper having circulation in the locality where the meeting is to be held at least two days before the meeting. (1953, c. 1193, s. 5.)

§ 14-12.7. Wearing of masks, hoods, etc., on public ways.

No person or persons over 16 years of age shall, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, be or appear upon any lane, walkway, alley, street, road, highway or other public way in this State. (1953, c. 1193, s. 6.)

§ 14-12.8. Wearing of masks, hoods, etc., on public property.

No person or persons shall in this State, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, or appear upon or within the public property of any municipality or county of the State, or of the State of North Carolina. (1953, c. 1193, s. 7.)

§ 14-12.9. Entry, etc., upon premises of another while wearing mask, hood or other disguise.

No person or persons over 16 years of age shall, while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, demand entrance or admission, enter or come upon or into, or be upon or in the premises, enclosure or house of any other person in any municipality or county of this State. (1953, c. 1193, s. 8.)

§ 14-12.10. Holding meetings or demonstrations while wearing masks, hoods, etc.

No person or persons over 16 years of age shall while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, hold any manner of meeting, or make any demonstration upon the private property of another unless such person or persons shall first obtain from the owner or occupier of the property his or her written permission to do so, which said written permission shall be recorded in the office of the register of deeds of the county in which said property is located before the beginning of such meeting or demonstration. (1953, c. 1193, s. 9.)

§ 14-12.11. Exemptions from provisions of Article.

The following are exempted from the provisions of G.S. 14-12.7, 14-12.8, 14-12.9, 14-12.10 and 14-12.14:

(1) Any person or persons wearing traditional holiday costumes in season;
(2) Any person or persons engaged in trades and employment where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade or profession;
(3) Any person or persons using masks in theatrical productions including use in Mardi Gras celebrations and masquerade balls;

(4) Persons wearing gas masks prescribed in civil defense drills and exercises or emergencies; and

(5) Any person or persons, as members or members elect of a society, order or organization, engaged in any parade, ritual, initiation, ceremony, celebration or requirement of such society, order or organization, and wearing or using any manner of costume, paraphernalia, disguise, facial makeup, hood, implement or device, whether the identity of such person or persons is concealed or not, on any public or private street, road, way or property, or in any public or private building, provided permission shall have been first obtained therefor by a representative of such society, order or organization from the governing body of the municipality in which the same takes place, or, if not in a municipality, from the board of county commissioners of the county in which the same takes place.

Provided, that the provisions of this Article shall not apply to any preliminary meetings held in good faith for the purpose of organizing, promoting or forming a labor union or a local organization or subdivision of any labor union nor shall the provisions of this Article apply to any meetings held by a labor union or organization already organized, operating and functioning and holding meetings for the purpose of transacting and carrying out functions, pursuits and affairs expressly pertaining to such labor union. (1953, c. 1193, s. 10.)

§ 14-12.12. Placing burning or flaming cross on property of another or on public street or highway.

(a) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State a burning or flaming cross or any manner of exhibit in which a burning or flaming cross, real or simulated, is a whole or a part, without first obtaining written permission of the owner or occupier of the premises so to do.

(b) It shall be unlawful for any person or persons to place or cause to be placed on the property of another in this State or on a public street or highway, a burning or flaming cross or any manner of exhibit in which a burning or flaming cross real or simulated, is a whole or a part, with the intention of intimidating any person or persons or of preventing them from doing any act which is lawful, or causing them to do any act which is unlawful. (1953, c. 1193, s. 11; 1967, c. 522, ss. 1, 2.)

CASE NOTES

Cited in State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

§ 14-12.13. Placing exhibit with intention of intimidating, etc., another.

It shall be unlawful for any person or persons to place or cause to be placed anywhere in this State any exhibit of any kind whatsoever, while masked or unmasked, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful. (1953, c. 1193, s. 12.)

§ 14-12.14. Placing exhibit while wearing mask, hood, or other disguise.

It shall be unlawful for any person or persons, while wearing a mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, to place or cause to be placed at or in any place in the State any exhibit of any kind whatsoever, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful. (1953, c. 1193, s. 13; 1967, c. 522, s. 3.)

§ 14-12.15. Punishment for violation of Article.

All persons violating any of the provisions of this Article, except for G.S. 14-12.12(b), 14-12.13, and 14-12.14, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. All persons violating the provisions of G.S. 14-12.12(b), 14-12.13, and 14-12.14 shall be punished as a Class I felon. (1953, c. 1193, s. 14; 1967, c. 602; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony and shall be punished by confinement in the State prison for not less than one nor more than five years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

ARTICLE 5.

Counterfeiting and Issuing Monetary Substitutes.

§ 14-13. Counterfeiting coin and uttering coin that is counterfeit.

If any person shall falsely make, forge or counterfeit, or cause or procure to be falsely made, forged or counterfeited, or willingly aid or assist in falsely making, forging or counterfeiting the resemblance or similitude or likeness of a Spanish milled dollar, or any coin of gold or silver which is in common use and received in the discharge of contracts by the citizens of the State; or shall pass, utter, publish or sell, or attempt to pass, utter, publish or sell, or bring into the State from any other place with intent to pass, utter, publish or sell as true, any such false, forged or counterfeited coin, knowing the same to be false, forged or counterfeited, with intent to defraud any person whatsoever, every person so offending shall be punished as a Class H felon. (1811, c. 814, s. 3, P. R.; R. C., c. 34, s. 64; Code, s. 1035; Rev., s. 3422; C. S., s. 4181; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to forgery, see § 14-119 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years" at the end of the section. The 1979 amendatory act

was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-14. Possessing tools for counterfeiting.

If any person shall have in his possession any instrument for the purpose of making any counterfeit similitude or likeness of a Spanish milled dollar, or other coin made of gold or silver which is in common use and received in discharge of contracts by the citizens of the State, and shall be duly convicted thereof, the person so offending shall be punished as a Class H felon. (1811, c. 814, s. 4, P. R.; R. C., c. 34, s. 65; Code, s. 1036; Rev., s. 3423; C. S., s. 4182; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "imprisoned in the State's prison or county jail for not less than four months nor more than ten years, or be fined not more than five hundred dollars" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Indictment Sufficient. — An indictment charging defendant with having in his possession "one pair of dies, upon which were made the likeness, similitude, figure and resemblance of the sides of a lawful Spanish milled silver dollar, etc., for the purpose of making and counterfeiting money in the likeness and similitude of Spanish milled silver dollars," was held to charge, with sufficient certainty, the offense designated in this section. State v. Collins, 10 N.C. 191 (1824).

§ 14-15. Issuing substitutes for money without authority.

If any person or corporation, unless the same be expressly allowed by law, shall issue any bill, due bill, order, ticket, certificate of deposit, promissory note or obligation, or any other kind of security, whatever may be its form or name, with the intent that the same shall circulate or pass as the representative of, or as a substitute for, money, he shall forfeit and pay for each offense the sum of fifty dollars ($50.00); and if the offender be a corporation, it shall in addition forfeit its charter. Every person or corporation offending against this section, or aiding or assisting therein, shall be guilty of a misdemeanor. (R. C., c. 36, s. 5; Code, s. 2493; 1895, c. 127; Rev., s. 3711; C. S., s. 4183.)

Local Modification. — Cumberland: 1933, c. 33; Currituck: 1933, c. 328.

CASE NOTES

In General. — In State v. Humphreys, 19 N.C. 555 (1837), the act of 1816, c. 900, which was very similar to this section, was discussed. It was there held that the act was constitutional and that the intent in so issuing the notes, etc., was an essential ingredient of the offense.

§ 14-16. Receiving or passing unauthorized substitutes for money.

If any person or corporation shall pass or receive, as the representative of, or as the substitute for, money, any bill, check, certificate, promissory note, or other security of the kind mentioned in G.S. 14-15, whether the same be issued within or without the State, such person or corporation, and the officers and agents of such corporation aiding therein, who shall offend against this section shall for every such offense forfeit and pay five dollars ($5.00), and shall be guilty of a misdemeanor. (R. C., c. 36, s. 6; Code, s. 2494; 1895, c. 127; Rev., s. 3712; C. S., s. 4184.)

CASE NOTES

Applicability of Section. — In State v. Bank of Fayetteville, 48 N.C. 450 (1856), it was held that this section, making it an offense to "pass and receive" bank notes, did not apply to a bank, but that the bank should be penalized under another section which made it unlawful to make and issue notes of a less denomination than $3.00.

§§ 14-16.1 to 14-16.5: Reserved for future codification purposes.

Article 5A.

Endangering Executive and Legislative Officers.

§ 14-16.6. Assault on executive or legislative officer.

(a) Any person who assaults any legislative officer named in G.S. 147-2(1), (2), or (3) or any executive officer named in G.S. 147-3(c), or any person who makes a violent attack upon the residence, office, temporary accommodation or means of transport of any legislative officer named in G.S. 147-2(1), (2), or (3) or any executive officer named in G.S. 147-3(c) in a manner likely to endanger such legislative officer or executive officer, shall be guilty of a felony and shall be punished as a Class H felon.

(b) Any person who commits an offense under subsection (a) and uses a deadly weapon in the commission of that offense shall be punished as a Class G felon.

(c) Any person who commits an offense under subsection (a) and inflicts serious bodily injury to any legislative officer named in G.S. 147-2(1), (2), or (3) or any executive officer as named in G.S. 147-3(c) shall be punished as a Class F felon. (1981, c. 822, s. 1.)

Cross References. — As to authority of the State Bureau of Investigation to investigate assaults upon or threats against the officers named in §§ 147-2 and 147-3, subsection (c), see § 114-15.

§ 14-16.7. Threats against executive or legislative officers.

(a) Any person who knowingly and willfully makes any threat to inflict serious bodily injury upon or to kill any legislative officer named in G.S. 147-2(1), (2), or (3) or any executive official as named in G.S. 147-3(c), shall be guilty of a felony and shall be punished as a Class J felon.

(b) Any person who knowingly and willfully deposits for conveyance in the mail any letter, writing, or other document containing a threat to inflict serious bodily injury upon or to kill any legislative officer named in G.S. 147-2(1), (2), or (3) or any executive official named in G.S. 147-3(c), shall be guilty of a felony and shall be punished as a Class J felon. (1981, c. 822, s. 1.)

§ 14-16.8. No requirement of receipt of the threat.

In prosecutions under G.S. 14-16.7 of this Article it shall not be necessary to prove that any legislative officer named in G.S. 147-2(1), (2), or (3) or any executive official as named in G.S. 147-3(c) actually received the threatening communication or actually believed the threat. (1981, c. 822, s. 1.)

§ 14-16.9. Officers-elect to be covered.

Any person who has been elected to any office covered by this Article but has not yet taken the oath of office shall be considered to hold the office for the purpose of this Article and G.S. 114-15. (1981, c. 822, s. 1.)

SUBCHAPTER III. OFFENSES AGAINST THE PERSON.

ARTICLE 6.

Homicide.

§ 14-17. Murder in the first and second degree defined; punishment.

A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life as the court shall determine pursuant to G.S. 15A-2000. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class C felon. (1893, cc. 85, 281; Rev., s. 3631; C. S., s. 4200; 1949, c. 299, s. 1; 1973, c. 1201, s. 1; 1977, c. 406, s. 1; 1979, c. 682, s. 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 1, 2; 1981, c. 662, s. 1.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to accomplices, see § 14-5 et seq.; as to assault in this State, but death in another, see § 15-131. As to indictment for homicide, see § 15-144 and the note thereto; as to verdict in prosecution for homicide, see § 15-172 and the note thereto. As to eligibility for parole of

prisoners serving life sentence, see § 15A-1371.

Effect of Amendments. — The first 1979 amendment, effective January 1, 1980, inserted "or a sex offense" near the middle of the first sentence.

Session Laws 1979, c. 682, ss. 13 and 14, provide:

"Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

The second 1979 amendment, effective July 1, 1981, substituted "as a Class D felony" for "by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison" at the end of the section. The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Session Laws 1979, 2nd Sess., c. 1251, s. 1, effective July 1, 1980, and applicable to offenses committed on or after that date, inserted in the second sentence "including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative or preparation of opium when the ingestion of such substance causes the death of the user." Session Laws 1979, 2nd Sess., c. 1251, s. 2, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "as a Class D felon" for "as a Class D felony" at the end of the section. Session Laws 1979, 2nd Sess., c. 1251, s. 2, was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, 2nd Sess., c. 1251, s. 3, reads as follows: "Nothing in sections 1 or 2 hereof shall be construed to render lawful any acts committed prior to the effective dates of those sections respectively and unlawful at the time said acts occurred, and nothing contained herein shall be construed to affect any prosecution instituted under section 1 hereof and pending on the effective date of section 2 hereof."

Session Laws 1979, 2nd Sess., c. 1251, s. 9, contains a severability clause.

The 1981 amendment, effective July 1, 1981, substituted "Class C felon" for "Class D felon" at the end of the section.

Legal Periodicals. — For brief comment on the argument of counsel as to the death penalty, see 32 N.C.L. Rev. 438 (1954).

For note as to improper court response to spontaneous jury inquiry as to pardon and parole possibilities, see 33 N.C.L. Rev. 665 (1955).

For comment on homicide by fright, see 44 N.C.L. Rev. 844 (1966).

For case law survey as to homicide, see 45 N.C.L. Rev. 918 (1967).

For comment on the felony-murder doctrine, see 3 Wake Forest Intra. L. Rev. 20 (1967).

For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

For note on voluntariness of guilty pleas in plea-bargaining context, see 49 N.C.L. Rev. 795 (1971).

For a comment entitled, "An Historical Analysis of Mandatory Capital Punishment," see 7 N.C. Cent. L.J. 306 (1976).

For a note on the burden of proof for affirmative defenses in homicide cases, see 12 Wake Forest L. Rev. 423 (1976).

For note on the erosion of the retreat rule and self-defense, see 12 Wake Forest L. Rev. 1093 (1976).

For survey of 1976 case law on constitutional law, see 55 N.C.L. Rev. 965 (1977).

For a comment on the merger doctrine as a limitation on the felony-murder rule, see 13 Wake Forest L. Rev. 369 (1977).

For a survey of 1977 law on criminal procedure, see 56 N.C.L. Rev. 983 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For survey of 1979 law on criminal procedure, see 58 N.C.L. Rev. 1404 (1980).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For comment on capital sentencing statute, see 16 Wake Forest L. Rev. 765 (1980).

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I. GENERAL CONSIDERATION.

Purpose. — This section intended to select out of all murders denounced those that were more heinous because committed with premeditation and deliberation, or in the perpetration or attempted perpetration of a felony, etc., as murder in the first degree, punishable with death, and leave other murders deemed less heinous as murder in the second degree, punished by imprisonment. State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942).

Division of Murder into Degrees. — At common law, when the intentional killing by a deadly weapon was shown, the law presumed malice aforethought, and the burden of reducing the offense to a lower grade by proof of matters of mitigation or excuse devolved upon the prisoner. The statute dividing murder into two degrees (under this section) contains no reference to this rule, but the Supreme Court of North Carolina in State v. Fuller, 114 N.C. 885, 19 S.E. 797 (1894), overruled on other grounds, State v. McKenna, 289 N.C. 668, 224 S.E.2d 537 (1976), held that one result of the division of murder into two degrees was that proof of intentional killing with a deadly instrument raised a presumption only of murder in the second degree, and the burden was on the State to aggregate the offense to murder in the first degree, as it was on the prisoner, to reduce it. But this applies only to cases of homicide in which premeditation must be shown and not when the homicide is shown or admitted to have been committed by lying in wait, poisoning, starvation, imprisonment or torture. As to

these, when intentionally done, the law still raised the presumption of murder in the first degree. But nonetheless if the jury convict of a lesser offense, it is within their power so to do under the statute. Nor is intentional homicide by poisoning necessarily always murder in the first degree. The presumption may be rebutted. State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906).

By the act of 1893, c. 85 (this section), the crime of murder has been divided into two degrees, first and second. The common-law definition and description are still applicable to the crime in the second degree; but it takes more than this to constitute murder in the first degree — the killing must be willful, deliberate and premeditated, and this must be shown by the State beyond a reasonable doubt before it is justified in asking a verdict of guilty of murder in the first degree. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899).

The statutes where murder is divided into two degrees have not, as a general rule, added to or taken away any ingredient of murder at common law, and every murder at common law is murder under the statutes. See State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899); State v. Dalton, 178 N.C. 779, 101 S.E. 548 (1919); State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

Prior to 1893 there were no degrees of murder in North Carolina. Any unlawful killing of a human being with malice aforethought, express or implied, was murder and punishable by death. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970); State v. Talbert, 282 N.C. 718, 194 S.E.2d 822 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

History. — For a brief history of this section in connection with sufficiency of indictment for murder in the first degree, see State v. Kirksey, 227 N.C. 445, 42 S.E.2d 613 (1947).

Same — Former § 15-162.1. — The repeal of § 15-162.1 leaving this section intact, showed the 1969 legislature's intent for this section to stand alone. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence reversed, Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

The repeal of § 15-162.1 did not modify, change, add to, or take from this section. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971); State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

Former § 15-162.1 did not alter this section which is capable of standing alone. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); Garner v. State, 8 N.C. App. 109, 174 S.E.2d 92 (1970).

What Constitutes Murder Generally. — This section does not give any new definition of murder, but permits that to remain as it was at common law. The section simply selects out of all murders denounced by common law those deemed more heinous on account of the mode of their perpetration, classifies them as murder in the first degree, and provides a greater punishment for them than that prescribed for "all other kinds of murder," which it denominates murder in the second degree. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

A killing done with malice and not in self-defense is murder, even though the person killed may have been seeking to effect an unlawful arrest upon the defendant. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978).

The corpus delicti in criminal homicide involves two elements: (1) the fact of the death, and (2) the existence of the criminal agency of another as the cause of death. State v. Jensen, 28 N.C. App. 436, 221 S.E.2d 717 (1976).

Same — Attempt to Kill. — An attempt only, to kill, with the most diabolical intent, may be moral, but cannot be legal, murder. State v. Scates, 50 N.C. 420 (1858).

Principals and Accessories. — The North Carolina law of homicide still maintains a careful distinction between principals and accessories. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Same — Accessory Before the Fact. — In this State, one who procures another to commit murder is an accessory before the fact to murder. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Same — There May Be Accessories to Murder in Both Degrees. — Since malice, express or implied, is a constituent element of murder in any degree, there may be accessories before the fact to the crime of murder in both degrees. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Admittedly the concept of accessory before the fact presupposes some arrangement between the assessory and the principal with respect to the commission of the crime. It does not follow, however, that there can be no accessory before the fact to second-degree murder, which imports a specific intent to do an unlawful act. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Same — Where one incites or employs a mental defective to kill another the question whether the employer is guilty as a principal depends upon whether the defective was criminally responsible for his act under the McNaughten rule. If the agent is legally responsible for his own acts, the instigator is

only an accessory before the fact if he is absent when the crime is committed. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Applied in State v. Hodgin, 210 N.C. 371, 186 S.E. 495 (1936); State v. Montgomery, 227 N.C. 100, 40 S.E.2d 614 (1946); State v. Lampkin, 227 N.C. 620, 44 S.E.2d 30 (1947); State v. Parrott, 228 N.C. 752, 46 S.E.2d 851 (1948); State v. Rogers, 233 N.C. 390, 64 S.E.2d 572 (1951); State v. Canipe, 240 N.C. 60, 81 S.E.2d 173 (1954); State v. Gales, 240 N.C. 319, 82 S.E.2d 80 (1954); State v. Arnold, 258 N.C. 563, 129 S.E.2d 229 (1963); State v. Johnson, 261 N.C. 727, 136 S.E.2d 84 (1964); State v. Phillips, 262 N.C. 723, 138 S.E.2d 626 (1964); State v. Matthews, 263 N.C. 95, 138 S.E.2d 819 (1964); State v. Shaw, 263 N.C. 99, 138 S.E.2d 772 (1964); Crawford v. Bailey, 234 F. Supp. 700 E.D.N.C. (1964); State v. Brown, 263 N.C. 327, 139 S.E.2d 609 (1965); State v. Howard, 274 N.C. 186, 162 S.E.2d 495 (1968); State v. Smith, 279 N.C. 505, 183 S.E.2d 649 (1971); State v. Freeman, 280 N.C. 622, 187 S.E.2d 59 (1972); State v. Bolin, 281 N.C. 415, 189 S.E.2d 235 (1972); State v. Willis, 281 N.C. 558, 189 S.E.2d 190 (1972); State v. Cutshall, 281 N.C. 588, 189 S.E.2d 176 (1972); State v. Ingram, 282 N.C. 142, 191 S.E.2d 595 (1972); State v. Edwards, 282 N.C. 201, 192 S.E.2d 304 (1972); State v. Hegler, 15 N.C. App. 51, 189 S.E.2d 596 (1972); State v. McSwain, 15 N.C. App. 675, 190 S.E.2d 682 (1972); Ham v. North Carolina, 471 F.2d 406 (4th Cir. 1973); State v. Huffman, 21 N.C. App. 331, 204 S.E.2d 241 (1974); State v. Perry, 21 N.C. App. 528, 204 S.E.2d 916 (1974); State v. Harrington, 22 N.C. App. 473, 206 S.E.2d 768 (1974); State v. Greenlee, 22 N.C. App. 489, 206 S.E.2d 753 (1974); State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Young, 291 N.C. 562, 231 S.E.2d 577 (1977); State v. Manuel, 291 N.C. 705, 231 S.E.2d 588 (1977); State v. Stanfield, 292 N.C. 357, 233 S.E.2d 574 (1977); State v. Carter, 293 N.C. 532, 238 S.E.2d 493 (1977); State v. Hunt, 43 N.C. App. 428, 259 S.E.2d 322 (1979); State v. Powell, 299 N.C. 95, 261 S.E.2d 114 (1980); State v. Horton, 299 N.C. 690, 263 S.E.2d 745 (1980).

Quoted in State v. Hudson, 218 N.C. 219, 10 S.E.2d 730 (1940); Davis v. North Carolina, 196 F. Supp. 488 (E.D.N.C. 1961); State v. Benton, 275 N.C. 378, 167 S.E.2d 775 (1969).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); State v. Daniels, 300 N.C. 105, 265 S.E.2d 217 (1980).

Cited in State v. Evans, 198 N.C. 82, 150 S.E. 678 (1929); State v. Macon, 198 N.C. 483, 152 S.E. 407 (1930); State v. Cooper, 205 N.C. 657, 172 S.E. 199 (1934); State v. Beard, 207 N.C. 673, 178 S.E. 242 (1935); State v. Horne, 209 N.C. 725, 184 S.E. 470 (1936); State v. Linney, 212 N.C. 739, 194 S.E. 470 (1938); State v. Blue, 219 N.C. 612, 14 S.E.2d 635 (1941); State v. Gause, 227 N.C. 26, 40 S.E.2d 463 (1946); State v. Ewing, 227 N.C. 107, 40 S.E.2d 600 (1946); Fuquay v. Fuquay, 232 N.C. 692, 62 S.E.2d 83 (1950); State v. Hall, 233 N.C. 310, 63 S.E.2d 636 (1951); State v. Reeves, 235 N.C. 427, 70 S.E.2d 9 (1952); State v. Roman, 235 N.C. 627, 70 S.E.2d 857 (1952); State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974); Resendez v. Garrison, 528 F.2d 1310 (4th Cir. 1975); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975); State v. Brower, 289 N.C. 644, 224 S.E.2d 551 (1976); State v. Hardy, 293 N.C. 105, 235 S.E.2d 828 (1977); State v. Finch, 293 N.C. 132, 235 S.E.2d 819 (1977); State v. Kirkman, 293 N.C. 447, 238 S.E.2d 456 (1977); State v. Harbison, 293 N.C. 474, 238 S.E.2d 449 (1977); State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977); State v. Hood, 294 N.C. 30, 239 S.E.2d 802 (1978); State v. Walters, 294 N.C. 311, 240 S.E.2d 628 (1978); State v. Matthews, 295 N.C. 265, 245 S.E.2d 727 (1978); State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978); Reeves v. Reed, 596 F.2d 628 (4th Cir. 1979); State v. Scott, 296 N.C. 519, 251 S.E.2d 414 (1979); State v. Sparks, 297 N.C. 314, 255 S.E.2d 373 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Bonds, 43 N.C. App. 467, 259 S.E.2d 377 (1979); Foster v. Barbour, 613 F.2d 59 (4th Cir. 1980); In re Ford, 49 N.C. App. 674, 272 S.E.2d 157 (1980).

II. MOTIVE AND INTENT TO KILL GENERALLY.

Motive — Not Essential Element. — It is not necessary to a conviction of murder that the State prove motive. State v. Adams, 136 N.C. 617, 48 S.E. 589 (1904); State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973).

Motive is not an essential element of murder; however, while not necessary to be proven, motive or the absence of motive is a circumstance to be considered. State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

It is not required that the state show motive for a killing, but evidence of motive, if otherwise admissible, is not only competent, but often very important, in strengthening the evidence for the prosecution. State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978).

Same — Use to Strengthen State's Case. — But the case of the State may be strengthened by the showing of a motive when the evidence is circumstantial. State v. Turner, 143 N.C. 641, 57 S.E. 158 (1907); State v.

Stratford, 149 N.C. 483, 62 S.E. 882 (1908); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973).

Same — To Identify Prisoner or Establish Malice. — And it may be shown to identify the prisoner as the perpetrator of the crime, and to establish malice, deliberation, and premeditation. State v. Adams, 138 N.C. 688, 50 S.E. 765 (1905); State v. Wilkins, 158 N.C. 603, 73 S.E. 992 (1912).

Intentional Killing Must Be Shown. — Before a conviction for murder can be had, an unlawful and intentional taking of another's life must be shown. Sometimes the intent may be imputed by reason of the killing with a deadly weapon, or by circumstances which indicate a reckless indifference to human life, but it must always exist before a charge of murder can be sustained. State v. Stitt, 146 N.C. 643, 61 S.E. 566 (1908).

If the accused previously procured a weapon for the purpose of using it, and does use it, the offense is ordinarily murder. State v. Johnson, 172 N.C. 920, 90 S.E. 426 (1916).

To convict a defendant of murder in the second degree, the State must prove that the defendant intentionally inflicted the wound which caused the death of the deceased. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Intent Must Coexist with Killing. — The act of killing, and the guilty intent, must concur to constitute the offense. State v. Scates, 50 N.C. 420 (1858).

Specific Intent Required in First Degree Murder. — A specific intent to kill is a necessary constitutent of the elements of premeditation and deliberation in first degree murder. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968); State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976).

A specific intent to kill is an essential element of first degree murder. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

A specific intent to kill is a necessary ingredient of premeditation and deliberation. State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975); State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

But Not in Second Degree Murder. — A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first degree murder, is not an element of second degree murder or manslaughter. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975).

Trial judge did not err in instructing the jury that second-degree murder differs from first-degree murder in that a specific intent to kill is not an element of second-degree murder. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Definitions of second-degree murder and voluntary manslaughter in the instructions to the jury in a prosecution for second-degree murder were not prejudicially deficient in that they did not require that the killings be intentional since specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder or manslaughter. State v. Alston, 295 N.C. 629, 247 S.E.2d 898 (1978).

Intent May Be Proved by Circumstantial Evidence. — Intent, a necessary element of murder in the second degree, is a mental attitude which can rarely be proved by direct evidence. It must ordinarily be proved by circumstances from which it can be inferred. State v. Hugenberg, 34 N.C. App. 91, 237 S.E.2d 327, cert. denied, 293 N.C. 591, 238 S.E.2d 151 (1977).

And Is Question for Jury. — The jury alone may determine whether an intentional killing has been established where no judicial admission of the fact is made by the defendant. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

III. MURDER IN THE FIRST DEGREE.

A. Defined.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Starnes, 220 N.C. 384, 17 S.E.2d 346 (1941); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Hamilton, 19 N.C. App. 436,

199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L.Ed.2d 1208 (1976); State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Davis, 289 N.C. 500, 223 S.E.2d 296 (1976), death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L.Ed.2d 69 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303 (1976), death sentence vacated, 429 U.S. 301, 97 S. Ct. 301, 50 L.Ed.2d 278 (1976); State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979).

For discussion of malice and presumptions of malice from intentional killing with a deadly weapon, see analysis lines IV(B) and (C).

Murder in the first degree is sometimes defined briefly as murder in the second degree plus premeditation. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

It is not necessary that the words "fixed design" always be included in defining murder in the first degree. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976).

Same—Deliberation Defined. — Deliberation means that the act is done in cool state of blood. It does not mean brooding over it or reflecting upon it for a week, a day or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978); State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

Deliberation means revolving over in the mind. A deliberate act is one done in a cool state of blood in furtherance of some fixed design. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969).

Deliberation means an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977).

The requirement of a cool state of blood does not mean that the defendant must be calm or tranquil. Premeditation and deliberation may be present even though the defendant is angry at the time of the killing, if he acts in the furtherance of a fixed design to kill. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973).

Deliberation does not require brooding or reflection for any appreciable length of time, but imports the execution of an intent to kill in a cool state of blood without legal provocation, and in furtherance of a fixed design. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980).

"Cool state of blood" does not mean the absence of passion and emotion, but an unlawful killing is deliberate and premeditated if done pursuant to a fixed design to kill, notwithstanding that defendant was angry or in an emotional state at the time, unless such anger or emotion was such as to disturb the faculties and reason. State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974).

Deliberation means that the action was done in a cool state of blood and does not require reflection or brooding for an apparent length of time, but rather an intention to kill executed by defendant in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion, suddenly aroused by just cause or legal provocation. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Deliberation means an intention to kill, executed by defendant in a cool state of blood, in

furtherance of a fixed design or to accomplish some unlawful purpose. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); States v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

B. Premeditation and Deliberation.

1. In General.

Same — Premeditation Defined. — Premeditation means thought of beforehand, for some length of time, however short. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971); State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977); State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978). It is a prior determination to do the act. State v. Cameron, 166 N.C. 379, 81 S.E. 748 (1914); State v. Bowser, 214 N.C. 249, 199 S.E. 31 (1938); State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973); State v. Baggett, 293 N.C. 307, 237 S.E.2d 827 (1977); State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979). Premeditation means thought over beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation. State v. Robbins, 275 N.C. 537, 169 S.E.2d 858 (1969); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980).

Premeditation means thought beforehand for some length of time. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 30 L. Ed. 2d 301 (1976); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

"Malice aforethought" was a term used in defining murder prior to the time of the adoption of this section dividing murder into degrees. As then used it did not mean an actual, express or preconceived disposition; but imported an intent, at the moment, to do without lawful authority, and without the pressure of necessity, that which the law forbade. As used in this section, the term premeditation and deliberation is more comprehensive and embraces all that is meant by aforethought, and more. State v. Hightower, 226 N.C. 62, 36 S.E.2d 649 (1946); State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Premeditation and Deliberation Are Essential Elements of First Degree Murder. — For a conviction of murder in the first degree the killing must be done with willful premeditation and determination. State v. McKay, 150 N.C. 813, 63 S.E. 1059 (1909); State v. Baldwin, 152 N.C. 822, 68 S.E. 148 (1910).

And before a conviction for murder in the first degree can be had, the State must show that the prisoner had formed, prior to the killing, with deliberation and premeditation, a purpose to kill deceased. State v. Terry, 173 N.C. 761, 92 S.E. 154 (1917); State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965). See 5 N.C.L. Rev. 364.

If the circumstances of the killing show a formed design to take life of deceased, the crime is murder in the first degree. State v. Walker, 173 N.C. 780, 92 S.E. 327 (1917); State v. Cain, 178 N.C. 724, 100 S.E. 884 (1919).

If defendant resolved in his mind a fixed purpose to kill his wife and thereafter, because of that previously formed intention, and not because of any legal provocation on her part, he deliberately and intentionally shot her, the three essential elements of murder in the first degree — premeditation, deliberation, and malice — concurred. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

To sustain a verdict of murder in the first degree, the evidence must be sufficient to support a finding beyond a reasonable doubt that the defendant with malice, after premeditation and deliberation, intentionally shot and killed the victim. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

In order to convict a defendant of first-degree murder the State is required to produce evidence which satisfies the jury beyond a reasonable doubt that he unlawfully killed a person with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

To convict a defendant of murder in the first degree, when the killing was not perpetrated by one of the means specified by this section and was not committed in the perpetration of or attempt to perpetrate a felony, the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).

In order to convict the defendant of first-degree murder, the State must satisfy the jury beyond a reasonable doubt of all the elements thereof, to-wit, an unlawful killing of a human being with malice and with a specific intent to kill and committed after premeditation and deliberation. State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976).

For discussion of malice, see analysis lines IV (B) and (C).

Except in Felony-Murder. — See analysis line III(E).

Must Be Shown in Addition to Presumption of Malice. — The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. State v. Miller, 197 N.C. 445, 149 S.E. 590 (1929); State v. Floyd, 226 N.C. 571, 39 S.E.2d 598 (1946).

A killing with a deadly weapon raises the presumption that the homicide was murder in the second degree, and if the State seeks a conviction of murder in the first degree, it has the burden of proving beyond a reasonable doubt that the homicide was committed with deliberation and premeditation. State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936).

The presumptions arising from a killing proximately caused by the intentional use of a deadly weapon does not relieve the State of the burden to establish beyond a reasonable doubt the additional elements of premeditation and deliberation which are necessary to constitute murder in the first degree. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

For discussion of presumptions arising from intentional killing with deadly weapon, see analysis line IV (C).

Length of Time Immaterial. — Weighing the purpose to kill long enough to form a fixed design, and the putting of such design into execution at a future period, no matter how long deferred, constitutes premeditation and deliberation sufficient to sustain a conviction of murder in the first degree. State v. Dowden, 118 N.C. 1145, 24 S.E. 722 (1896).

The killing of a human being after the fixed purpose to do so has been formed, for however short a time, is sufficient for the conviction of murder in the first degree. State v. Walker, 173 N.C. 780, 92 S.E. 327 (1917). No particular period of time is necessary to constitute premeditation and deliberation for a conviction of murder in the first degree under this section. If the purpose to kill at all events has been deliberately formed, the interval which elapses before its execution is immaterial. State v. Coffey, 174 N.C. 814, 94 S.E. 416 (1917); State v. Holdsclaw, 180 N.C. 731, 105 S.E. 181 (1920). And deliberation and premeditation need not be of any perceptible length of time. State v. Bynum, 175 N.C. 777, 95 S.E. 101 (1918); State v. Burney, 215 N.C. 598, 3 S.E.2d 24 (1939); State v. Hammonds, 216 N.C. 67, 4 S.E.2d 439 (1939).

No fixed length of time is required for the mental processes of premeditation and deliberation constituting an element of the offense of murder in the first degree, and it is sufficient if these processes occur prior to, and not simultaneously with, the killing. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970).

The true test for premeditation is not the duration of time as much as it is the extent of the reflection and the time for premeditation would naturally vary with different individuals and under differing circumstances. State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975).

Where one forms a purpose to take the life of another and weighs this purpose in his mind long enough to form a fixed design or determination to kill at a subsequent time, no matter how soon or how late, and pursuant thereto kills, this would be a killing with premeditation and deliberation and would be murder in the first degree. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

Intent Formed Simultaneous with Act of Killing. — Where the intent to kill is formed simultaneously with the act of killing, the homicide is not murder in the first degree. State v. Dowden, 118 N.C. 1145, 24 S.E. 722 (1896); State v. Barrett, 142 N.C. 565, 54 S.E. 856 (1906).

A defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind, intoxication or some other cause. State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975).

Defendant who does not have mental capacity to form intent to kill, or to premeditate and deliberate upon the killing, cannot be convicted of murder in the first degree. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

If a defendant does not have the mental capacity to form an intent to kill or to premeditate and deliberate upon the killing, he cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to disease of the mind or some other cause. State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

Same—Theory of Diminished Responsibility Not Adopted. — The Supreme Court has not adopted with respect to the specific intent to commit a crime such as first-degree murder what has been called the theory of diminished responsibility, under which some of the states hold that a defendant may offer evidence of an unusual or abnormal mental condition which is not sufficient to establish legal insanity, but tends to show that he did not have the capacity to premeditate or deliberate at the time of the murder. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

2. Proof.

Proof by Circumstantial Evidence. — It is said in State v. Watson, 222 N.C. 672, 24 S.E.2d 540 (1943), that "premeditation and deliberation are not usually susceptible of direct proof, and are, therefore, susceptible of proof by circumstances from which the facts sought to be proven may be inferred. That these essential elements of murder in the first degree may be proven by circumstantial evidence has been repeatedly held by this court." State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances from which the facts sought to be proved may be inferred. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976); State v. Smith, 290 N.C. 148, 226 S.E.2d 10, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

Premeditation and deliberation are not usually susceptible of direct proof, and are therefore susceptible of proof by circumstances. State v. Perry, 276 N.C. 339, 172 S.E.2d 541 (1970); State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974).

The elements of premeditation and deliberation are not usually susceptible to direct proof, but must be established from the circumstances surrounding the homicide. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976); State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

Ordinarily, it is not possible to prove premeditation and deliberation by direct evidence. These facts must be established by proof of circumstances from which they may be inferred. State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976); State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976); State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

It is not necessary, and usually is not possible, for the State to prove premeditation and deliberation directly; they must be inferred from the circumstances. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973).

Premeditation and deliberation are not ordinarily susceptible of proof by direct evidence and therefore must usually be proved by circumstantial evidence. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

Premeditation and deliberation usually must be established by circumstantial evidence, since there is seldom direct evidence of these elements. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Since premeditation and deliberation refer to processes of the mind, they must almost always be proved, if at all, by circumstantial evidence. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

Circumstances Which May Be Considered. — In determining the question of premeditation and deliberation it is proper for the jury to take into consideration the conduct of the defendant, before and after, as well as at the time of, the homicide, and all attending circumstances. State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

In determining the question of premeditation and deliberation, the conduct of defendants, before and after, as well as at the time of, the homicide, and all attendant circumstances, are competent. State v. Chavis, 231 N.C. 307, 56

S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950).

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased; (4) the dealing of lethal blows after deceased has been felled and rendered helpless. State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961); State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969); State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Van Landingham, 283 N.C. 589, 197 S.E.2d 539 (1973).

Want of provocation, absence of excuse, lack of justification, and defendant's statement that he shot a person "to prove a point" — all permitted, if not compelled, a legitimate inference of premeditation and deliberation. State v. Rich, 277 N.C. 333, 177 S.E.2d 422 (1970).

Premeditation and deliberation may be inferred from a vicious and brutal slaying of a human being. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

Any unseemly conduct toward the corpse of the person slain, or any indignity offered it by the slayer, and also concealment of the body, are evidence of express malice, and of premeditation and deliberation in the slaying, depending, of course, upon the particular circumstances of the case. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The additional ingredient of premeditation and deliberation necessary in first degree murder may be inferred from the vicious and brutal circumstances of the homicide, e.g., lack of provocation, threats before and during the occurrence, infliction of lethal blows after the victim had been felled and rendered helpless, and conduct of the defendant before and after the killing. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

The elements of premeditation and deliberation are not ordinarily susceptible to direct proof, but are inferred from various circumstances, such as ill will, previous difficulty between the parties, or evidence that the killing was done in a vicious and brutal manner. State v. Fountain, 282 N.C. 58, 191 S.E.2d 674 (1972).

Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: want of provocation on the part of the deceased; the conduct of defendant before and after the killing; the use of grossly excessive force, or the dealing of lethal blows after the deceased has been felled. State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976); State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Mitchell, 288 N.C. 360, 218 S.E.2d 332 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1210 (1976); State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976); State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

The ingredients of premeditation and deliberation necessary in first-degree murder may be inferred from the vicious and brutal circumstances of the homicide indicating a complete lack of provocation and a viciousness which demonstrates that death was the actor's objective. State v. DeGregory, 285 N.C. 122, 203 S.E.2d 794 (1974).

The use of grossly excessive force or the delivering of lethal blows after a deceased has been felled are among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Previously existing hostile feelings between defendant and deceased, a prior assault upon the deceased by defendant, the use of grossly excessive force and killing in an unusually brutal way have all been held to be circumstances tending to show premeditation and deliberation. State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

Premeditation and deliberation must usually be inferred from various circumstances including (1) want of provocation on the part of the deceased, (2) the conduct of an accused before and after the killing and (3) that the killing was done in a vicious and brutal manner. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) want of provocation on the part of the deceased, (2) the conduct of defendant before and after the killing, (3) the dealing of lethal blows after deceased has been felled and rendered helpless, (4) the vicious or brutal manner of the killing, (5) the number of shots fired. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Among the circumstances to be considered in determining whether a murder was committed with premeditation and deliberation are: (1) want of provocation, (2) the conduct of the accused before and after the killing, (3) threats and declarations of the accused, (4) the use of grossly excessive force or the dealing of lethal blows after the deceased has been felled. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) the want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) the vicious and brutal manner of the killing; and (4) the number of blows inflicted or shots fired. State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); State v. Hill, 294 N.C. 320, 240 S.E.2d 794 (1978).

Among circumstances which may tend to prove premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) conduct and statements of the defendant both before and after the killing; and (3) threats made against the deceased by the defendant. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980).

Presumption from Method of Murder. — When a homicide is perpetrated by means of poison, lying in wait, imprisonment, starving or torture, the means and method used involves planning and purpose. Hence, the law presumes premeditation and deliberation. The act speaks for itself. State v. Dunheen, 224 N.C. 738, 32 S.E.2d 322 (1944).

When a homicide is perpetrated by means of torture, premeditation and deliberation are presumed and defendant is guilty of murder in the first degree. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

No Presumption from Use of Deadly Weapon. — Premeditation and deliberation necessary to constitute murder in the first degree are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949). See State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958).

No presumption as to premeditation and deliberation arises from a killing proximately caused by the intentional use of a deadly weapon. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

C. Murder by Poison.

Generally. — A murder perpetrated by means of poison is murder in the first degree. State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950).

D. Murder by Lying in Wait.

Ambush. — Defendants who lay in wait and killed deceased from ambush are guilty of murder in first degree. State v. Wiggins, 171 N.C. 813, 89 S.E. 58 (1916). See State v. Satterfield, 207 N.C. 118, 176 S.E. 466 (1934); State v. Mozingo, 207 N.C. 247, 176 S.E. 582 (1934).

When this section speaks of murder perpetrated by lying in wait, it refers to a killing where the assassin has stationed himself or is lying in ambush for a private attack upon his victim. An assailant who watches and waits in ambush for his victim is most certainly lying in wait. State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

Assailant Need Not Be Concealed. — It is not necessary that an assailant be actually concealed in order to lie in wait. If one places himself in a position to make a private attack upon his victim and assails him at a time when the victim does not know of the assassin's presence or, if he does know, is not aware of his purpose to kill him, the killing would constitute a murder perpetrated by lying in wait. State v. Allison, 298 N.C. 135, 257 S.E.2d 417 (1979).

E. Murder Committed in Perpetration of a Felony.

Term "Felony Murder" Disapproved. — Since "felony murder" is not a statutory term, its use in an issue submitted to the jury is ill-advised and its usage is expressly disapproved. State v. Foster, 293 N.C. 674, 239 S.E.2d 449 (1977).

Death Need Not Be Intended. — It is evident under this section a homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949); State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

The killing of another human being, whether intentional or otherwise, while the person who kills is engaged in the perpetration of a felony, which felony is inherently or forseeably dangerous to human life, is murder at common law. State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976).

A homicide is murder in the first degree if it results from the commission or attempted commission of one of the four specified felonies or of

any other felony inherently dangerous to life, without regard to whether death was intended or not. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

And Premeditation and Deliberation Need Not Be Proved. — A murder committed in the perpetration or attempt to perpetrate a robbery or any felony is murder in the first degree, and in such instance the State is not put to proof of premeditation and deliberation. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949).

When a murder is committed in the perpetration or attempt to perpetrate any robbery, burglary or other felony, this section declares it murder in the first degree. In those instances the law presumes premeditation and deliberation, and the State is not put to further proof of either. State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970); State v. Jenerett, 281 N.C. 81, 187 S.E.2d 735 (1972); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976).

Where a murder is committed in the perpetration or attempt to perpetrate a felony the State is not put to the proof of premeditation and deliberation; the law presumes them. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

A murder committed in the perpetration or attempted perpetration of any felony within the purview of this section is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

A murder committed in the perpetration or attempt to perpetrate any felony within the purview of this section is murder in the first degree without proof of an intentional killing with malice after premeditation and deliberation. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Application of the felony-murder rule supplants the necessity for proof of an intentional killing with malice after premeditation and deliberation. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976).

Under this section, premeditation and deliberation are not elements of the crime of felony-murder. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

Evidence of premeditation and deliberation is not required as an essential element of proof of a felony-murder charge. Chance v. Garrison, 537 F.2d 1212 (4th Cir. 1976).

It is a well-established rule that when the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation. State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977).

Same — Burden of Proof. — The felony-murder rule does not place any burden of proof upon a criminal defendant. The State is required to prove, beyond a reasonable doubt, that a murder was committed in the perpetration or attempted perpetration of a robbery, and that defendant participated in that crime. Upon a finding by the jury that these elements are proved beyond a reasonable doubt, defendant is, by this section, guilty of first-degree murder. There is no requirement in the statutory definition of the crime that the State prove malice, premeditation or deliberation. Thus, the felony-murder rule does not unconstitutionally relieve the State of the burden of proving malice, since malice is not an element of the crime. Further, no burden is placed upon a defendant to prove or disprove any of the elements of the crime contained in this section. State v. Womble, 292 N.C. 455, 233 S.E.2d 454 (1977).

Same — Arson. — A murder committed in the perpetration or attempt to perpetrate arson is murder in the first degree irrespective of premeditation, deliberation, or malice aforethought. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976).

Same — Rape. — Proof that a homicide was committed in the perpetration or attempted perpetration of rape makes the crime murder in the first degree and dispenses with the necessity of proof of premeditation and deliberation. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. King, 226 N.C. 241, 37 S.E.2d 684 (1946).

A homicide committed in the perpetration of the capital offense of rape is murder in the first degree, irrespective of premeditation and deliberation. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Same — Robbery. — Where murder is committed in the perpetration of a robbery from the person, it is murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. State v. Alston, 215 N.C. 713, 3 S.E.2d 11 (1939); State v. Maynard, 247 N.C. 462, 101 S.E.2d 340 (1958).

A homicide committed in the perpetration or an attempt to perpetrate a robbery is murder in the first degree, notwithstanding the absence of any fixed intent to kill or any previous purpose, design or plan. State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

A homicide committed in the perpetration of a robbery is declared by this section to be

murder in the first degree. When a homicide is thus committed, the State is not put to the proof of premeditation and deliberation. In such event the law presumes premeditation and deliberation. State v. Bunton, 247 N.C. 510, 101 S.E.2d 454 (1958).

When a murder is committed in the perpetration or attempt to perpetrate a robbery from the person, this section pronounces it murder in the first degree, irrespective of premeditation or deliberation or malice aforethought. State v. Bailey, 254 N.C. 380, 119 S.E.2d 165 (1961).

When a murder is committed in the perpetration or attempt to perpetrate the felony or robbery, it is murder in the first degree, irrespective of premeditation, deliberation or malice aforethought. State v. Haynes, 276 N.C. 150, 171 S.E.2d 435 (1970); State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

The felony-murder rule provides in pertinent part that a murder which shall be committed in the perpetration or attempt to perpetrate robbery shall be deemed to be murder in the first degree. In such cases the law presumes premeditation and deliberation, and the State is not put to further proof of either. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972).

Where a homicide is committed in the commission of, or in the attempt to commit, an armed robbery, the State is not required to prove premeditation and deliberation; this section pronounces it murder in the first degree. State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Unbroken Chain of Events Required. — A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Bush, 289 N.C. 159, 221 S.E.2d 333 (1976); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

An interrelationship between the felony and the homicide is prerequisite to application of felony-murder doctrine. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976); State v. Squire, 292 N.C. 494, 234 S.E.2d 563 (1977).

A killing is committed in the perpetration of a felony when an unbroken chain of events leads from such felony to the act causing death, so that the homicide is part of a series of events forming one continuous transaction. State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976).

A killing is committed in the perpetration or attempted perpetration of another felony when there is no break in the chain of events between the felony and the act causing death, so that the felony and homicide are part of the same series of events, forming one continuous transaction. State v. Wooten, 295 N.C. 378, 245 S.E.2d 699 (1978).

But completion of the robbery or other felony is not required to sustain a conviction under the felony-murder rule. State v. Hopper, 292 N.C. 580, 234 S.E.2d 580 (1977).

All Conspirators in Felony Are Equally Guilty. — Each party to a conspiracy to burglarize or rob a home is guilty of murder in the first degree if any one of the conspirators commits murder in an attempt to perpetrate the burglary or robbery. State v. Bell, 205 N.C. 225, 171 S.E. 50 (1933).

Where defendants conspire to rob a certain place, and a murder is committed by one or more of them in the attempt to perpetrate the robbery, each of them is guilty of murder in the first degree. State v. Stefanoff, 206 N.C. 443, 174 S.E. 411 (1934); State v. Miller, 219 N.C. 514, 14 S.E.2d 522 (1941); State v. Bennett, 226 N.C. 82, 36 S.E.2d 708 (1946); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949).

Where a conspiracy is formed to rob a bank, and murder is committed by one of the conspirators in the attempt to perpetrate the crime, each conspirator is guilty of murder in the first degree, under this section, and it is immaterial which one of them fired the fatal shot. State v. Green, 207 N.C. 369, 177 S.E. 120 (1934); State v. Kelly, 216 N.C. 627, 6 S.E.2d 533 (1940).

When a conspiracy is formed to commit a robbery or burglary, and a murder is committed by any one of the conspirators in the attempted perpetration of the crime, each and all of the conspirators are guilty of murder in the first degree. State v. Fox, 277 N.C. 1, 175 S.E.2d 561 (1970); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976); State v. Peplinski, 290 N.C. 236, 225 S.E.2d 568, cert. denied, 429 U.S. 932, 97 S. Ct. 339, 50 L. Ed. 2d 301 (1976); State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

Where all defendants had formed a conspiracy to rob the deceased, and in attempting to perpetrate this crime one defendant shot and killed the deceased, then each and all of the conspirators are guilty of murder in the first degree, and the court correctly refused to charge that the conspiracy had been abandoned, and that the other defendants were not accountable for the act of the defendant who

shot and killed the deceased. State v. Hairston, 280 N.C. 220, 185 S.E.2d 633, cert. denied, 409 U.S. 888, 93 S. Ct. 194, 34 L. Ed. 2d 145 (1972).

Where the evidence was sufficient to support a finding by the jury that defendants had formed a conspiracy to rob the deceased, and that in attempting to perpetrate this crime one of the defendants shot and killed the deceased, each of the defendants was guilty of murder in the first degree. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972).

The felony-murder rule applies whenever a conspirator kills another person in the course of committing a felony, as against the contention that the killing was not part of the conspiracy. If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment necessarily or probably required the use of force and violence which may result in the taking of life unlawfully, every party in such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Where all of the defendants not only conspire to perpetrate a robbery, but all actually participate actively in its perpetration, and in the course thereof a killing occurs, all participants are guilty of murder in the first degree. State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

Killing in Perpetration of Robbery Generally. — A homicide committed in the perpetration of, or in attempt to perpetrate, a robbery will be deemed murder in the first degree. State v. Lane, 166 N.C. 333, 81 S.E. 620 (1914). See State v. Glover, 208 N.C. 68, 179 S.E. 6 (1935); State v. Exum, 213 N.C. 16, 195 S.E. 7 (1938); State v. Biggs, 224 N.C. 722, 32 S.E.2d 352 (1944).

A murder perpetrated in an attempt to commit robbery is murder in the first degree. State v. Carey, 285 N.C. 509, 206 S.E.2d 222 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

A finding that a homicide was committed in the perpetration of an attempted robbery sufficies to support the conviction of murder in the first degree. State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 429 L. Ed. 2d 903 (1976).

This section expressly provides that a murder perpetrated in an attempt to commit robbery is murder in the first degree. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

A murder committed in the perpetration or attempted perpetration of robbery is murder in the first degree. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

A murder committed in the perpetration of, or attempt to perpetrate, a robbery is murder in the first degree and punishable by death. State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976).

A murder committed in the perpetration of any robbery, whether armed robbery or common-law robbery, is murder in the first degree. State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977).

Killing in Perpetration of Burglary. — A finding that a homicide was committed in the perpetration of a burglary suffices to support the conviction of murder in the first degree. State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 429 L. Ed. 2d 903 (1976).

What Unspecified Felonies Are within Purview of Section. — A felony which is inherently dangerous to life is within the purview of this section although not specified therein. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Woods, 286 N.C. 612, 213 S.E.2d 214 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3207, 49 L. Ed. 2d 1208 (1976).

Any unspecified felony is within the purview of this section if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Foster, 293 N.C. 674, 239 S.E.2d 449 (1977).

Same — Discharging Firearm into Occupied Property. — The criminal offense created by § 14-34.1 is a felony within the purview of this section. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

A homicide committed in the perpetration of the felony under § 14-34.1 can result in conviction for murder in the first degree under the felony-murder rule of § 14-17. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

Section 14-34.1, relating to the intentional discharge of a firearm into an occupied dwelling, is an unspecified felony under this section because of the reasonable correlation between committing a crime under § 14-34.1 and the possibility of death occurring. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

Same — Killing during Escape or Flight. — A murder committed in the perpetration or attempt to perpetrate a felonious escape is murder in the first degree. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

Escape is ordinarily within the res gestae of the felony and a killing committed during escape or flight is ordinarily within the

felony-murder rule. State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

Same — Killing in Perpetration of Felonious Breaking and Entering and Larceny. — Where the evidence tends to show that defendant, armed with pistol, feloniously broke into and entered an apartment; that he committed the crime of felonious larceny therein; and that while in said apartment he came upon and shot and killed the deceased, these crimes created substantial foreseeable human risks and therefore were unspecified felonies within the purview of this section. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Same — Killing in Perpetration of Act of Sodomy. — Without deciding whether every felony not specified in the statute must be inherently dangerous to life, the crime committed where a 15-year-old boy, under threat of gunfire and knife, was compelled to submit to an act of sodomy by the defendant was a crime as atrocious and as inherently dangerous as the specified felonies in this section. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

Charges Merge. — Where it appears conclusively that armed robbery charges were proved as essential elements in the capital offense of murder in the first degree upon which the defendants were convicted, the robberies became a part of and were merged into the murder charges. Having been so used, the defendants cannot again be charged, convicted and sentenced for these elements although the robberies constituted crimes within themselves. State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972).

And No Additional Punishment for Felony May Be Imposed. — When a felony within the purview of § 14-34.1 is relied upon as an essential element of and the basis for the conviction of a defendant for murder in the first degree under the felony-murder rule, no additional punishment can be imposed for such felony as an independent criminal offense. State v Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

Proof of the arson charge was an essential and indispensable element in the State's proof of felony-murder and as such affords no basis for additional punishment. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

When the State, in the trial of a charge of murder, uses evidence that the murder occurred in the perpetration of an armed robbery so as to establish that the murder was a murder in the first degree, the underlying felony becomes a part of the murder charge to the extent of preventing a further prosecution of the defendant for, or a further sentence of the defendant for, commission of the armed robbery. State v. Squire, 292 N.C. 494, 234 S.E.2d 563, cert. denied, 434 U.S. 998, 98 S. Ct. 638, 54 L. Ed. 2d 493 (1977).

F. Death Penalty.

Death Penalty Expressly Authorized. — The imposition of the death penalty upon a conviction of murder is expressly authorized by N.C. Const., Art. XI, § 2. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence rev'd, Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971).

Effect of Furman v. Georgia. — Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), holds that the Eighth and Fourteenth Amendments of the U. S. Constitution will no longer tolerate the infliction of a death sentence where either the jury or the judge is permitted to impose that sentence as a matter of discretion. State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973); State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

The jury may not constitutionally be permitted to exercise its discretion and choose between life and death, a procedure held unconstitutional by the Supreme Court of the United States in Furman v. Georgia. State v. Blackmon, 284 N.C. 1, 199 S.E.2d 431 (1973).

Same — Capital punishment has not been declared unconstitutional per se. Rather, the Eighth and Fourteenth Amendments will no longer tolerate the infliction of the death sentence if either judge or jury is permitted to impose that sentence as a matter of discretion. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Imposition of the death penalty upon conviction of first-degree murder is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Judgment and sentence of death upon conviction of first-degree murder is not unconstitutional. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Defendant's contention in a trial for first-degree murder that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected in many decisions. State v. Carter, 289 N.C. 35, 220 S.E.2d 313 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1211 (1976).

Defendants' contention that capital punishment under this section would violate the federal and State Constitutions has been rejected several times. State v. Bush, 289 N.C.

159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Same — No Effect on Convictions. — Where the Supreme Court of the United States in Furman v. Georgia held that the imposition of the death penalty, under certain state statutes and in the application thereof, was unconstitutional, that decision did not affect the conviction but only the death sentence. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Former Mandatory Death Penalty Provision of This Section Held Unconstitutional. — North Carolina's mandatory death penalty statute for first-degree murder contained in this section as amended in 1973 and before its amendment in 1977, departed markedly from contemporary standards respecting the imposition of the punishment of death and could not be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish be exercised within the limits of civilized standards since it provided no objective standards for jury and failed to allow for consideration of the particular character and record of each defendant with a view toward mitigation of the offense. Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Same — The Effect of Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976), was to return the construction of this statute to its post-Furman (Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972)), pre-Waddell (State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973)) status. Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978). (In State v. Waddell, the court held that provisions giving the jury discretion to impose sentences of life imprisonment in capital cases were unconstitutional, but were severable, with the result that the death penalty would become mandatory in such cases. — Ed. Note.)

Retention, etc., of Death Penalty Is Legislation Question. — The matter of retention, modification or abolition of the death penalty is a question for the lawmaking authorities rather than the courts. State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973).

Standing to Challenge Constitutionality. — Furman v. Georgia is without significance when the jury in a murder trial returns a verdict recommending life imprisonment. In that situation the defendant has no standing to raise the constitutionality of the death penalty or of a statute because it provides for that punishment. State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972); State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Rankin, 282 N.C. 572, 193 S.E.2d 740 (1973).

Cases in Which Defendants Received Death Sentence Remanded Pursuant to Mandate of United States Supreme Court. — Pursuant to mandates of the Supreme Court of the United States in Hill v. North Carolina, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971); Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); Williams v. North Carolina, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); Sanders v. North Carolina, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971); and Roseboro v. North Carolina, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971), first-degree murder cases in which the defendants received the death sentence were remanded to the superior court with direction that the defendants be sentenced to life imprisonment in the State's prison. State v. Hill, 279 N.C. 371, 183 S.E.2d 97 (1971); State v. Atkinson, 279 N.C. 386, 183 S.E.2d 106 (1971); State v. Williams, 279 N.C. 388, 183 S.E.2d 106 (1971); State v. Sanders, 279 N.C. 389, 183 S.E.2d 107 (1971); State v. Roseboro, 279 N.C. 391, 183 S.E.2d 108 (1971).

Resentencing of Convicted Murderer. — Where an individual was convicted of murder and sentenced to death, which sentence was later invalidated, resentencing the convicted murderer to life imprisonment did not violate the due process clause as an ex post facto application of the law, especially since before the time of the convicted murderer's June 19, 1973, offense, North Carolina had given notice in the 1969 version of this section, that it intended to exact the maximum possible penalty for first-degree murder. Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978).

When Murder Considered Committed for Purposes of Ex Post Facto Punishment Prohibition. — For purposes of the prohibition against ex post facto legislation, a murder was committed when the murderous acts were performed and not when death resulted. Therefore, where defendant administered poison to her husband on three occasions, all before June 1, 1977, at a time when the maximum punishment for first-degree murder was life imprisonment, imposition of the death sentence under § 15A-2002 would violate the prohibition against imposition of an ex post facto punishment. State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Prosecutor's Argument. — Where the prosecuting attorney, while making a vigorous plea for the imposition of the death penalty, did not depart from or distort the record, and there was nothing in his argument which would tend to mislead the jury or deprive the defendant of a fair trial, the argument was proper. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

But where the prosecuting attorney, in his argument, traveled outside the record, used language offensive in its nature, and, in support of his plea for the death penalty, injected into his argument his own account of his record as a solicitor in other cases, for the purpose of persuading the jury that he did not ask the death penalty where it was not deserved, the argument was improper. State v. Smith, 279 N.C. 163, 181 S.E.2d 458 (1971).

IV. MURDER IN THE SECOND DEGREE.

A. In General.

What Constitutes Second-Degree Murder. — Murder in the second degree is the unlawful killing of a human being with malice, but without elements of premeditation and deliberation. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Starnes, 220 N.C. 384, 17 S.E.2d 346 (1941); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Kea, 256 N.C. 492, 124 S.E.2d 174 (1962); State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969); State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970); State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971); State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265, cert. denied, 283 N.C. 755, 198 S.E.2d 725 (1973); State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976); State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Christopher, 29 N.C. App. 231, 223 S.E.2d 835 (1976); State v. Periman, 32 N.C. App. 33, 230 S.E.2d 802 (1977); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979); State v. Rogers, 299 N.C. 597, 264 S.E.2d 89 (1980); State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980); State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

By this section the crime of murder in the second degree is as at common law. State v. Smith, 221 N.C. 278, 20 S.E.2d 313 (1942).

An unlawful killing with malice is murder in the second degree. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975); State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971); State v. Williams, 288 N.C. 680, 220 S.E.2d 558 (1975).

Under statutes of this description, murder in the second degree is common-law murder but the killing is not accompanied by the distinguishing features of murder in the first degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Included in Murder in First Degree. — If a person is guilty of murder in the first degree, a fortiori, his guilt encompasses murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Manslaughter is a lesser included offense of murder in the second degree. State v. Holcomb, 295 N.C. 608, 247 S.E.2d 888 (1978).

Elements of the offense. — An intent to inflict a wound which produces a homicide is an essential element of murder in the second degree. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

The essential elements of the offense of murder in the second degree are that the killing was unlawful and with malice. For these elements to be presumed present, the burden is upon the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant intentionally used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

The universal applicability of the statements that an intent to inflict a wound which produces a homicide is an essential element of murder in the second degree, and that second-degree murder imports a specific intent to do an unlawful act is questionable. It is more fundamentally sound to say that any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief, though there may be no intention to injure a particular person is sufficient to supply the malice necessary for second-degree murder. Such an act will always be accompanied by a general intent to do the act itself but it need not be accompanied by a specific intent to accomplish any particular purpose or to do any particular thing. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

The law of North Carolina continues to be that the elements of malice and unlawfulness are essential to a second-degree murder conviction. Gardner v. Forister, 468 F. Supp. 761 (W.D.N.C. 1979).

Same — Proximate Cause. — To warrant a conviction for homicide the State must establish that the act of the accused was a proximate cause of the death. State v. Jones, 290 N.C. 292, 225 S.E.2d 549 (1976).

Proximate cause is an element of second-degree murder and manslaughter. State v. Sherrill, 28 N.C. App. 311, 220 S.E.2d 822 (1976).

Same — Same — Forseeability is not an element of proximate cause in a homicide case where an intentionally inflicted wound caused the victim's death. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

Culpable Negligence May Support Conviction. — Culpable negligence from which death proximately ensues makes the actor guilty of manslaughter, and under some circumstances guilty of murder. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

Both involuntary manslaughter and second-degree murder can involve an act of "culpable negligence" that proximately causes death. Culpable negligence, standing alone, will support at most involuntary manslaughter. When, however, an act of culpable negligence also imports danger to another and is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life, it will support a conviction for second-degree murder. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

If Malice Is Shown. — Since the distinction between manslaughter and murder in the second degree is malice, culpable negligence will not support a murder charge unless there are sufficient facts to support a finding of malice. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

There need not be two definitions of culpable negligence, one for involuntary manslaughter and one for murder in the second degree. The distinguishing element of the two offenses is the requirement of malice in murder in the second degree. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 338 (1980).

B. Malice in General.

Definition. — Malice is that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Tilley, 18 N.C. App. 300, 196 S.E.2d 816 (1973); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979).

Malice is not only hatred, ill will, or spite, as it is ordinarily understood — to be sure that is malice — but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse or justification. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970); State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980).

Malice exists as a matter of law whenever there has been unlawful and intentional homicide without excuse or mitigating circumstance. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Patterson, 288 N.C. 553, 220 S.E.2d 600 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976); State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979).

Malice not only means ill will, hatred or spite, sometimes called "express malice," but also exists as a matter of law whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

In a legal sense, malice is not restricted to spite or enmity toward a particular person. It also denotes a wrongful act intentionally done without just cause or excuse. State v. Jenkins, 300 N.C. 578, 268 S.E.2d 458 (1980).

Malice is always a necessary ingredient of murder. State v. Baldwin, 152 N.C. 822, 68 S.E. 148 (1910).

Same — Second-Degree Murder. — Malice as an essential characteristic of the crime of murder in the second degree may be either express or implied. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

The difference between second-degree murder and manslaughter is that malice, express or implied, is present in the former and not in the latter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

The offense of murder in the second degree requires malice as an element, but not malice aforethought. State v. McGee, 47 N.C. App. 280, 267 S.E.2d 67 (1980).

Express Malice Not Required. — But it is not necessary to a conviction for murder that the State prove express malice. State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907).

Proof. — The manner of the killing by defendant, his acts and conduct attending its commission, and his declaration immediately connected therewith, were evidence of express malice. State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

Malice may be shown by evidence of hatred, ill will, or dislike. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Any unseemly conduct toward the corpse of the person slain or any indignity offered it by the slayer should go to the jury on the question

of malice. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Malice may be implied from circumstances other than the use of a deadly weapon. State v. Periman, 32 N.C. App. 33, 230 S.E.2d 802 (1977).

Malice may be implied from the acts of defendant. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Same — Death Ensuing from Attack Made with Hands and Feet Only. — Ordinarily if death ensues from an attack made with hands and feet only, on a person of mature years and full health and strength, the law would not imply malice required to make the homicide second-degree murder, because ordinarily death would not be caused by use of such means. The inference would be quite different, however, if the same assault were committed upon an infant of tender years or upon a person enfeebled by old age, sickness, or other apparent physical disability. State v. Sallie, 13 N.C. App. 499, 186 S.E.2d 667, cert. denied, 281 N.C. 316, 188 S.E.2d 900 (1972).

C. Intentional Killing with a Deadly Weapon.

Intentional Killing with Deadly Weapon Creates Presumptions of Malice and Unlawfulness. — At common law, the intentional killing of a human being with a deadly weapon, nothing more appearing, was murder, malice being presumed from the facts. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899). The common-law rule has been followed and it is now also presumed that a killing with a deadly weapon is unlawful and malicious. State v. Benson, 183 N.C. 795, 111 S.E. 869 (1922), overruled on other grounds, State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965); State v. Walker, 193 N.C. 489, 137 S.E. 429 (1927).

Intentional killing of a human being with a deadly weapon implies malice. State v. McDowell, 145 N.C. 563, 59 S.E. 690 (1907); State v. Brinkley, 183 N.C. 720, 110 S.E. 783 (1922); State v. Pasour, 183 N.C. 793, 111 S.E. 779 (1922).

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased and thereby proximately caused his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice. State v. Adams, 241 N.C. 559, 85 S.E.2d 918 (1955); State v. Revis, 253 N.C. 50, 116 S.E.2d 171 (1960).

Malice is implied in law from the killing with a deadly weapon. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

Malice is implied in law from the intentional killing with a deadly weapon. State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969).

The intentional use of a deadly weapon, as a weapon, when death proximately results from such use, gives rise to two presumptions: (1) that the killing was unlawful, and (2) that it was done with malice. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970); State v. Myers, 299 N.C. 671, 263 S.E.2d 768 (1980).

Where there is plenary evidence that deceased died from a wound intentionally inflicted by defendant with a rifle, the presumptions that the killing was unlawful and that it was done with malice are created. State v. Jennings, 276 N.C. 157, 171 S.E.2d 447 (1970).

Malice may be presumed from evidence which satisfies the jury beyond a reasonable doubt that the death of the victim proximately resulted from pistol shots intentionally fired at him by the defendant. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

A presumption of malice arises when one intentionally assaults another with a deadly weapon and thereby proximately causes his death. State v. Goins, 24 N.C. App. 468, 211 S.E.2d 481, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

The killing of a person with a deadly weapon, when established beyond a reasonable doubt, raises two presumptions: first, that the killing was unlawful, and second, that it was done with malice. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

When a killing resulting from the intentional use of a deadly weapon is established, two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice. State v. Lee, 292 N.C. 617, 234 S.E.2d 574 (1977).

Which Will Support Conviction of Second-Degree Murder. — Since the act of 1893, the killing being proved, and nothing else appearing, the law presumes malice, but not premeditation and deliberation, and the killing is murder in the second degree. State v. Hicks, 125 N.C. 636, 34 S.E. 247 (1899).

The intentional killing of a human being with a deadly weapon implies malice and, if nothing else appears, constitutes murder in the second degree. State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Hawkins, 214 N.C. 326, 199 S.E. 284 (1938); State v. Bright, 215 N.C. 537, 2 S.E.2d 541 (1939); State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949); State v. Lamm, 232 N.C. 402, 61 S.E.2d 188 (1950); State v. Brown, 249 N.C. 271, 106 S.E.2d 232 (1958); State v. Downey, 253 N.C. 348, 117 S.E.2d 39 (1960); State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

When an intentional killing of a person with a deadly weapon is admitted judicially in court

by a defendant, or is proven by the State's evidence, the law raises two presumptions against the killer: (1) that the killing was unlawful; and (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

When the State satisfies the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased with a pistol and thereby proximately caused his death, there arise the presumptions that the killing was (1) unlawful and (2) with malice, constituting the offense of murder in the second degree. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

If the State has satisfied the jury from the evidence beyond a reasonable doubt that the defendant intentionally shot the deceased and thereby proximately caused her death, two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; and nothing else appearing, the defendant would be guilty of murder in the second degree. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975).

When the defendant admits or the State satisfies the jury beyond a reasonable doubt that the defendant intentionally used a deadly weapon and thereby proximately caused the death of a human being, the law raises presumptions that the killing was unlawful and that it was done with malice. Such unlawful killing of a human being with malice is murder in the second degree. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

If the State satisfies the jury beyond a reasonable doubt that a defendant intentionally used a deadly weapon and thereby caused the death, then two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; and nothing else appearing, the defendant would be guilty of murder in the second degree. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree, where all the evidence tends to show that defendant stubbornly continued over a period of hours to curse the deceased and to assault his helpless victim time after time with various deadly weapons while a witness was begging him to cease and desist. By these persistent assaults without the slightest provocation he inflicted mortal wounds proximately causing the death of his victim. This evidence affords no basis upon which defendant could be found guilty of manslaughter. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

If the State satisfied the jury from the evidence beyond a reasonable doubt that defendant stabbed the victim intentionally with a knife which constituted a deadly weapon and the stab wound so inflicted proximately caused her death, these facts would give rise to the presumptions that the killing was unlawful and with malice, the essentials of murder in the second degree. State v. Parker, 279 N.C. 168, 181 S.E.2d 432 (1971), cert. denied, 409 U.S. 987, 93 S. Ct. 342, 34 L. Ed. 2d 253 (1972).

When a jury finds from the State's evidence beyond a reasonable doubt that a defendant intentionally shot the deceased and that the wound so inflicted proximately caused his death, the presumptions arise that the killing was unlawful and that it was done with malice; nothing else appearing, the defendant is guilty of murder in the second degree. State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); State v. Boyd, 278 N.C. 682, 180 S.E.2d 794 (1971); State v. Oxendine, 24 N.C. App. 444, 210 S.E.2d 908, cert. denied, 287 N.C. 667, 216 S.E.2d 910 (1975).

The evidence was ample to show that the proximate cause of death was a wound in the head from a pistol bullet intentionally fired at the deceased by the defendant. Upon this evidence the law raises a presumption of an unlawful killing and a presumption of malice sufficient to support a conviction of murder in the second degree. State v. McIlwain, 279 N.C. 469, 183 S.E.2d 538 (1971).

If the State has satisfied the jury beyond a reasonable doubt that defendant intentionally shot his wife with a shotgun and thereby proximately caused her death, two presumptions arise: (1) that the killing was unlawful, and (2) that it was done with malice; and, nothing else appearing, the defendant would be guilty of murder in the second degree. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second degree. State v. Cannady, 17 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Chavis, 30 N.C. App. 75, 226 S.E.2d 389, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree. State v. Lea, 17 N.C. App. 71, 193 S.E.2d 383 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 154 (1973);

State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 809 (1976).

An unlawful killing with malice is murder in the second degree, and when it is shown that a defendant intentionally shot the deceased with a deadly weapon and thereby caused his death, presumptions arise that the killing was unlawful and that it was done with malice. State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

Where all the evidence tends to show that defendant intentionally inflicted a wound with a deadly weapon which caused deceased's death, such evidence raises inferences of an unlawful killing with malice which are sufficient to permit, but not require, the jury to return a verdict of murder in the second degree. State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978).

In a homicide case, in the absence of evidence of a killing in the heat of passion and the absence of evidence of self-defense, proof of the intentional infliction of a wound raises not mere permissible inferences but mandatory presumptions of the existence of malice and unlawfulness entitling the State at least to a conviction of murder in the second degree. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

Intent Must Be Shown. — The presumptions that a homicide was unlawful and done with malice do not arise against the slayer in a prosecution for homicide, unless he admits, or the State proves, that he intentionally killed the deceased with a deadly weapon. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

The expression "intentional killing" is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

The intentional use of a deadly weapon as a weapon is necessary to give rise to presumptions of unlawfulness and of malice. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

Malice, as one of the essential elements of murder in the second degree, is not presumed merely by the pointing of a gun or pistol at another person in fun in violation of § 14-34. In order for this presumption of malice to arise from an assault with a deadly weapon, there must be an intent to inflict a wound with such weapon which produces death. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

It is error for the trial court to instruct the jury that once a killing is proven to have been done with a deadly weapon the law presumes malice, since in order for a presumption of malice to arise, it has to be established or admitted that the defendant intentionally used a deadly weapon, as a weapon, and inflict wounds proximately resulting in death. State v. Drake, 8 N.C. App. 214, 174 S.E.2d 132 (1970).

The expression, intentional killing, is not used in the sense that a specific intent to kill must be admitted or established. The sense of the expression is that the presumptions arise when the defendant intentionally assaults another with a deadly weapon and thereby proximately causes the death of the person assaulted. A specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder or manslaughter. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions. The presumptions do not arise if an instrument, which is per se or may be a deadly weapon, is not intentionally used as a weapon, e.g., from an accidental discharge of a shotgun. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971); State v. Dubois, 279 N.C. 73, 181 S.E.2d 393 (1971).

For the presumptions of malice and unlawfulness to arise from a killing with a deadly weapon, the defendant must admit or the State must prove beyond a reasonable doubt that the killing was intentional. State v. Barnwell, 17 N.C. App. 299, 194 S.E.2d 63, cert. denied, 283 N.C. 106, 194 S.E.2d 634 (1973).

Constitutionality of Presumptions as to Malice and Unlawfulness. — Under the decision of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), the due process clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that, in order to rebut the presumption of malice, defendant must prove to the satisfaction of the jury that he killed in the heat of a sudden passion, and in order to rebut the presumption of unlawfulness, defendant must prove to the satisfaction of the jury that he killed in self-defense. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 306 (1977).

The Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) decision does not preclude use of the presumptions of malice and unlawfulness upon proof beyond a reasonable doubt of a killing by the intentional use of a deadly weapon; nor does it prohibit making the presumptions mandatory in the absence of contrary evidence or permitting the logical inferences from facts proved to remain and be weighed against contrary evidence if it is produced. State v. Hankerson, 288 N.C. 632, 220

S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977).

The presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. State v. Lester, 289 N.C. 239, 221 S.E.2d 268 (1976).

Mullaney v. Wilbur, 421 U.S. 634, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) does not apply to the presumption of malice created when the State proves beyond a reasonable doubt that the accused intentionally inflicted a wound with a deadly weapon proximately causing death. State v. Johnson, 28 N.C. App. 265, 220 S.E.2d 834, cert. denied, 289 N.C. 454, 223 S.E.2d 162 (1976).

The ruling of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) does not preclude all use of traditional presumptions of malice and unlawfulness. It precludes only utilizing them in such a way as to relieve the State of the burden of proof on these elements when the issue of their existence is raised by the evidence. The presumptions themselves, standing alone, are valid and constitutional. State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977).

The presumptions of malice and unlawfulness arising from an intentional assault with a deadly weapon proximately causing death are constitutionally sound. State v. Biggs, 292 N.C. 328, 233 S.E.2d 512 (1977).

Rebuttal of Presumption. — Where a defendant produced evidence from which a jury could have found that he killed in the heat of passion suddenly aroused or that he killed in self-defense, the State was not entitled to the benefit of mandatory presumptions of malice and unlawfulness. It was entitled at most to the benefit of permissible inferences that these elements existed if the jury should find it had proved beyond a reasonable doubt defendant's intentional infliction of a wound with a deadly weapon resulting in death. These permissible inferences place no burden upon defendant to rebut them by raising a reasonable doubt as to the existence of the inferred elements. It was error to so instruct the jury. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

Same — If there is evidence of provocation or self-defense, the mandatory presumptions of malice and unlawfulness disappear, but the logical inferences from the facts proved may be weighed against the evidence. State v. Hankerson, 288 N.C 632, 220 S.E.2d 575 (1975), reversed on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977).

Evidence of self-defense or of killing in a heat of passion upon sudden provocation are matters of excuse and mitigation which should be weighed against the raised inferences of unlawfulness and malice. State v. Hodges, 296 N.C. 66, 249 S.E.2d 371 (1978).

When evidence of self-defense is presented in a murder in the second-degree case, the mandatory presumption of unlawfulness disappears but the logical inferences from the facts proved may be weighed against this evidence. State v. McLaurin, 46 N.C. App. 746, 266 S.E.2d 406 (1980).

For discussion of burden of proof with respect to presumptions, see analysis line VI (D).

Presumption Not Rebutted. — In prosecution for second-degree murder, where there was no evidence of just cause or reasonable provocation for the homicide, nor was there evidence of self-defense, unavoidable accident or misadventure, defendant's self-serving declarations alone were not sufficient to rebut the presumption of malice arising in the case. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

V. DEFENSES AND DENIALS.

A. In General.

Defendant may rely on more than one defense. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

B. Accident.

Misadventure or accident is not an affirmative defense but merely a denial that defendant intentionally shot the deceased. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975).

A defendant's assertion of accidental killing is not an affirmative defense. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

The contention of a defendant charged with homicide that a killing was accidental is not an affirmative defense, but rather a denial of guilt by denying the element of intent. State v. Jackson, 36 N.C. App. 126, 242 S.E.2d 891, cert. denied, 295 N.C. 470, 246 S.E.2d 11 (1978).

Upon a defendant's assertion that a killing was an accident, the denial of guilt applies to all the charges against the defendant regarding the transaction in question. State v. Jackson, 36 N.C. App. 126, 242 S.E.2d 891, cert. denied, 295 N.C. 470, 246 S.E.2d 11 (1978).

And Does Not Shift the Burden of Proof. — The plea of accidental homicide, if indeed it can be properly called a plea, is certainly not an affirmative defense, and therefore does not impose the burden of proof upon the defendant, because the State cannot ask for a conviction unless it proves that the killing was done with criminal intent. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Defendant's assertion that the killing of deceased with a deadly weapon was accidental is not an affirmative defense which shifts the

burden of proof to him to exculpate himself from a charge of murder; it is merely a denial that the defendant was committed the crime, and the burden remains on the State to prove a homicide resulting from the intentional use of a deadly weapon before any presumption arises against the defendant. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

Assertion by an accused that a killing with a deadly weapon was accidental is a denial that he committed the crime charged and is in no sense an affirmative defense shifting the burden to him to satisfy the jury that death of the victim was in fact an accident. State v. Harris, 289 N.C. 275, 221 S.E.2d 343 (1976).

For cases discussing burden of proof in general and other cases discussing the burden in cases involving claims of accidental killing, see analysis line VI (D).

Accident will be no defense to a homicide committed in the perpetration of or in the attempt to perpetrate a felony. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

C. Insanity.

Legal insanity requires that the accused be laboring under such defect of reason from disease of the mind as to be incapable of knowing the nature and quality of his act, or if he does know this, not to know right from wrong. State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

Testimony relating to insanity or mental debilities is not competent for jury consideration as bearing upon whether the State has satisfied the jury from the evidence beyond a reasonabe doubt that a defendant has unlawfully killed the victim in the execution of an actual, specific intent to kill formed after premeditation and deliberation or that the defendant has intentionally killed the victim. State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976).

D. Intoxication.

Drunkeness May Negate Specific Intent to Kill. — Voluntary drunkenness is not a legal excuse for crime; but where a specific intent, or premeditation and deliberation, is essential to constitute a crime or a degree of a crime, the fact of intoxicating may negative its existence. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

The general rule that voluntary drunkenness is no legal excuse for crime does not obtain with respect to crimes where, in addition to the overt act, it is required that a definite, specific intent be established as an essential feature. Murder in the first degree is a specific intent crime in that a specific intent to kill is a necessary ingredient of premeditation and deliberation. Intoxication which renders an offender utterly unable to form the required intent may be shown as a defense. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

While voluntary drunkenness is not, per se, an excuse for a criminal act, it may be sufficient in degree to prevent and, therefore, disprove the existence of a specific intent such as the intent to kill. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Defendant's intoxicated condition went only to negate the specific intent necessary to find him guilty of first-degree murder. State v. Cummings, 22 N.C. App. 452, 206 S.E.2d 781, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

And Is Defense to First-Degree Murder But Not to Second-Degree Murder. — Voluntary drunkenness is a defense to the charge of first-degree murder to the extent that it precludes the mental processes of premeditation and deliberation but voluntary drunkenness is no defense to murder in the second degree. State v. Couch, 35 N.C. App. 202, 241 S.E.2d 105 (1978).

Intoxication may negate the specific intents of premeditation and deliberation necessary to prove first-degree murder, but it is not a defense to second-degree murder. State v. King, 49 N.C. App. 499, 272 S.E.2d 26 (1980).

Voluntary Intoxication Not a Defense to Felony-Murder Charge. — Since voluntary intoxication is not a defense to a charge of arson, it is not a defense to a charge of felony-murder having as its underlying felony the crime of arson. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

Degree of Intoxication Which Must Be Shown. — To make the defense of intoxication available the evidence must show that at the time of the killing the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. And where the evidence shows that the purpose to kill was deliberately and premeditatedly formed when sober, the imbibing of intoxicants to whatever extent in order to carry out the design will not avail as a defense. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

If at the time of a killing, a defendant was so drunk as to be utterly incapable of forming a deliberate and premeditated intent to kill a person, he could not be guilty of murder in the first degree, for an essential element of that crime would be lacking. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

For intoxication to constitute a defense it must appear that the defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and weigh it

and understand the nature and consequence of his act. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

If it is shown that a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated purpose to kill, an essential element of murder in the first degree is absent. State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

If a person on trial for murder in the first degree was so drunk at the time he committed the homicide charged in the indictment that he was utterly incapable of forming a deliberate and premeditated intent to kill, essential elements of murder in the first degree are absent. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

The influence of intoxication upon the question of existence of premeditation depends upon its degree and its effect upon the mind and passion. For it to constitute a defense it must appear that defendant was not able, by reason of drunkenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequences of his act. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

In order for intoxication to negate the existence of the requisite intent to kill in a prosecution for first-degree murder the evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

No Inference As Matter of Law. — Whether intoxication and premeditation can coexist depends upon the degree of inebriety and its effect upon the mind and passions. No inference of the absence of deliberation and premeditation arises from intoxication, as a matter of law. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

A person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary plan, design, or intention to commit murder in the first degree. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973).

No inference of the absence of deliberation and premeditation arises as a matter of law from intoxication; and mere intoxication cannot serve as an excuse for the offender. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

Reduction of Charge. — Where legal intoxication is shown, grade of offense is reduced to second-degree murder. State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

A showing of legal intoxication to the jury's satisfaction will mitigate a charge of first-degree murder to murder in the second degree. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976).

Intent to Kill Formed When Sober and Executed When Drunk. — Where the facts show that the intent to kill was deliberately formed when sober and executed when drunk, intoxication is no defense to the capital charge of murder in the first degree. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

The fact that, after his intent to kill was deliberately and premeditatedly formed when sober, defendant voluntarily drank enough intoxicants to produce pathological intoxication and then executed his murderous intent, is held not to constitute a valid defense to murder in the first degree in this State. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Violation of Motor Vehicle Law Not Sufficient to Establish Defense. — A person may be "under the influence" of intoxicants in violation of the motor vehicle laws, § 20-138, and yet be quite capable of forming and carrying out a specific intent to kill. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

Breathalyzer Not Applicable in Homicides. — The chemical analysis (Breathalyzer) test authorized by § 20-139.1 is, by its express terms, applicable only to criminal actions arising out of the operation of a motor vehicle and has no application to criminal responsibility for homicide. State v. Medley, 295 N.C. 75, 243 S.E.2d 374 (1978).

Effect of Intoxication as Question for Jury. — When a defendant has committed an overt lethal act, the decision has been that whether his intoxication was so gross as to preclude a capacity intentionally to kill is normally a fact issue for the jury to resolve. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

It is for the jury to determine whether the mental condition of accused was so far affected by intoxication that he was unable to form a guilty intent to commit murder, unless the evidence is not sufficient to warrant the

submission of the question to the jury. State v. Hamby, 276 N.C. 674, 174 S.E.2d 385 (1970), death sentence vacated, 408 U.S. 937, 92 S. Ct. 2862, 33 L. Ed. 2d 754 (1972).

E. Provocation.

Provocation is Affirmative Defense. — The legal provocation that will rob the crime of malice and thus reduce it to manslaughter, and self-defense, are affirmative pleas. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Provocation never disproves malice, it only removes the presumption of malice, which the law raises without proof. A malicious killing is murder, however gross the provocation. State v. Johnson, 23 N.C. 354 (1840).

Abusive language will not serve as a legally sufficient provocation for a homicide in this State. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

Nor Mitigate Homicide to Lesser Degree. — Mere words, however abusive, are never sufficient legal provocation to mitigate a homicide to a lesser degree. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

Heat of Passion. — In order to reduce second-degree murder to voluntary manslaughter, there must be some evidence that the defendant killed his victim in the heat of passion engendered by provocation which the law deems adequate to depose reason. State v. Burden, 36 N.C. App. 332, 244 S.E.2d 204, cert. denied, 295 N.C. 468, 246 S.E.2d 216 (1978).

Evidence that the defendant found his estranged wife riding in a car with another man is not sufficient to show adequate cause for passion which would negate the malice of murder and reduce it to manslaughter. State v. Burden, 36 N.C. App. 332, 244 S.E.2d 204, cert. denied, 295 N.C. 468, 246 S.E.2d 216 (1978).

Same — Defined. — See State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

F. Self-Defense.

Right Is Based on Real or Apparent Necessity. — The right to kill in self-defense, or in defense of one's family or habitation, rests upon necessity, real or apparent. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965); State v. Jackson, 284 N.C. 383, 200 S.E.2d 596 (1973).

One may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm or when it is not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

The right to act in self-defense is based upon necessity, real or apparent, and a person may use such force as is necessary or apparently necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

A person may kill even though it be not necessary to kill to avoid death or great bodily harm if he believes it to be necessary and he has reasonable grounds for such belief. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

And Accused Must Not Have Initiated Dispute. — Self-defense requires, among other things, that the one invoking the defense be without fault in initiating the affray. It must also be shown that the killing was necessary or appeared to be necessary to prevent death or great bodily harm to defendant. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479, cert. denied, 281 N.C. 157, 188 S.E.2d 366 (1972).

A person is justified in defending himself if he is without fault in provoking, or engaging in, or continuing a difficulty with another. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

A person may kill in self-defense if he be free from fault in bringing on the difficulty and if it is necessary, or appears to him to be necessary, to kill so as to save himself from death or great bodily harm. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Or He Will Not Be Excused on Grounds of Self-Defense. — Where a prisoner makes an assault upon A. and is reassaulted so fiercely that the prisoner cannot retreat without danger of his life, and the prisoner kills A.: Held, that the killing cannot be justified upon the ground of self-defense. The first assailant does the first wrong and brings upon himself the necessity of slaying, and is therefore not entitled to a favorable interpretation of the law. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

If one takes life, though in defense of his own life, in a quarrel which he himself has commenced with intent to take life or inflict serious bodily harm, the jeopardy in which he has been placed by the act of his adversary constitutes no defense whatever, but he is guilty of murder. But, if he commenced the quarrel with no intent to take life or inflict grievous bodily harm, then he is not acquitted of all responsibility for the affray which arose from his own act, but his offense is reduced from murder to manslaughter. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

One who kills under a reasonable belief that it is necessary to do so to save himself from death or great bodily harm will not be entirely excused on the ground of self-defense if he is the aggressor, that is, if he aggressively and willingly enters into a fight without legal excuse or provocation. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

An accused who, though otherwise acting in self-defense, is the aggressor in bringing on the affray is guilty at least of voluntary manslaughter. The defendant, under such circumstances, "loses the benefit of perfect self-defense." State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

Although a party is privileged to use deadly force to defend against an attack by unarmed assailants of vastly superior size, strength or number, if the defendant precipitated the altercation intending to provoke a deadly assault by the victim in order that he might kill him, his subsequent killing of the victim in response to the attack is murder. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978).

Unless He Quits the Combat. — In order that the right of self-defense may be restored to a person who has provoked or commenced a combat, he must attempt in good faith to withdraw from the combat. He must also in some manner make known his intention to his adversary; and if the circumstances are such that he cannot notify his adversary, as where the injuries inflicted by him are such as to deprive his adversary of his capacity to receive impressions concerning his assailant's design and endeavor to cease further combat, it is the assailant's fault and he must bear the consequences. As long as a person keeps his gun in his hand prepared to shoot, the person opposing him is not expected or required to accept any act or statement as indicative of an intent to discontinue the assault. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

The term "quitting the combat," within the meaning of these decisions, does not always and necessarily require that a defendant should physically withdraw therefrom. If the counterattack is of such a character that he cannot do this consistently with safety of life or limb, such a course is not required; but before the right of perfect self-defense can be restored to one who has wrongfully brought on a difficulty, and particularly where he has done so by committing a battery, he is required to abandon the combat in good faith and signify this in some way to his adversary. There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only to clearly evince the withdrawal of the accused in good faith from the combat, but also as fairly to advise his adversary that his danger has passed and to make his conduct thereafter the pursuit of vengeance rather than measures taken to repel the original assault. And when, as heretofore shown, the counterassault is so fierce that the original assailant cannot comply with this requirement, then, in the language of Lord Hale, "He that first assaulted hath done the first wrong and brought upon himself this necessity, and shall not have the advantage of his own wrong to gain the favorable interpretation of the law, that that necessity which he brought on himself should, by way of interpretation, be accounted a flight to save himself from murder or manslaughter." State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

A defendant, prosecuted for a homicide in a situation that he has provoked by the use of language "calculated and intended" to bring on the encounter, cannot maintain the position of perfect self-defense unless, at a time prior to the killing, he withdrew from the encounter within the meaning of the law. State v. Watson, 287 N.C. 147, 214 S.E.2d 85 (1975).

A defendant, prosecuted for homicide in a difficulty which he has himself wrongfully provoked, may not maintain the position of perfect self-defense unless, at a time prior to the killing, he had quitted the combat. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

Amount of Force Used. — If the defendant in killing the deceased was acting in self-defense but used more force than was necessary or reasonably appeared necessary under the circumstances, he is guilty of voluntary manslaughter. State v. Burden, 36 N.C. App. 332, 244 S.E.2d 204, cert. denied, 295 N.C. 468, 246 S.E.2d 216 (1978).

Questions for Jury. — The reasonableness of defendant's belief that self-defense is necessary is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time of the killing. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

Where the jury finds that the defendant intended to kill and inflicted injuries, to be completely absolved, the jury must find that he acted in self-defense against actual or apparent danger of death or greater bodily harm. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Where the jury finds that the defendant did not intend to kill, the defendant is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Where a defendant in a prosecution for first-degree murder raises a defense of self-defense, the reasonableness of his belief that it was necessary to kill so as to save himself from death or great bodily harm, and the amount of force required, must be judged by the jury upon the facts and circumstances as they appeared to the defendant at the time of the killing. State v. Davis, 289 N.C. 500, 223

S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

The jury is permitted to consider all facts and circumstances, including evidence of self-defense, in determining whether a killing was unlawful. State v. McLaurin, 46 N.C. App. 746, 266 S.E.2d 406 (1980).

Self-Defense Held Not Applicable in Trial for Second-Degree Murder. — See State v. Peterson, 24 N.C. App. 404, 210 S.E.2d 883 (1975).

Defense of Habitation. — For a case reviewing the law of the defense of habitation, and the distinction between the defense of habitation and ordinary self-defense, see State v. McCombs, 297 N.C. 151, 253 S.E.2d 906 (1979).

The defense of habitation or domicile is limited to those cases where a defendant is attempting to prevent a forcible entry into his home. State v. McLaurin, 46 N.C. App. 746, 266 S.E.2d 406 (1980).

VI. PRACTICE AND PROCEDURE.

A. Charge.

A charge of murder in the first degree includes murder in the second degree and manslaughter. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971).

Charges of child abuse and child neglect were not merged into a charge of second-degree murder as the elements of child abuse and neglect are distinct and independent of the elements constituting second-degree murder. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Election by State. — By specifically alleging the offense is committed in the perpetration of rape the State confines itself to that allegation in order to show murder in the first degree. Without a specific allegation, the State may show murder by any of the means embraced in the statute. State v. Davis, 253 N.C. 86, 116 S.E.2d 365 (1960), cert. denied, 365 U.S. 855, 81 S. Ct. 816, 5 L. Ed. 2d 819 (1961).

The district attorney during the trial of defendant on a capital offense, and when defendant was voluntarily absent, could properly elect to waive the charge of first-degree murder and proceed with the prosecution of a noncapital offense, second-degree murder. State v. Mulwee, 27 N.C. App. 366, 219 S.E.2d 304, cert. denied, 288 N.C. 732, 220 S.E.2d 622 (1975).

The State is not required to elect prior to the introduction of evidence as to whether it will proceed under the felony-murder rule or on the basis of premeditation and deliberation. State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

Same — Effect of Solicitor's Announcement That State will Not Prosecute for First Degree Murder. — A solicitor's announcement that the State would not prosecute for the capital felony of first degree murder, but for a lesser included offense, did not render incompetent any pertinent evidence bearing on the defendant's guilt. State v. Ferguson, 280 N.C. 95, 185 S.E.2d 119 (1971).

B. Indictment.

Form. — Nothing contained in the act of 1893 required any alteration or modification of the existing form of indictment for murder. Therefore, it was not necessary that an indictment for murder committed in the attempt to perpetrate larceny should contain a specific allegation of the attempted larceny, such allegation not having been necessary in indictments prior to the said act of 1893. State v. Covington, 117 N.C. 834, 23 S.E. 337 (1895).

This section does not require an allegation or count to be contained in the bill of indictment as to the means used in committing the murder. The statute only classifies the crime as to degree and punishment in the manner therein set forth. State v. Smith, 223 N.C. 457, 27 S.E.2d 114 (1943).

Same — Felony Murder. — A felony murder may be proven by the State although the bill of indictment charges murder in the statutory language of § 15-144. State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

An indictment must be sufficient in form to allege murder and support a conviction of murder in the first degree under § 15-144. It is not required that the indictment allege that the murder was committed in the perpetration of a robbery or other felony in order that it be sufficient to support a verdict of murder in the first degree. State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972), death sentence vacated, 409 U.S. 1004, 93 S. Ct. 453, 34 L. Ed. 2d 295 (1973).

An indictment under § 15-144 will support a verdict of murder in the first degree if the jury finds beyond a reasonable doubt that an accused killed with malice and after premeditation and deliberation or in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony the commission of which creates any substantial foreseeable human risk and actually results in loss of life. State v. Bush, 289 N.C. 159, 221 S.E.2d 333, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Same — Same — Recommended Procedure. — The better practice where the State prosecutes a defendant for first-degree murder on the theory that the homicide was committed in the perpetration of or attempt to perpetrate a felony under the provisions of this section would be that the district attorney should not secure a separate indictment for the felony. If he does, and there is a conviction of both, the defendant will be sentenced for the murder and

the judgment will be arrested for the felony under the merger rule. If the separate felony indictment is treated as surplusage only and the murder charge submitted to the jury under the felony-murder rule, then obviously the defendant cannot thereafter be tried for the felony. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Remedy for Alternative Indictment Held to Be by Motion for Bill of Particulars. — After the return of a verdict of guilty of murder in the first degree, defendant moved in arrest of judgment because the indictment was alternative, indefinite, and uncertain. It was held that although the indictment was alternative, either charge constituted murder in the first degree under this section, informing defendant of the crime charged, and defendant's remedy, if he desired greater certainty, was by motion for a bill of particulars under § 15-143 (now § 15A-925). State v. Puckett, 211 N.C. 66, 189 S.E. 183 (1937).

Quashing Bill. — A defendant who was tried on a bill of indictment returned by the grand jury charging him with murder in the first degree, could not quash the bill on the ground that, following a preliminary hearing, he was bound over for trial on the lesser charge of second degree murder. State v. Mack, 282 N.C. 334, 193 S.E.2d 71 (1972).

Indictment Sufficient to Charge Conspiracy to Murder. — See State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

C. Pleas.

Plea of Not Guilty. — The defendant's plea of not guilty entitled him to present evidence that he acted in self-defense, that the shooting was accidental, or both; election is not required. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

Defendant's plea of not guilty puts in issue every essential element of the crime of first degree murder, and the State must satisfy the jury from the evidence beyond a reasonable doubt that defendant unlawfully killed the deceased with malice and in execution of an actual, specific intent to kill formed after premeditation and deliberation. State v. Propst, 274 N.C. 62, 161 S.E.2d 560 (1968).

Defendant's plea of not guilty puts into issue all of the elements of the charges against him and the burden remains on the State to satisfy the jury beyond a reasonable doubt of all of the elements of the offense charged, including the lesser offense of second-degree murder. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

The fact that the law imposed the threat of the gas chamber did not render petitioner's plea of guilty to second-degree murder involuntary. Petitioner entered his plea to a lesser offense of murder and was not exposed to the defect which prompted the holding in United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968). Pickett v. Henry, 315 F. Supp. 1138 (E.D.N.C. 1970).

There is no rule which precludes a plea of guilty to a crime for which the maximum punishment is life imprisonment. State v. Watkins, 283 N.C. 17, 194 S.E.2d 800, cert. denied, 414 U.S. 1000, 94 S. Ct. 353, 38 L. Ed. 2d 235 (1973).

Effect of Principal's Guilty Plea to Voluntary Manslaughter. — Principal's guilty plea to voluntary manslaughter did not determine that the crime of second-degree murder had not been committed, thus barring trial of one who aided and abetted. State v. Cassell, 24 N.C. App. 717, 212 S.E.2d 208, appeal dismissed, 287 N.C. 261, 214 S.E.2d 433 (1975).

What State Must Prove. — In any prosecution for a homicide the State must prove two things: (1) that the deceased died by virtue of a criminal act; and (2) that the act was committed by the defendant. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971); State v. McCall, 286 N.C. 472, 212 S.E.2d 132 (1975), death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976); State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

As in all criminal cases, in a prosecution for homicide during the perpetration or attempted perpetration of a robbery, there are two items which the State must prove: (a) that a crime has been committed, i.e., the corpus delicti; and (b) that defendant committed the crime. State v. Perry, 293 N.C. 97, 235 S.E.2d 52 (1977).

Same — Intent to Kill. — It is the duty of the State to allege and prove that the killing, though done with a deadly weapon, was intentional or willful. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

If the State is unable to prove an intentional shooting, no presumption of malice arises, and, in order to convict this defendant of unlawful homicide, the State must satisfy the jury beyond a reasonable doubt that defendant's culpable negligence proximately caused the death of his wife. Otherwise, defendant would be entitled to an accquittal. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Same — Proof of Unlawful Homicide. — In a prosecution for unlawful homicide, the burden is always upon the State to prove an unlawful slaying. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Same — Jurisdiction. — In a prosecution for murder, the defendant's challenge to jurisdiction alleging the insufficiency of the evidence to show the murder was committed in

this State is not an affirmative defense. Rather the State has the burden to show beyond a reasonable doubt that the courts of this State had jurisdiction to try the accused. Former cases to the contrary are no longer authoritative. State v. Batdorf, 293 N.C. 486, 238 S.E.2d 497 (1977).

Proof Must Be Beyond Reasonable Doubt. — It makes no difference whether the State is relying on circumstantial or direct evidence, or both, the evidence must produce in the mind of the jurors a moral certainty of the defendant's guilt, otherwise the State has not proven his guilt beyond a reasonable doubt. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

D. Burden of Proof.

The State must bear the burden throughout the trial of proving each element of the crime charged including, where applicable, malice and unlawfulness beyond a reasonable doubt. State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977).

Same — In a prosecution for murder by means of poison, the burden is on the State to prove beyond a reasonable doubt that the deceased died from poison and that defendant administered the poison with criminal intent. State v. Hendrick, 232 N.C. 447, 61 S.E.2d 349 (1950).

Same — Murder in the second degree is the unlawful killing of a human being with malice, and the burden is on the State to satisfy the jury from the evidence beyond a reasonable doubt of the presence of each essential element of the offense. State v. Adams, 241 N.C. 559, 85 S.E.2d 918 (1955).

If upon a consideration of all the testimony, including the testimony of the defendant, the jury is not satisfied beyond a reasonable doubt that the defendant intentionally killed the deceased, it should return a verdict of not guilty of murder in the second degree. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Burden May Not Be Shifted to Defendant. — On review of a conviction for second-degree murder the Supreme Court of North Carolina erred in declining to hold retroactive the rule in Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), which requires the State to establish all elements of a criminal offense beyond a reasonable doubt, and which invalidates presumptions that shift the burden of proving such elements, including self-defense, to the defendant. Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977).

In a murder prosecution, defendant has no burden to produce evidence sufficient to raise a reasonable doubt as to the existence of malice or unlawfulness. His burden is simply to produce some evidence from which a jury could find the nonexistence of these elements, i.e., to produce some evidence of a killing in the heat of passion or some evidence of self-defense from which a jury could find the existence of these things. Upon production of such evidence the burden is upon the State to prove beyond a reasonable doubt the existence of malice and the absence of self-defense. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

Inversion of Order of Proof Does Not Shift Burden. — In a prosecution for first-degree murder, the trial court did not err in requiring defendant to present his evidence before the State put on its evidence during a hearing on defendant's motion to suppress, and there was no merit to defendant's contention that the inversion of the order of proof resulted in a shift of the burden of proof, since the order of proof is merely a matter of practice without legal effect; there was nothing in the trial court's order denying defendant's motion to suppress to indicate that the trial judge believed otherwise; and defendant was not prejudice by the order of proof because it resulted in his having to call one of the State's principal witnesses as his own. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Burden Where Evidence of Self-Defense Is Shown. — The burden was on the State to prove beyond a reasonable doubt that defendant did not act in self-defense, there being evidence in the case that he did. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

When the issue of self-defense is raised, the state continues to have the burden of proving each element of the crime of murder in the second degree beyond a reasonable doubt. Simultaneously, the additional burden is added of proving malice based on inferences rather than presumptions. State v. McLaurin, 46 N.C. App. 746, 266 S.E.2d 406 (1980).

Same — Instruction Placing Burden of Proving Self-defense on Defendant Unconstitutional. — In a prosecution for second-degree murder, an instruction placing the burden of proving self-defense upon the defendant was constitutionally infirm, since North Carolina considers unlawfulness, or the absence of self-defense, to be an element of murder. Wynn v. Mahoney, 600 F.2d 448 (4th Cir.), cert. denied, 444 U.S. 950, 100 S. Ct. 423, 62 L. Ed. 2d 320 (1979).

Where Accidental Killing is Claimed. — The claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Burden of proof where defendant asserts killing was accidental. See State v. Fowler, 268 N.C. 430, 150 S.E.2d 731 (1966).

For other cases discussing shifting of burden of proof in accident cases, see analysis line V (B).

E. Admissibility of Evidence.

1. Testimony.

Evidence of Accidental Discharge of Weapon Admissible. — When it is made to appear that death was caused by a gunshot wound, testimony tending to show that the weapon was fired in a scuffle or by some other accidental means is competent to rebut an intentional shooting. State v. Phillips, 264 N.C. 508, 142 S.E.2d 337 (1965).

Evidence of Abnormal Mental Condition Not Amounting to Legal Insanity Admissible. — A defendant may offer evidence of an abnormal mental condition, although not sufficient to establish legal insanity, for the purpose of showing that he did not have the capacity to deliberate or premeditate at the time the homicide was committed — elements necessary for a conviction of murder in the first degree. State v. Baldwin, 276 N.C. 690, 174 S.E.2d 526 (1970).

Circumstantial Evidence Admissible. — Circumstantial evidence may be used in homicide cases to establish the cause of death and the criminal agency. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969).

Circumstances immediately connected with the killing by the defendant, the viciousness and depravity of his acts and conduct attending the killing, are evidence of malice and properly considered. State v. Fleming, 296 N.C. 559, 251 S.E.2d 430 (1979).

In a prosecution for murder in the first degree, malice on the part of defendant could be established by inference from the use of a deadly weapon and by surrounding circumstances which included two earlier assaults and the accusations concerning deceased's romantic relationship with defendant's wife. State v. Alston, 44 N.C. App. 72, 259 S.E.2d 767 (1979).

Same — Circumstantial evidence must exclude every reasonable hypothesis of innocence. See State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Same — Proof Beyond Reasonable Doubt. — The convincing effect of circumstantial evidence on the mind of the jury is measured by the same standard of intensity required of any other evidence — the jury must be convinced beyond a reasonable doubt as to every element of the crime before they find the defendant guilty of it, whether the evidence is wholly circumstantial, only partly so, or entirely direct. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Same — Admissions By Defendant. — A defendant cannot deprive the State of the right to place before the jury all the circumstances of a homicide by admitting the bare facts as to identity, the location where the body was found, its general condition and the cause of death. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Evidence of Deceased's Violent Character Is Admissible. — Where the defendant in a homicide prosecution has offered evidence tending to show self-defense, testimony by him of specific acts of violence committed by the deceased in his presence or of which the defendant had knowledge prior to the homicide is admissible to show the deceased's character as a violent and dangerous fighting man in order to permit the jury to determine whether the defendant acted under a reasonable apprehension of danger to his person or his life. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Evidence of the deceased's violent character, whether known to the defendant or not, is admissible in a homicide case where self-defense is in issue and the State's evidence is wholly circumstantial or the nature of the transaction is in doubt in order to shed light on the question of which party was the first aggressor. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978); State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

But May Not Be Based on Personal Opinion. — The trial court's actions in excluding a witness's testimony regarding specific acts of violence by the deceased which were not shown to be within defendant's knowledge prior to the homicide and striking her statements as to the deceased's violent character based solely on her personal experience were correct, since specific acts and a witness's personal opinion are not admissible to show another person's character as evidence of his conduct on a particular occasion. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

And evidence as to the general moral character of the deceased is not admissible in a prosecution for homicide. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), cert. denied, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973).

Defendant's Statements Admissible. — In the prosecution of a 16 year old boy for second-degree murder, statements given by defendant to investigating officers prior to his arrest were admissible, since no fact brought out on voir dire examination indicated that defendant was not clearly informed of his rights or that he did not understand his rights and did not waive his right to remain silent, to have the advice and presence of a lawyer, or to have a parent present, and defendant gave his statement freely and voluntarily without fear and without

promise of favor. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Expert Medical Testimony. — Testimony of a physician in a prosecution for the murder of a two-year-old child that the bruises on the child's chest did not form the typical bruising pattern normally sustained by children in day-to-day activities, and the opinion of another physician that the child was a "battered" child, and his explanation of that term, were well within the bounds of permissible expert medical testimony. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

In a prosecution of defendant for the murder of his 18-month-old step-daughter, the trial court did not err in admitting the testimony of three doctors who opined that decedent's injury was probably not caused by a fall down a flight of stairs, since all three medical experts were in a better position to have an opinion on the cause of the deceased's injuries than the jury because of their medical training and their experience in observing and treating skull fractures; the witnesses stated only their opinions as to the possibilities, not the certainties, of the cause of deceased's injuries; and none of the three experts made any statement as to their opinion of defendant's guilt or innocence. State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980).

In a prosecution for first-degree murder, the trial court did not err in allowing an expert witness to testify that bite marks appearing on the victim's body were made by defendant's teeth, since the expert witness did not rely on untested methods or unproved hypotheses but applied scientifically established techniques of dentistry and photography to determine whether the bite marks were caused by defendant's teeth. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Evidence of Killing in Perpetration of Rape. — In a prosecution for murder in the first degree, testimony that in his voluntary confession defendant stated he entered deceased's house to rape her was competent to show that killing was done in perpetration or attempt to perpetrate rape, which constitutes murder in first degree without proof of premeditation and deliberation. State v. King, 226 N.C. 241, 37 S.E.2d 684 (1946).

Evidence of Killing in Perpetration of Robbery. — Evidence tending to show that the prisoner killed the deceased in the perpetration or attempt to perpetrate a robbery is expressly made competent by this section and may be considered by the jury in determining the degree of crime, and whether the accused committed the highest felony or one of lower degree. State v. Westmoreland, 181 N.C. 590, 107 S.E. 438 (1921).

Evidence of the defendant's participation in a prior armed robbery is admissible for the purpose of showing intent in a prosecution for murder committed during the perpetration or attempted perpetration of a robbery. State v. May, 292 N.C. 644, 235 S.E.2d 178, cert. denied, 434 U.S. 928, 98 S. Ct. 414, 54 L. Ed. 2d 288 (1977).

Evidence of Prior Abuse of Victim. — Evidence that, on various occasions during approximately three and one-half years prior to her death, defendant had intentionally inflicted personal injuries upon his wife was admissible as bearing on intent, malice, motive, premeditation and deliberation on the part of the prisoner. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

Ordinarily, the eye of suspicion cannot turn upon the husband as the murder of his wife; and when charged upon him, in the absence of positive proof, strong and convincing evidence — evidence that leaves no doubt on the mind that he had towards her that mala mens which alone could lead him to perpetrate the crime — is always material. How else could this be done than by showing his acts toward her, the manner in which he treated her, and the declarations of his malignity? In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of his feelings. A single expression and a single act of violence are most frequently the result of temporary passion, as evanescent as the cause producing them. But a long continued course of brutal conduct shows a settled state of feeling inimical to the object. Malice may be proved as well by previous acts as by previous threats, and often much more satisfactorily. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969).

In a prosecution for second-degree murder, the acts of the defendant which tended to show child abuse also tended to show intent and design of the defendant with respect to the death of the child and were competent in evidence. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 2d 382 (1979).

In a prosecution for second-degree murder, the victim was a five-year-old child who died as a result of injuries to her head which could have been caused by a beating administered on one or several occasions by the defendant, previous acts of physical abuse were competent to show defendant's predisposition to commit the violent act complained of in the indictment. Moreover, the evidence of child abuse was competent to show the state of mind necessary to establish malice, an essential element of second-degree murder. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 2d 382 (1979).

Evidence of Private Prosecution. — In first-degree murder prosecution, the court erred in excluding the evidence that wife of deceased had employed private prosecution in the case. State v. White, 286 N.C. 395, 211 S.E.2d 445 (1975).

Evidence of threats is admissible and may be offered as tending to show premeditation and deliberation, and previous express malice, which are necessary to convict of murder in the first degree. State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

Evidence of threats against the victim are admissible in evidence to show premeditation and deliberation. State v. Reams, 277 N.C. 391, 178 S.E.2d 65 (1970), cert. denied, 404 U.S. 840, 92 S. Ct. 133, 30 L. Ed. 2d 74 (1971).

In homicide cases, threats by the accused have always been freely admitted either to identify him as the killer or to disprove accident or justification, or to show premeditation and deliberation. Remoteness in time of the threat does not render the evidence incompetent but goes only to its weight. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

Evidence of threats by the defendant in a homicide prosecution is freely admissible to show premeditation and deliberation. Moreover, mere remoteness in time between the utterance of a threat and the commission of the crime ordinarily goes only to its weight and effect as evidence, rather than to its competence. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978).

Same — General threats to kill not shown to have any reference to deceased are not admissible in evidence, but a threat to kill or injure someone not definitely designated is admissible in evidence where other facts adduced give individuation to it. State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

And Uncommunicated Threats May Be Admissible. — Generally speaking, uncommunicated threats are not admissible in homicide cases. But there are exceptions to the rule which must be considered in the light of the facts of the particular case. Such exceptions occur where the evidence has an explanatory bearing on the plea of self-defense. State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).

It is now generally recognized that in trials for homicide uncommunicated threats are admissible where they tend to throw light on the occurrence and aid the jury to a correct interpretation of the same, and there is testimony ultra sufficient to carry the case to the jury tending to show that the killing may have been done from a principle of self-preservation. State v. Hurdle, 5 N.C. App. 610, 169 S.E.2d 17 (1969).

Evidence bearing upon the atrocity of the offense and the callous disregard exhibited by the defendant toward the victim is especially relevant and material when the punishment to be imposed is to be fixed by the jury in its discretion. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Use of Hypnosis to Assist Recollection of Witness. — The circumstance that a witness was hypnotized prior to a murder trial in order to assist her recollection would bear upon the credibility of her testimony concerning the occurrences observed and heard by her at the time of the murders, but would not render her testimony incompetent where nothing in the record indicates that the witness was under hypnosis at the time of her testimony in court. State v. McQueen, 295 N.C. 96, 244 S.E.2d 414 (1978).

2. Physical Evidence.

Real Evidence Must Be Properly Identified. — Any evidence which is relevant to the trial of a criminal action is admissible but when real evidence (i.e., the object itself) is offered into evidence, it must be properly identified and offered. State v. Winford, 279 N.C. 58, 181 S.E.2d 423 (1971).

Clothing Admissible. — The admission in evidence of the articles of clothing found upon a murder victim's body was not error, where the location of the bullet holes in her dress and the presence thereon of stains, identified by an expert witness as powder burns, were material and tended to show that when the shots were fired the pistol was held close to the victim's body. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the circumstances of the crime. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

In a prosecution for first-degree murder the clothing of deceased is admissible if its appearance throws any light on the circumstances of the crime. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

The clothing of the deceased worn at the time of a homicide is another circumstance showing the manner of the killing. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Evidence of Fingerprints of Codefendant Admissible. — In the prosecution of two defendants for armed robbery and murder, there was no merit to one defendant's contention that the

trial court erred in admitting evidence of fingerprints of a codefendant found on the murder weapon as well as cards containing his fingerprints which were never linked to the murder weapon since the evidence of the fingerprints was relevant because the state proceeded upon a theory of acting in concert, and, in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

"Fruit" of Plain View Search Admissible. — In a prosecution for first-degree murder, where a State trooper had stopped defendants' car for reckless driving and had subsequently observed the butt of a revolver protruding from under the center armrest, the revolver was properly admissible in evidence as the fruit of a lawful warrantless "plain view" seizure under circumstances requiring no search. State v. Smith, 289 N.C. 143, 221 S.E.2d 247 (1976).

Nontestimonial Identification Admissible. — In a prosecution for first-degree murder the trial court's denial of defendant's motion to suppress nontestimonial identification evidence was without error where, pursuant to an order of the trial court, fingernail scrapings, samples of defendant's head and pubic hair, saliva samples, blood samples, and photographs of any wounds on defendant's body were taken; the order stated defendant's right to counsel; the State stipulated that nothing defendant said during the procedure would be offered into evidence; defendant was fully advised of his constitutional right to the presence of counsel; and the State was not in violation of any provision under Ch. 15A, Art. 14, by not procuring an express waiver from defendant, as the statute does not require an express waiver of the right to have counsel present at a nontestimonial identification procedure. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

Photographs Are Admissible. — In a prosecution under this section, where photographs are identified as accurate representations of the scene of the crime by the witness, the photographs are competent in evidence for the purpose of enabling the witness to explain his testimony, and a general objection to the admission of the photographs in evidence cannot be sustained. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964).

There was no error in the admission of the two photographs of the body of a murder victim, the court instructing the jury that they were to be considered solely for the purpose of illustrating the testimony of the witness. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

In a prosecution for first-degree murder a photograph is admissible for the purpose of illustrating the testimony of the doctor who examined the deceased. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

Despite Defendant's Admissions. — Photographs of the victim's body and articles of clothing found upon it were competent notwithstanding the admission by the defendant, through his counsel, in open court, that the body was that of the victim, that it was discovered in a wooded area, partially hidden under boards and an old quilt and in a state of decomposition, and that the cause of death was five gunshot wounds in the abdomen. Notwithstanding these admissions, the circumstances with reference to the shooting of the deceased and the disposition of her body were material upon the question of the degree of the homicide and the decision as to the punishment to be inflicted, if the jury should find the defendant guilty of murder in the first degree. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

In a prosecution for first-degree murder, photographs of deceased and the clothing of deceased are admissible despite defendant's contention that since he did not controvert the killing, the photographs and clothing were prejudicial and inflammatory, since the burden was still on the State to prove its case beyond a reasonable doubt so as to convince the jury that there had been an unlawful killing with malice and that the circumstances of the killing justified a finding of premeditation, deliberation and a specific intent to kill. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

And Regardless of Their Gruesome Character. — If a photograph is relevant and material, the fact that it is gory or gruesome, and thus may tend to arouse prejudice, will not alone render it inadmissible. State v. Mercer, 275 N.C. 108, 165, S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975).

In a prosecution for homicide, photographs showing the condition of the body when found, the location where found, and the surrounding conditions at the time the body was found are not rendered incompetent by their portrayal of the gruesome spectacle and horrifying events which the witness testifies they accurately portray. State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969), death sentence rev'd, Atkinson v. North Carolina, 403 U.S. 948, 91 S. Ct. 2283, 29 L. Ed. 2d 859 (1971); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence, when properly authenticated. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

In a prosecution for second-degree murder or involuntary manslaughter photographs depicting the way deceased looked at the hospital the night he died are not inadmissible because they were not made at the time of the event, or because they are gory or gruesome. State v. Cox, 289 N.C. 414, 222 S.E.2d 246 (1976).

In a prosecution for first-degree murder the fact that a photograph depicts a gruesome scene does not render it incompetent. State v. Williams, 289 N.C. 439, 222 S.E.2d 242, death sentence vacated, 429 U.S. 809, 97 S. Ct. 45, 50 L. Ed. 2d 69 (1976).

But Photographs Should Not Be Repetitive. — Where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors. State v. Mercer, 275 N.C. 108, 165 S.E.2d 328 (1969), overruled on other grounds, State v. Caddell, 287 N.C. 266, 215 S.E.2d 348 (1975).

And Photographs of Body in Casket Are Not Admissible. — The trial court erred in a first-degree murder case in allowing the jury to be shown certain photographs of the victim's body lying in a casket but such error was harmless beyond a reasonable doubt in view of the overwhelming evidence of defendant's guilt. State v. Temple, 302 N.C. 1, 273 S.E.2d 273 (1981).

F. Sufficiency of Evidence.

1. First-Degree Murder.

In General — Preliminary Question to Be Determined by Court. — In a first-degree murder prosecution, the trial court must determine the preliminary question whether the evidence, in its light most favorable to the State, is sufficient to permit the jury to make a legitimate inference and finding that the defendant, after premeditation and deliberation, formed a fixed purpose to kill and thereafter accomplished the purpose. State v. Walters, 275 N.C. 615, 170 S.E.2d 484 (1969).

Same — Evidence Held Sufficient. — Testimony of facts and circumstances which occurred after the commission of a homicide which tended to show a preconceived plan formed and carried out by the prisoner in detail, resulting in his actual killing of the deceased by two pistol shots, without excuse, with evidence that he had thereafter stated he had done as he had intended, was competent upon the question of deliberation and premeditation, under the evidence in the case, to sustain a verdict of murder in the first degree. State v. Westmoreland, 181 N.C. 590, 107 S.E. 438 (1921).

State's evidence was sufficient to justify overruling motion for judgment of nonsuit and to submit to the jury the question as to whether or not defendant killed the deceased with malice and premeditation and deliberation. See State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

Evidence held sufficient to permit the jury to make a legitimate inference of premeditation and deliberation. State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2290, 29 L. Ed. 2d 860 (1971).

Where there is no evidence that the deceased had any weapon or at any time offered any threat to defendant, the want of provocation, absence of any excuse or justification, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation and was sufficient to be submitted to the jury on the issue of murder in the first degree. State v. Duncan, 282 N.C. 412, 193 S.E.2d 65 (1972).

The want of provocation, the absence of any excuse or justification for the shooting, the number of shots fired or attempted to be fired, the fact that defendant ran immediately after the shooting, coupled with the other evidence, permitted a legitimate inference of premeditation and deliberation, and was sufficient to be submitted to the jury on the issue of murder in the first degree. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976).

Where defendant was not harmed by the victim in any way and did not believe he would have had any difficulty in defending himself against her, and the victim's death was an unnecessary and senseless killing; where the 55 stab wounds constituted grossly excessive force; and where force which would have been lethal had the victim not already been dead was applied when an automobile was driven over her felled body, the evidence was sufficient to take the issue of defendant's guilt of first-degree murder to the jury. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

In a prosecution for first-degree murder, the evidence was sufficient to withstand a motion for nonsuit where it tended to show that deceased died as a result of a gunshot wound inflicted by a shot fired from a trailer, defendant, a short time before the shooting, had test fired a 12 gauge shotgun, 12 gauge shotgun

wadding was found in a straight line between the trailer and the bodies after the shooting, a freshly-fired 12 gauge shotgun was later found in defendant's house hidden between the quilts and mattress of the bed and defendant was the only person in the trailer when the fatal shots were fired. State v. McCall, 289 N.C. 512, 223 S.E.2d 303, death sentence vacated, 429 U.S. 912, 97 S. Ct. 301, 50 L. Ed. 2d 278 (1976).

A motion for nonsuit of a first-degree murder charge must be denied if there is evidence tending to show an unlawful killing of a human being with malice and with premeditation and deliberation. State v. Barbour, 295 N.C. 66, 243 S.E.2d 380 (1978).

Conspiracy to Murder. — State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of conspiracy to commit murder where there was evidence that defendant had discussed the murder with another and the means by which it might be accomplished, that defendant sent the coconspirator a picture of the victim for identification purposes, that defendant sent sums of money to the coconspirator, and that after an unsuccessful attempt was made upon the victim's life, defendant had stated to a friend, who had introduced her to the coconspirator, that the coconspirator knew somebody who would "finish the job." State v. Graham, 24 N.C. App. 591, 211 S.E.2d 805, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

A murder perpetrated by means of poison. — In a prosecution for first-degree murder by poison, the evidence was sufficient to withstand motions for directed verdict and for judgment of nonsuit, where defendant purchased rat poison with intent to kill deceased and, pursuant to a preconceived plan to do so, defendant poured it into tea prepared specially for deceased's consumption, deceased drank the tea and almost immediately became ill and died. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Evidence sufficient to take first-degree murder by poison case to jury. See State v. Detter, 298 N.C. 604, 260 S.E.2d 567 (1979).

Felony-Murder — Killing in Perpetration of Arson. — Evidence tending to show that defendant perpetrated or attempted to perpetrate the crime of arson upon a dwelling house, and thereby proximately caused the deaths of the occupants, was sufficient to be submitted to the jury on the charge of murder in the first degree. State v. Anderson, 228 N.C. 720, 47 S.E.2d 1 (1948).

Same — Killing in Perpetration of Rape. — The confession of defendant that while he was having sexual intercourse with an eight-year-old child, she started to scream and that he put his hand over her mouth; that when he took his hand off her mouth she spoke once and said nothing more; that he believed her to be dead and carried away and hid her body; with corroborating evidence that deceased was last seen with defendant, and that her body was found at the place where defendant said he placed it; with expert medical testimony of the use of force and violence in the penetration of deceased's vagina; and that death resulted from suffocation from the bursting of air sacs in deceased's lungs, was held sufficient to be submitted to the jury and sustain a conviction of murder in the first degree. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Same — Killing in Perpetration of Robbery. — Evidence tending to show that the prisoner with another entered a store with intent to rob its cash drawer, and shot and killed the deceased is of an attempt to commit a felony and sufficient to sustain a verdict of murder in the first degree, as defined by this section, under proper instructions from the court thereon upon conflicting evidence. State v. Sterling, 200 N.C. 18, 156 S.E. 96 (1930).

Where upon a trial for murder all the evidence and inferences therefrom unquestionably tended to show that the deceased was killed by one lying in wait and for the purpose of robbery, with evidence tending to establish that the defendant had perpetrated the crime, and there was no evidence in mitigation of the offense, the evidence established the crime of murder in the first degree under this section, and an instruction to the jury either to convict the defendant of murder in the first degree, or to acquit him was not error. State v. Myers, 202 N.C. 351, 162 S.E. 764 (1932).

Where all the evidence for the State tends to show that the defendants killed the deceased while attempting to rob him, the crime is murder in the first degree, under this section, and the failure of the trial court to submit the issue of guilty of murder in the second degree is not error. State v. Donnell, 202 N.C. 782, 164 S.E. 352 (1932). See State v. Brown, 231 N.C. 152, 56 S.E.2d 441 (1949).

Evidence tending to show that defendant killed the deceased with a deadly weapon while attempting to perpetrate a robbery is sufficient to be submitted to the jury on the issue of first degree murder, the credibility and probative force of the evidence being for the jury. State v. Langley, 204 N.C. 687, 169 S.E. 705 (1933).

Evidence tending to show that the defendant on trial for a homicide drove to a filling station at night with two others for the purpose of robbery, that defendant waited outside in the car while his companions went into the filling station and that deceased was killed by a shot from a gun fired from the outside, was sufficient to be submitted to the jury on the question of defendant's guilt of murder in the first degree as stated in this section. State v. Ferrell, 205 N.C. 640, 172 S.E. 186 (1934).

Evidence that defendant, while in the custody of officers of the law who had arrested him when they apprehended him in the commission of a robbery, drew his pistol in an attempt to escape, and with premeditation and deliberation shot one of the officers in his attempt to escape, is sufficient to support an instruction to the jury on the question of murder in the first degree. State v. Brooks, 206 N.C. 113, 172 S.E. 879 (1934).

Evidence tending to show that defendants conspired to rob deceased and that they killed him with deadly weapons in the perpetration of the robbery was sufficient to take the issue of their guilt of murder in the first degree to the jury. State v. Chavis, 231 N.C. 307, 56 S.E.2d 678 (1949).

In a prosecution for first-degree murder, where defendant admitted to State's witness that he and his brother had a blunt instrument and a knife when they decided to rob decedent, and evidence showed that decedent died of injuries inflicted by both blunt and sharp objects, the evidence was sufficient to withstand a motion for nonsuit even though defendant's admissions did not include the actual use of the weapons against decedent. State v. Warren, 289 N.C. 551, 223 S.E.2d 317 (1976).

In a prosecution for murder committed during perpetration of an armed robbery and for conspiracy to commit armed robbery, the proof of murder in the first degree is complete when the State proves beyond a reasonable doubt that the trigger man shot and killed the victim in the trigger man's attempt to rob him. State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3209, 49 L. Ed. 2d 1209 (1976).

Where the evidence, taken in the light most favorable to the State, permits a legitimate inference that defendant was engaged in the perpetration or attempted perpetration of a robbery at the time the deceased was killed, the jury is entitled to draw this inference, notwithstanding the State's introduction of defendant's extrajudicial declarations in which he states he killed in self-defense rather than in the course of a robbery. State v. Wooten, 295 N.C. 378, 245 S.E.2d 699 (1978).

If there is evidence tending to show that defendant took property belonging to the deceased immediately after killing him, such evidence would support a jury determination that the killing occurred during the perpetration of a robbery. State v. Wooten, 295 N.C. 378, 245 S.E.2d 699 (1978).

2. Second-Degree Murder.

Evidence Sufficient. — See State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964).

A general motion to nonsuit is properly refused where the evidence is sufficient to support conviction of any one of the degrees of homicide. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969).

As to evidence of second-degree murder sufficient for jury, see State v. McCain, 6 N.C. App. 558, 170 S.E.2d 531 (1969).

The evidence was sufficient to be submitted to the jury in a second-degree murder prosecution where it tended to show that the defendant and the deceased were imprisoned in the same prison unit, that a prison guard saw them arguing and broke them up, that later the guard saw defendant approach deceased who was lying on his bunk and make a striking movement toward the deceased's body, that although the guard saw no knife or other weapon in defendant's hand, a small knife was later discovered in a heater and deceased had died from a stab wound in the chest. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

The state's evidence is sufficient to be submitted to the jury on the issue of defendant's guilt of murder in the second degree where as here it tends to show that the defendant intentionally inflicted a wound with a deadly weapon which caused deceased's death. State v. Moore, 46 N.C. App. 563, 265 S.E.2d 421 (1980).

The State's evidence was sufficient to support defendant's conviction of second-degree murder where it tended to show that the victim entered a car occupied by defendant and defendant's companion in order to sell defendant a stolen M-16 rifle; the victim was seated in the front seat and defendant was seated in the back seat; defendant told the victim he had to pick up the money for the rifle at a friend's house; as the car was being driven by defendant's companion, defendant shot the victim in the head with a pistol which belonged to the girlfriend of the defendant's companion; defendant threatened to shoot his companion unless he followed defendant's orders, whereupon the companion assisted defendant in burying the body; and a search of the residence of defendant and his companion uncovered the M-16 rifle. State v. Fletcher, 301 N.C. 709, 272 S.E.2d 859 (1981).

The State's evidence was sufficient to support convictions of defendants for second-degree murder where it tended to show that the victim, a State's witness, and another person were standing in the front yard of the witness's house at 4:00 A.M.; the witness heard a vehicle approaching the house, and heard one defendant screaming at him; the witness saw such defendant driving a pickup truck on the road in front of the house and saw the second defendant firing a gun from the back of the pickup; after passing the house, the pickup turned around and drove by the house again, at which time the second defendant fired several more shots; and the victim sustained a gunshot wound in the

neck and died as a result thereof. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981).

Evidence Insufficient to Support Murder Charge. — Where the State's evidence established a brutal murder, showed that defendant had the opportunity to commit it and raised suspicion in imaginative minds, it did not suffice to sustain a conviction. State v. Jones, 280 N.C. 60, 184 S.E.2d 862 (1971).

Where the evidence showed that defendant wanted his wife dead, that he actively sought her death, and that he harbored great hostility toward her; this, without more, was not enough to permit a jury to find that he killed her. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Where the evidence might support a reasonable inference that defendant was responsible for his wife's death and that he procured someone to murder her, these facts alone would not make defendant guilty of murder. State v. Furr, 292 N.C. 711, 235 S.E.2d 193, cert. denied, 434 U.S. 924, 98 S. Ct. 402, 54 L. Ed. 2d 281 (1977).

Evidence of motive, standing alone, is insufficient to support a conviction for murder. State v. Lee, 34 N.C. App. 106, 237 S.E.2d 315 (1977), aff'd, 294 N.C. 299, 240 S.E.2d 449 (1978).

Evidence was insufficient to be submitted to the jury on charges of second-degree murder and voluntary manslaughter but was sufficient to be submitted on the charge of involuntary manslaugher where the evidence tended to show that defendant, a 16 year old boy, shot his 10 year old sister, but in showing the events leading up to and preceding the death of the sister, the State relied entirely on voluntary statements of defendant to the effect that he and his sister were fussing; defendant was "messing around with a shotgun"; and the gun accidentally went off. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Causal Connection between Assault and Death. — Nonexpert testimony, even without an opinion as to the cause of death, can establish a causal connection between an assault and death sufficient to take the State's case to the jury. State v. Luther, 21 N.C. App. 13, 203 S.E.2d 343, aff'd, 285 N.C. 570, 206 S.E.2d 238 (1974).

3. Defenses.

Evidence Insufficient to Support Defense of Accidental Death. — Evidence in a prosecution for second-degree murder that defendant did not intend for the bullet to strike the victim but that he intended to fire to the right of his head for the purpose of scaring him did not present the defense of death by accident. State v. Walker, 34 N.C. App. 485, 238 S.E.2d 666 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 847 (1978).

Evidence Insufficient to Support Defense of Intoxication. — Where the evidence tends to show that defendant was drinking heavily but there is no evidence tending to show that defendant did not know what he was doing, both in the planning and the execution of the crime which he consummated, then the evidence is not sufficient to make available to him the defense of intoxication. State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2875, 33 L. Ed. 2d 762 (1972).

G. Instructions to Jury.

1. Instructions Concerning Degree of Offense Charged.

Where Jury May Be Instructed to Return Verdict of First-Degree Murder or Not Guilty. — Where all the evidence is to the effect that a murder was committed in the perpetration of a robbery, it is not error for the court to limit the jury to a verdict of guilty of murder in the first degree or not guilty under this section. State v. Gosnell, 208 N.C. 401, 181 S.E. 323 (1935).

It is only in cases where all of the evidence tends to show that the homicide was committed by means of poison, lying in wait, imprisonment, starving, torture, or in the perpetration or attempt to perpetrate a felony, that the trial judge can instruct the jury that they must return a verdict of murder in the first degree or not guilty. State v. Perry, 209 N.C. 604, 184 S.E. 545 (1936).

Where there was abundant evidence tending to establish that homicide was committed in the perpetration of capital felony rape, and that defendant was the one who committed the offense, and no element of murder in the second degree or manslaughter was made to appear, court properly limited the possible verdicts to guilty of murder in first degree or not guilty. State v. Mays, 225 N.C. 486, 35 S.E.2d 494 (1945); State v. Scales, 242 N.C. 400, 87 S.E.2d 916 (1955).

Where evidence tends to show murder committed in the perpetration of robbery pursuant to a conspiracy and that both defendants were present and participated in the crime, the court properly limited the jury to verdicts of guilty of murder in the first degree or not guilty. State v. Matthews, 226 N.C. 639, 39 S.E.2d 819 (1946).

A murder committed in the perpetration or attempted commission of the felony of kidnapping or holding a human being for ransom constitutes murder in the first degree and an instruction to this effect upon supporting evidence cannot be held for error. State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949).

In those cases in which the State proves a murder committed by one of the means stated in this section, or in the perpetration or attempted perpetration of a felony, an instruction to the jury to return a verdict of murder in the first degree or not guilty is proper; provided, that there is no evidence, or any inference deducible therefrom, tending to show a lesser offense. State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976).

Where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of "guilty of murder in the first degree," if they are satisfied beyond a reasonable doubt, or of "not guilty." State v. Smith, 294 N.C. 365, 241 S.E.2d 674 (1978).

When Jury Must Be Instructed on Lesser Included Offense. — Where any view of the evidence would justify a verdict of guilty of manslaughter, it is error if the court does not submit to the jury an instruction on this lesser degree of the crime. State v. Manning, 251 N.C. 1, 110 S.E.2d 474 (1959).

In a prosecution charging a defendant with the slaying of a person, the issue of defendant's guilt of second-degree murder or of manslaughter is properly submitted to the jury. State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971).

The judge is required to declare and explain the law arising on the evidence. It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence in the case. It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there is no basis for submission of manslaughter to the jury, it was the duty of the judge to instruct it accordingly. State v. Duboise, 279 N.C. 73, 181 S.E.2d 393 (1971).

The trial judge is required to instruct the jury on the lesser included offense of manslaughter only where there is evidence which would sustain such a verdict. It is not error to omit a charge on manslaughter where there is no evidence of manslaughter. State v. Mays, 14 N.C. App. 90, 187 S.E.2d 479, cert. denied, 281 N.C. 157, 188 S.E.2d 366 (1972).

The trial judge must instruct the jury as to involuntary manslaughter when the crime charged is second-degree murder if there is evidence from which the jury could find that the defendant committed the lesser offense. State v. Redfern, 291 N.C. 319, 230 S.E.2d 152 (1976).

The necessity for instructing the jury as to an included crime of lesser degree, such as manslaughter, than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977).

In all cases in which the State relies upon premeditation and deliberation to support a first-degree murder conviction, the court must submit the issue of second-degree murder. State v. Hammond, 34 N.C. App. 390, 238 S.E.2d 198 (1977).

In a prosecution for first-degree murder, instructions on a lesser included offense of manslaughter are required only when there is evidence from which the jury could find that such included crime of lesser degree was committed. State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977).

In all cases in which the State relies upon premeditation and deliberation to support a conviction of murder in the first degree, the trial court must submit to the jury an issue of murder in the second degree. This requirement is present because premeditation and deliberation are operations of the mind which must always be proved, if at all, by circumstantial evidence. If the jury chooses not to infer the presence of premeditation and deliberation, it should be given the alternative of finding the defendant guilty of second-degree murder. State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

Defendant is entitled to have a lesser included offense submitted to the jury under the proper instruction but only when there is evidence to support that lesser included offense. State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980).

Same — Instruction Required. — Where the evidence offered by defendant, if believed by the jury, was sufficient to support a verdict of involuntary manslaughter, which is a lesser degree of the crime charged in the bill of indictment, the court erred in excluding it from the list of permissible verdicts. State v. Wrenn, 279 N.C. 676, 185 S.E.2d 129 (1971).

In a prosecution for first-degree murder in which the defendant was found guilty of voluntary manslaughter, the trial judge erred in failing to instruct the jury on involuntary manslaughter where the defendant's testimony was, in its entirety, an account of an unintentional killing. State v. Graham, 38 N.C. App. 86, 247 S.E.2d 300 (1978).

In a prosecution for first-degree murder, where there is some evidence from which the jury could infer that the defendant killed the victim without premeditation and deliberation, it was error for the trial court not to instruct on second-degree murder since the jury should be instructed on a lesser included offense when there is evidence from which the jury could find

that such lesser included offense was committed. Error in failing to submit the question of defendant's guilt of a lesser degree of the same crime is not cured by a verdict of guilty of the offense charged because it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly submitted to the jury. State v. Poole, 298 N.C. 254, 258 S.E.2d 339 (1979).

Same — Instruction Not Required. — There being no evidence in the record to sustain a verdict of manslaughter, it was not error for the court to omit manslaughter from the possible verdicts which the jury might return. State v. Vestal, 278 N.C. 561, 180 S.E.2d 755 (1971), cert. denied, 414 U.S. 874, 94 S. Ct. 157, 38 L. Ed. 2d 114 (1973).

Court's failure to instruct the jury that involuntary manslaughter was one of their possible verdicts was not error where all of the evidence showed that defendant took a pistol from his back pocket and shot his victim twice after the defendant, a customer, had gotten into a dispute with the victim, a storekeeper, during the course of which the victim ordered defendant out of his store, advanced upon defendant, and hit him with a "billy club," and where none of the evidence suggests that the two shots fired by defendant were fired involuntarily or by reason of culpable negligence. State v. Credle, 18 N.C. App. 142, 196 S.E.2d 289 (1973).

In prosecution for second-degree murder, where there was no evidence of just cause or reasonable provocation for the homicide, nor was there evidence of self-defense, unavoidable accident or misadventure, defendant's self-serving declarations alone were not sufficient to rebut the presumption of malice arising in the case, and the trial court did not err in failing to instruct on manslaughter as a lesser included offense. State v. Mull, 24 N.C. App. 502, 211 S.E.2d 515 (1975).

When all the evidence tends to show that the accused committed second-degree murder and there is no evidence of guilt of involuntary manslaughter, the court correctly refuses to charge on the unsupported lesser offense. The presence of such evidence is the determinative factor. State v. Redfern, 291 N.C. 319, 230 S.E.2d 152 (1976).

Where, in a prosecution for second-degree murder, there is no evidence that defendant killed under the heat of passion raised by sudden provocation and nothing that raises the issue of self-defense, a possible verdict of voluntary manslaughter should not be submitted. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

In a prosecution for second-degree murder involving the death of a child from the so-called "battered child" syndrome, where there was a great disparity in age and size between the victim and her slayer, and particularly where the slayer stood in loco parentis with the child, as a matter of law adequate provocation could not be found to exist so as to justify submission of voluntary manslaughter where the evidence showed that the defendant beat and abused a child unto its death. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L. Ed. 2d 382 (1979).

The trial court in a second-degree murder case did not err in failing to charge the jury that it might find defendant, who offered no evidence in his own behalf, guilty of voluntary manslaughter, since evidence presented by the State tended to show that defendant was guilty of murder if he was guilty of anything, and evidence presented by a codefendant tended to show that defendant was not guilty of anything. State v. Gadsden, 300 N.C. 345, 266 S.E.2d 665 (1980).

Where the evidence tends to show that the defendant committed the crime charged and there is no evidence of a lesser included offense, the trial court is correct in not charging on the lesser included offense. State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980).

Same — Felony Murder. — Although it is rarely the case where the felony-murder statute applies that the jury should be permitted to consider a lesser degree of homicide than murder in the first degree, if, however, there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial court, under appropriate instructions, to submit that view to the jury. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958).

While the evidence was sufficient to support the theory of murder committed in the attempted perpetration of the felony of rape and also supported the inference that defendant did not intend to commit rape but sought to have intercourse with his victim on a voluntary basis and that his assault upon her was precipitated when she struck at him while she was trying to drive him from the house, it was the duty of the court upon such evidence to submit the question of defendant's guilt of murder in the second degree, in addition to the question of defendant's guilt of murder in the first degree, or not guilty. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958).

When all of the evidence tended to show that defendant killed deceased in the perpetration of rape, without evidence of guilt of a less degree of the crime, the court correctly refrained from submitting the question of defendant's guilt of murder in the second degree. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

It is a well-established rule that when the law and evidence justify the use of the felony-murder rule, the court is not required to

submit to the jury second-degree murder or manslaughter unless there is evidence to support it. State v. Warren, 292 N.C. 235, 232 S.E.2d 419 (1977).

Same — Submission Prejudicial Error. — If there is evidence of self-defense and no evidence of involuntary manslaughter, it is prejudicial error to submit a charge of involuntary manslaughter in a trial for second-degree murder. State v. Brooks, 46 N.C. App. 833, 266 S.E.2d 3 (1980).

Submission of Question of Greater Offense. — Where the jury convicts the defendant of murder in the second degree, asserted error in submitting the question of defendant's guilt of murder in the first degree is rendered harmless. State v. Casper, 256 N.C. 99, 122 S.E.2d 805 (1961), cert. denied, 376 U.S. 927, 84 S. Ct. 691, 11 L. Ed. 2d 622 (1964).

The submission of a question regarding the guilt of a defendant of murder in the second degree becomes harmless when the jury returns a verdict of manslaughter. State v. Bryant, 282 N.C. 92, 191 S.E.2d 745 (1972), cert. denied, 410 U.S. 958, 93 S. Ct. 1432, 35 L. Ed. 2d 691 (1973); State v. Chavis, 30 N.C. 75, 226 S.E.2d 389, cert. denied, 290 N.C. 778, 229 S.E.2d 33 (1976).

Where defendant contends that the State introduced no evidence of first-degree murder but defendant was found guilty of the lesser offense of murder in the second degree, any error which might have occurred by the submission of the issue for the greater offense was thereby cured. State v. Hamilton, 19 N.C. App. 436, 199 S.E.2d 159, cert. denied, 284 N.C. 256, 200 S.E.2d 656 (1973).

Defendant's conviction of voluntary manslaughter would render harmless an error, had error been committed, in submitting to the jury the question of defendant's guilt of the more serious offense, at least absent any showing that the verdict of guilty of the lesser offense was affected thereby. State v. McLamb, 20 N.C. App. 164, 200 S.E.2d 838 (1973).

2. Other Instructions.

Accident. — In a prosecution for murder and assault with a deadly weapon with intent to kill where the trial judge instructs the jury on the defense of accident it is not error if the court does not define the word "accident." State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Instruction Concerning Accomplice. — In a prosecution for murder where an accomplice testified for the State, the trial court did not error in failing to instruct the jury that the accomplice was guilty, as an accomplice, of the crime charged against defendant. State v. Keller, 50 N.C. App. 364, 273 S.E.2d 741 (1981).

Alibi Instruction Not Required. — In prosecution for first-degree murder, where the record shows that the crime was committed on a certain corner at a specified time, and defendant testified that he was on that corner at that time, there was insufficient evidence to require instruction on alibi even had there been a special request for it. State v. Waddell, 289 N.C. 19, 220 S.E.2d 293 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1210 (1976).

Instruction on Burden of Proof of Unlawful Killing. — Where the prisoner is on trial for murder in the first degree, burglary and rape, and there is evidence to support a verdict for each of these offenses, an instruction is proper, and in keeping with the language of this section, when construed as a whole, that the burden of proof was on the State to show beyond a reasonable doubt an unlawful killing with malice and with premeditation and deliberation or murder committed in the perpetration, or attempt to perpetrate, other felonies named. State v. Walker, 193 N.C. 489, 137 S.E. 429 (1927).

Instructions placing the burden on defendant (1) to show circumstances that would reduce the offense from second-degree murder to manslaughter and (2) to justify the killing on ground of self-defense were erroneous in view of Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), and State v. Hankerson, 288 N.C. 632, 220 S.E.2d 575 (1975), rev'd on other grounds, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977); State v. McLaurin, 33 N.C. App. 589, 235 S.E.2d 871 (1977).

An instruction placing the burden on petitioner to satisfy the jury of the absence of malice, or that the killing was committed in self-defense, is constitutional error unless the court should find that there was no evidence to support verdicts of either manslaughter or not guilty, or the instruction was otherwise harmless error beyond a reasonable doubt. Gardner v. Forister, 468 F. Supp. 761 (W.D.N.C. 1979).

The question whether evidence is sufficient to raise a reasonable doubt is always for the jury under proper instructions from the court. The instructions should, however, be put in terms of the State's burden to prove every element beyond a reasonable doubt, not defendant's burden to raise a reasonable doubt since defendant has no such burden. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

Trial judge's charge to jury in prosecution for first-degree murder placing burden on defendant to rebut presumption of malice so as to reduce the charge from second-degree murder to manslaughter was not error where all the evidence revealed a cold-blooded killing done with malice and with premeditation and deliberation, and the jury returned a verdict of murder in the first degree never reaching the questions raised as to

instructions relating to second-degree murder and manslaughter. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

Circumstantial Evidence. — While circumstantial evidence is sufficient to justify a conviction when, and only when, the circumstances proved are consistent with the hypothesis of guilt and inconsistent with every other reasonable hypothesis, no set form of words is required to be used in conveying to the jury this rule relating to the degree of proof required for conviction upon circumstantial evidence. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

No set of words is required by the law in regard to the force of circumstantial evidence. All that the law requires is that the jury shall be clearly instructed, that unless after due consideration of the evidence they are "fully satisfied" or "entirely convinced" or "satisfied beyond a reasonable doubt" of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a "formula" for the instruction of the jury, by which to "guage" the degrees of conviction, has resulted in no good. State v. Westborok, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

In the absence of a request to do so, the failure of the court to instruct the jury regarding circumstantial evidence, or as to what such evidence should show, will not be held for reversible error, if the charge is correct in all other respects as to the burden and measure of proof. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Defense of Habitation. — Under the evidence, the trial court in a second-degree murder case erred in failing to charge the jury on defense of habitation. State v. Hedgepeth, 46 N.C. App. 569, 265 S.E.2d 413 (1980).

Felony-Murder. — Where the evidence is sufficient to be submitted to the jury on the theory of defendant's guilt of murdering his victim in an attempt to commit the crime of rape under this section, but is insufficient to show defendant's guilt of the crime of kidnapping, an instruction that defendant would be guilty of murder in the first degree if the jury should find that the murder was perpetrated in the attempt to commit the crime of rape or in the commission of the felony of kidnapping, must be held prejudicial as permitting the jury to rest its verdict on a theory not supported by the evidence. State v. Knight, 248 N.C. 384, 103 S.E.2d 452 (1958).

In a case of murder in the first degree committed in the perpetration of, or attempt to perpetrate, a robbery, instruction that the jury should return a verdict of guilty as charged, guilty as charged with a recommendation for life imprisonment, or not guilty is a proper instruction. When the indictment and evidence disclose a killing in the perpetration of a robbery, only one of such verdicts may be returned. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971).

Where the evidence permits a legitimate inference that a murder was committed in perpetration of a robbery, and murder so committed is "deemed to be murder in the first degree" it is not then prejudicial error to defendant for the court to give the State's contentions and to charge the jury that a murder committed in the perpetration of a robbery will be deemed murder in the first degree. State v. Rich, 277 N.C. 333, 177 S.E.2d 422 (1970).

Where the court has consolidated first-degree murder and armed robbery charges in the same trial against defendant under § 15-152 (now § 15A-926(a)), the court may instruct the jury on murder in the first degree as a separate crime requiring deliberation, premeditation, and malice, rather than permit the jury to rely on the felony-murder rule as a basis for finding defendant guilty of first-degree murder. State v. Thompson, 285 N.C. 181, 203 S.E.2d 781, cert. denied, 419 U.S. 867, 95 S. Ct. 123, 42 L. Ed. 104 (1974).

Instruction on Insanity Properly Refused. — In the absence of any evidence of insanity, it is not error for the trial judge to refuse the defendant's request that he instruct the jury upon the law relating to insanity as a defense to the charge of murder. State v. Jones, 293 N.C. 413, 238 S.E.2d 482 (1977).

Intent to Kill. — With respect to jury instructions, the phrase "that he intended to kill" is self-explanatory, and, absent a special request for instructions from the defendant, the presiding judge was not required to supply its definition. State v. Sparks, 285 N.C. 631, 207 S.E.2d 712 (1974), death sentence vacated, 428 U.S. 905, 96 S. Ct. 3213, 49 L. Ed. 2d 1212 (1976).

Same — Mistake. — Where defendant, intending to kill a certain person, by mistake inflicts fatal injuries on another, he is guilty in the same degree as though he had killed the person intended, and therefore an instruction that if the jury should be satisfied beyond a reasonable doubt that defendant intended to kill a certain person with malice and with premeditation and deliberation and that by mistake he shot and killed deceased, defendant would be guilty of murder in the first degree, is without error. State v. Burney, 215 N.C. 598, 3 S.E.2d 24 (1939).

Same — Inability to Form Specific Intent. — The trial court did not err in instructing the jury that in order to find that defendant could

not form a specific intent to commit a felony or that the defendant was mentally incapable of premeditation and deliberation they must find that the defendant was "utterly incapable" (or "utterly unable") of forming a specific intent. State v. Griffin, 288 N.C. 437, 219 S.E.2d 48 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3210, 49 L. Ed. 2d 1210 (1976).

Intoxication. — Trial court did not err in charging that defendant's intoxication could have no bearing upon his guilt or innocence of the lesser included offenses in the charge of first-degree murder. State v. Cummings, 22 N.C. App. 452, 206 S.E.2d 781, cert. denied, 285 N.C. 760, 209 S.E.2d 284 (1974).

In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to kill, the court is not required to charge the jury thereupon. State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1208 (1976).

Instruction on Manslaughter. — Where a jury was properly instructed as to both degrees of murder and yet found defendant guilty of murder in the first degree rather than the second degree, error in the charge on manslaughter was harmless. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969); State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

But when the jury is instructed that it may find defendant guilty of murder in the first degree, murder in the second degree, manslaughter, or not guilty, and the verdict is guilty of murder in the second degree, an error in the charge on manslaughter will require a new trial. State v. Freeman, 275 N.C. 662, 170 S.E.2d 461 (1969).

In a prosecution for first-degree murder, a new trial was required where the trial judge twice and at crucial times in the charge to the jury gave an incorrect instruction as to the definition of voluntary manslaughter and related it to the evidence in a manner which would not disclose patent error to the average juror, despite the fact that the trial judge properly defined voluntary manslaughter in another portion of the charge. State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976).

Instruction as to Right to Consider Eligibility to Parole. — When, in a prosecution for murder in the first degree, the question of eligibility for parole arises spontaneously during the deliberations of the jury and is brought to the attention of the court by independent inquiry of the jury and request for information, the court should instruct the jury that the question of eligibility for parole is not a proper matter for the jury to consider and should be eliminated entirely from their deliberations, and the action of the court is merely telling the jury that it cannot answer the inquiry must be held for prejudicial error upon appeal from conviction of the capital felony without recommendation of life imprisonment. State v. Conner, 241 N.C. 468, 85 S.E.2d 584 (1955).

Instruction on Premeditation and Deliberation. — The trial judge gave the following instruction: "Premeditation means to think beforehand, and when we say that the killing must be accompanied by deliberation and premeditation, it is meant that there must be a fixed purpose to kill which preceded the act of killing for some length of time, however short, although the manner and length of time in which the purpose is formed, is not material. If, however, the purpose to kill is formed simultaneously with the killing, then there is no premeditation and deliberation, and in that event the homicide would not be murder in the first degree." This is a correct statement of the law. State v. Faust, 254 N.C. 101, 118 S.E.2d 769, cert. denied, 368 U.S. 851, 82 S. Ct. 85, 7 L. Ed. 2d 49 (1961).

Judge's instruction to the jury in a first-degree murder case that the jury, in determining premeditation and deliberation, may consider the "absence of provocation" did not express a court opinion that there was no evidence of provocation in the case. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

Where the issues of premeditation and deliberation constituted the primary focus of the jury's inquiry, the trial court's charge that the jury could infer these elements from matters not supported by the evidence constituted prejudicial error entitling defendant to a new trial. State v. Buchanan, 287 N.C. 408, 215 S.E.2d 80 (1975).

An instruction on deliberation that so long as the killing was the product of premeditation and deliberation it is murder in the first degree notwithstanding that the execution thereof might have been done while the defendant was in a state of anger, passion, or emotional excitement was a correct statement of law. State v. Potter, 295 N.C. 126, 244 S.E.2d 397 (1978).

Same — Charge of First-Degree Murder Must Be Supported By Evidence of Premeditation and Deliberation. — The law is fixed by the statute, that the killing must be willful, upon premeditation and with deliberation, and where there is no evidence tending to prove this, the jury should be so instructed, and the question of guilt on the charge of murder in a first degree ought not to be submitted to them. State v. Rhyne, 124 N.C. 847, 33 S.E. 128 (1899).

In order for the trial court to submit a charge of first-degree murder to the jury, there must be

evidence tending to show that the defendant, with malice, after premeditation and deliberation, intentionally shot and killed the victim. State v. Baggett, 293 N.C. 307, 237 S.E.2d 827 (1977).

Instruction on Presumption of Malice. — The trial court in a homicide prosecution erred in instructing the jury to presume the existence of malice if they found that the victim's death was intentionally caused where there was no evidence of the use of a deadly weapon, since malice is presumed only where death resulted from the intentional use of a deadly weapon. State v. Tilley, 18 N.C. App. 300, 196 S.E.2d 816 (1973).

In a prosecution for first-degree murder, trial judge did not err in charging the jury that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon, the law raised presumptions that the killing was unlawful and that it was done with malice. State v. Taylor, 289 N.C. 223, 221 S.E.2d 359 (1976).

No Instruction on Transformation of Presumptions to Inferences. — Whether there is evidence in the case from which a jury could find a killing in the heat of passion or self-defense so that the mandatory presumptions are transformed into permissible inferences depends largely on the quantum of the evidence rather than its quality or credibility. This is a question for the court, not the jury. No instructions on this principle should be given the jury. State v. Patterson, 297 N.C. 247, 254 S.E.2d 604 (1979).

Reasonable Doubt. — The defining of "reasonable doubt" as a possibility of innocence not only was not reversible error but constituted an instruction more favorable to the defendant than the usual definitions such as "fully satisfied," "entirely convinced," or "satisfied to a moral certainty." State v. Wright, 282 N.C. 364, 192 S.E.2d 818 (1972).

A trial judge is not required to define "reasonable doubt" without a request to do so, but if he does undertake to define it, the definition should be in substantial accord with the definitions of this court. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

No set formula is required to convey to the jury the fixed principle relating to the degree of proof required for conviction. State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), death sentence vacated, 408 U.S. 939, 92 S. Ct. 2873, 33 L. Ed. 2d 761 (1972).

Self-Defense — Instruction Must be Given Where Supported by Evidence. — Where there is evidence that defendant acted in self-defense, the court must charge on this aspect even though there is contradictory evidence by the State or discrepancies in defendant's evidence. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

In cases where the defendant has met his burden of production for self-defense, the failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury is prejudicial error and entitles the defendant to a new trial. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Failure to include not guilty by reason of self-defense in the court's final mandate to the jury, where required, is not cured by the discussion of the law of self-defense in the body of the charge to the jury. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Where the State's evidence presents testimony which would permit, but not require, the jury to find that: (1) Defendant was without fault in bringing on the difficulty, (2) deceased was armed with and first assaulted defendant with a deadly weapon, (3) the fatal blow was struck during a struggle for the weapon first used by deceased and (4) the defendant used such force as was necessary or as appeared to him to be necessary to save himself from death or great bodily harm, the evidence was sufficient to require the trial judge to state and apply the law of self-defense to the facts of the case and the court's failure to so do constituted prejudicial error. State v. Deck, 285 N.C. 209, 203 S.E.2d 830 (1974).

When the State or defendant produces evidence that defendant acted in self-defense in a prosecution for first-degree murder, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Instruction Permitting Verdict of Guilty as Accessory to Second-Degree Murder. — In a prosecution of a defendant as an accessory before the fact to the murder of her husband, defendant was not prejudiced by an instruction which would permit the jury to return a verdict of guilty as an accessory to murder in the second degree. State v. Benton, 276 N.C. 641, 174 S.E.2d 793 (1970).

Sufficiency. — The court charged fully as to what was reasonable doubt, circumstantial evidence, presumption of innocence, etc. In absence of a request to do so, it was not error for the court to fail to define robbery in detail. State v. Godwin, 216 N.C. 49, 3 S.E.2d 347 (1939).

Harmless Error. — In a prosecution for first-degree murder, the trial judge's characterization of deceased as a common-law husband of the defendant in his charge to the jury was harmless error. State v. Hunt, 289 N.C. 403, 222 S.E.2d 234, death sentence vacated, 429 U.S. 809, 97 S. Ct. 46, 50 L. Ed. 2d 69 (1976).

Same — Defense of Another. — North Carolina law recognizes that a person may not only take life in his own defense, but he may also do so in defense of another who stands in a family relation to him. The failure to instruct the jury on this fundamental issue constitutes prejudicial error. State v. Spencer, 21 N.C. App. 445, 204 S.E.2d 552 (1974).

Same — Request Is Unnecessary. — As the defense of self-defense was a substantial and essential feature of the case arising on defendant's evidence, no special prayers for instructions were required, and the judge's failure to charge with respect thereto was prejudicial error, and entitled defendant to a new trial. State v. Todd, 264 N.C. 524, 142 S.E.2d 154 (1965).

The trial court is required to charge on self-defense, even without a special request, when, but only when, there is some construction of the evidence from which could be drawn a reasonable inference that the defendant assaulted the victim in self-defense. State v. Lewis, 27 N.C. App. 426, 219 S.E.2d 554 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Same — Instruction Not Required Where Evidence Insufficient. — If the evidence is insufficient to evoke the doctrine of self-defense in a prosecution for first-degree murder, the trial judge is not required to give instructions on that defense even when specifically requested. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

In a prosecution for first-degree murder, evidence of powder burns on defendant's hands, which at most permitted an inference that defendant struggled for possession of the murder weapon before the fatal shots were fired, was insufficient to require an instruction to the jury on self-defense. State v. Davis, 289 N.C. 500, 223 S.E.2d 296, death sentence vacated, 429 U.S. 809, 97 S. Ct. 47, 50 L. Ed. 2d 69 (1976).

Same — Form of Instruction. — The proper charge to the jury on the verdict of not guilty by reason of self-defense is: If, however, although you are satisfied beyond a reasonable doubt that the defendant did intentionally kill deceased and thereby proximately caused his death, if you are further satisfied, not beyond a reasonable doubt, but are satisfied that at the time of the shooting the defendant did have reasonable grounds to believe and did believe that he was about to suffer death or serious bodily harm at the hands of deceased, and under those circumstances he used only such force as reasonably appeared necessary, you the jury being the judge of such reasonableness, and you also are satisfied that the defendant was not the aggressor, then he would be justified by reason of self-defense, and it would be your duty to return a verdict of not guilty. State v. Dooley, 285 N.C. 158, 203 S.E.2d 815 (1974).

Same — Incorrect Instruction. — Where, after briefly and correctly charging as to first-degree murder and second-degree murder, the court stated that "in order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction that he acted in self-defense," there is obvious and prejudicial error since proof of self-defense would acquit the defendant not reduce the charge. State v. Carver, 286 N.C. 179, 209 S.E.2d 785 (1974).

Where the jury could have logically deduced from the charge of self-defense that defendant was under a duty to retreat in his own home if the assault upon him was not murderous, defendant deserved a new trial due to error in the charge. State v. Boswell, 24 N.C. App. 94, 210 S.E.2d 129 (1974).

The court correctly refused to give an instruction on self-defense which omitted the requirement that before one may kill in self-defense he must have reasonable grounds to believe that it is necessary to kill to protect himself from death or great bodily harm. State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3208, 49 L. Ed. 2d 1209 (1976).

H. Verdict.

Determination of Degree of Murder. — Under this section, distinguishing murder into two degrees, the jury, on conviction, must determine in their verdict whether the crime is murder in the first or second degree. State v. Gadberry, 117 N.C. 811, 23 S.E. 477 (1895); State v. Truesdale, 125 N.C. 696, 34 S.E. 646 (1899).

First-Degree Murder Generally. — For a conviction of murder in the first degree under this section and § 15-172, the jury must find specifically under the evidence that this degree of crime has been committed by the defendant, and the verdict must be received in open court in the presence of the presiding judge under constitutional mandate, N.C. Const., Art. I, §§ 13, 17, which right may not be waived. State v. Bazemore, 193 N.C. 336, 137 S.E. 172 (1927).

Verdict of Second-Degree Murder in Prosecution for First-Degree Murder. — In a case of first-degree murder, committed after premeditation and deliberation, a verdict of second-degree murder is permissible if the jury should fail to find premeditation and deliberation. State v. Hill, 276 N.C. 1, 170 S.E.2d 885 (1969), death sentence vacated, 403 U.S. 2287, 91 S. Ct. 2287, 29 L. Ed. 2d 860 (1971).

Verdict of Armed Robbery in Prosecution for First-Degree Murder. — Where the jury returned a verdict of guilty as to the charge of armed robbery, the trial judge did not enter judgment as to that charge and properly so

since it conclusively appears that the armed robbery charge was proved as an essential element in the capital offense of murder in the first degree. The armed robbery charge, therefore, became a part of and was merged into the murder charge. State v. Williams, 290 N.C. 770, 228 S.E.2d 241 (1976).

I. Appeal.

Failure to Assign Error Precludes Review. — Where the defendant in a murder prosecution did not assign as error on direct appeal the failure of the trial judge in his instructions to place the burden of proving the absence of heat of passion or the absence of self-defense on the State, he waived his right to complain about such errors in post-conviction review. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Where the defendant in a prosecution for second-degree murder failed to raise at trial, on direct appeal or in a subsequent petition for post-conviction relief, the question of the trial judge's alleged error in instructing the jury that the burden was on the defendant to disprove malice to reduce the killing to voluntary manslaughter and to prove that he killed in self-defense, the defendant could not seek collateral review of the alleged error. State v. Locklear, 39 N.C. App. 671, 251 S.E.2d 638, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979) (decided under former Rule 28, Rules of Practice in the Court of Appeals of North Carolina).

Same — Error in Allowing New Trial. — In a prosecution for murder the trial court erred in allowing the defendant a new trial on the basis that the retroactivity of the Mullaney rule, see Hankerson v. North Carolina, 432 U.S. 233, 97 S. Ct. 2339, 53 L. Ed. 2d 306 (1977), was applicable in this case in which the defendant appellant did not object or assign as error on appeal the instructions of the trial court to the jury requiring the defendant to prove the absence of malice or that he acted in self-defense in order to reduce the alleged crime of murder in the second degree to voluntary manslaughter. State v. Watson, 37 N.C. App. 399, 246 S.E.2d 25, appeal dismissed, 295 N.C. 652, 257 S.E.2d 434 (1978).

Finding as to Mental Capacity Conclusive on Appeal. — Where the jury, by its verdict, has established that the defendant, at the time of the alleged offenses, had the mental capacity to know right from wrong with reference to these acts, that finding, supported as it is by ample evidence, is conclusive on appeal. State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975).

J. Miscellaneous.

Consolidation for Trial. — In a prosecution of defendant for armed robbery and murder, the trial court did not err in consolidating defendant's case for trial with that of a codefendant since defendants were charged in separate indictments for the same crimes; they were tried upon the theory that the murder with which they were charged was committed in connection with a robbery committed by them jointly; their defenses were not antagonistic; and neither attempted to incriminate the other in the presentation of an alibi. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

Motion for Mistrial Properly Denied. — In a prosecution of defendant for armed robbery and murder, trial court did not commit prejudicial error in denying defendant's motion for a mistrial after striking the testimony of several witnesses concerning the absence of fingerprints of defendant at the murder scene and the absence of gunpowder on the hands of bystanders after the robbery-murder, since the trial court, after the motions to strike were allowed, instructed the jury not to consider the striken evidence and specifically referred to the evidence and the witness who provided it, since there was no way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration, and since defendant's motion for mistrial was a matter addressed to the sound discretion of the trial judge, and no abuse of that discretion appeared. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

§ 14-17.1. Crime of suicide abolished.

The common-law crime of suicide is hereby abolished as an offense. (1973, c. 1205.)

§ 14-18. Punishment for manslaughter.

Voluntary manslaughter shall be punishable as a Class F felony, and involuntary manslaughter shall be punishable as a Class H felony. (4 Hen. VII, s. 13; 1816, c. 918, P. R.; R. C., c. 34, s. 24; 1879, c. 255; Code, s. 1055; Rev., s. 3632; C. S., s. 4201; 1933, c. 249; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote this section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For case law survey as to homicide, see 45 N.C.L. Rev. 918 (1967).

For a note on the burden of proof for affirmative defense in homicide cases, see 12 Wake Forest L. Rev. 423 (1976).

For note on the erosion of the retreat rule and self-defense, see 12 Wake Forest L. Rev. 1093 (1976).

CASE NOTES

I. General Consideration.
II. Manslaughter.
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III. Heat of Passion.
IV. Reckless Use of Firearms.
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I. GENERAL CONSIDERATION.

Burden of Proof. — When the State undertakes a prosecution for unlawful homicide, it assumes the burden of producing evidence sufficient to prove that the deceased died as the result of a criminal act committed by the defendant. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

In a prosecution for manslaughter, the state must produce evidence sufficient to establish beyond a reasonable doubt that the death proximately resulted from defendants' unlawful acts. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923 (1980).

The act complained of does not have to be the sole proximate cause of the death, nor the last act in sequence of time. There may be more than one proximate cause of the death in question. It is enough if defendants' unlawful acts join and concur with other causes in producing the result. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923 (1980).

The act of the accused need not be the immediate cause of death; he is legally accountable if the direct cause is the natural result of the criminal act. State v. Cummings, 301 N.C. 374, 271 S.E.2d 277 (1980).

Applied in State v. Phillips, 262 N.C. 723, 138 S.E.2d 626 (1964); State v. Matthews, 263 N.C. 95, 138 S.E.2d 819 (1964); State v. Shaw, 263 N.C. 99, 138 S.E.2d 772 (1964); State v. Howard, 272 N.C. 144, 157 S.E.2d 665 (1967); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Brown, 282 N.C. 117, 191 S.E.2d 659 (1972); State v. Wallace, 16 N.C. App. 647, 192 S.E.2d 642 (1972); State v. Harrington, 286 N.C. 327, 210 S.E.2d 424 (1974); State v. Honeycutt, 21 N.C. App. 342, 204 S.E.2d 238 (1974); State v. Chappell, 24 N.C. App. 656, 211 S.E.2d 828 (1975); State v. Allmond, 27 N.C. App. 29, 217 S.E.2d 734 (1975).

Stated in Carey v. Garrison, 452 F. Supp. 485 (W.D.N.C. 1978).

Cited in Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Walters, 33 N.C. App. 521, 235 S.E.2d 906 (1977); Reeves v. Reed, 596 F.2d 628 (4th Cir. 1979); State v. Daniels, 300 N.C. 105, 265 S.E.2d 217 (1980).

II. MANSLAUGHTER.

A. In General.

Definitions. — Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. State v. Kea, 256 N.C. 492, 124 S.E.2d 174 (1962); State v. Benge, 272 N.C. 261, 158 S.E.2d 70 (1967); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Spencer, 27 N.C. App. 301, 219 S.E.2d 231 (1975); State v. Cousins, 289 N.C. 540, 223 S.E.2d 338 (1976); State v. Jones, 291 N.C. 681, 231 S.E.2d 252 (1977); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Alston, 295 N.C. 629, 247 S.E.2d 898 (1978).

Manslaughter is defined as the unlawful killing of a human being without malice, express or implied, without premeditation and deliberation, and without the intention to kill or to inflict serious bodily injury. State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970), death sentence vacated, 403 U.S. 948, 91 S. Ct. 2289, 29 L. Ed. 2d 860 (1971); State v. Richardson, 14 N.C. App. 86, 187 S.E.2d 435 (1972), cert. denied, 284 N.C. 258, 200 S.E.2d 658 (1973).

Involuntary homicide is also "manslaughter." United Servs. Auto. Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965).

Voluntary manslaughter is the intentional killing of a person without malice, while involuntary manslaughter is the unintentional killing of a person without malice. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962); State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265, cert. denied, 283 N.C. 755, 198 S.E.2d 725 (1973).

Manslaughter is a lesser included offense of murder in the second degree. State v. Holcomb, 295 N.C. 608, 247 S.E.2d 888 (1978).

Malice is not a necessary element of voluntary manslaughter. Reeves v. Reed, 452 F. Supp. 783 (W.D.N.C. 1978), rev'd on other grounds, 596 F.2d 628 (4th Cir. 1979).

The difference between second-degree murder and manslaughter is that malice, express or implied, is present in the former and not in the latter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

Proximate cause is an element of second-degree murder and manslaughter. State v. Sherrill, 28 N.C. App. 311, 220 S.E.2d 822 (1976).

B. Voluntary.

Definitions. — Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Fox, 18 N.C. App. 523, 197 S.E.2d 265, cert. denied, 283 N.C. 755, 198 S.E.2d 725 (1973); State v. Christopher, 29 N.C. App. 231, 223 S.E.2d 835 (1976); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Holcomb, 295 N.C. 608, 247 S.E.2d 888 (1978).

Voluntary manslaughter is the unlawful killing of a person without malice and without premeditation. State v. Foust, 32 N.C. App. 301, 232 S.E.2d 276 (1977); State v. King, 49 N.C. App. 499, 272 S.E.2d 26 (1980).

Generally voluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force under the circumstances is employed or where the defendant is the aggressor bringing on the affray. Although a killing under these circumstances is both unlawful and intentional, the circumstances themselves are said to displace malice and to reduce the offense from murder to manslaughter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Ferrell, 300 N.C. 157, 265 S.E.2d 210 (1980); State v. Lindsay, 45 N.C. App. 514, 263 S.E.2d 364 (1980).

Voluntary manslaughter is the intentional unlawful killing of a human being without malice, either express or implied, and without deliberation or premeditation. Gardner v. Forister, 468 F. Supp. 761 (W.D.N.C. 1979); State v. Brown, 300 N.C. 731, 268 S.E.2d 201 (1980).

C. Involuntary.

Definitions. — Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty. State v. Lawson, 6 N.C. App. 1, 169 S.E.2d 265 (1969); State v. Holshouser, 15 N.C. App. 469, 190 S.E.2d 420 (1972); State v. Robinson, 15 N.C. App. 542, 190 S.E.2d 427 (1972).

Involuntary manslaughter has been defined to be, "Where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony, or from a lawful act negligently done." State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Involuntary manslaughter is the unintentional killing of a human being without malice, premeditation or deliberation, which results from the performance of an unlawful act not amounting to a felony, or not naturally dangerous to human life; or from the performance of a lawful act in a culpably negligent way; or from the culpable omission to perform some legal duty. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971); State v. Cates, 293 N.C. 462, 238 S.E.2d 465 (1977).

Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Cannady, 16 N.C. App. 569, 192 S.E.2d 677 (1972); State v. Stewart, 292 N.C. 219, 232 S.E.2d 443 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Haith, 48 N.C. App. 319,

269 S.E.2d 205, appeal dismissed, 301 N.C. 403, 273 S.E.2d 449 (1980).

Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice by some unlawful act not amounting to a felony or naturally dangerous to human life, or by an act or omission constituting culpable negligence. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1207 (1976); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980); State v. Lindsay, 45 N.C. App. 514, 263 S.E.2d 364 (1980).

Involuntary manslaughter is the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner. Culpable negligence under the criminal law is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. State v. Newcomb, 26 N.C. App. 595, 216 S.E.2d 730, cert. denied, 288 N.C. 249, 217 S.E.2d 680 (1975).

Involuntary manslaughter is the unintentional killing of a human being without malice, proximately caused by (1) an unlawful act not amounting to a felony or naturally dangerous to human life, or (2) culpably negligent act or omission. State v. Redfern, 291 N.C. 319, 230 S.E.2d 152 (1976); State v. Waite, 32 N.C. App. 279, 232 S.E.2d 278 (1977).

Involuntary manslaughter is the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty. State v. Everhart, 291 N.C. 700, 231 S.E.2d 604 (1977).

Homicide Must Have Been Unintentional and Without Malice. — To constitute involuntary manslaughter, the homicide must have been without intention to kill or inflict serious bodily injury, and without either express or implied malice. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

To warrant a conviction of involuntary manslaughter, the State must establish that the acts of the defendants were a proximate cause of the death. State v. Cummings, 301 N.C. 374, 271 S.E.2d 277 (1980).

Unintentional Killing by Intentional Act. — While involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is accomplished by means of some intentional act. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

An intentional violation of some statute designed for the protection of people which proximately though unintentionally causes death can support a conviction of involuntary manslaughter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

A mere assault which proximately results in death, but which does not indicate a total disregard for human life and is committed with no intent to kill or to inflict serious bodily injury, will support, at most, a verdict of involuntary manslaughter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

The jury is required to find that defendant committed either an unlawful or a culpably negligent act before it can convict him of involuntary manslaughter. State v. Walker, 31 N.C. App. 199, 228 S.E.2d 772 (1976).

Punishment for involuntary manslaughter may be by fine or imprisonment or both in the discretion of the court. The imprisonment, however, may not exceed ten years. State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967).

Defendant's contention that involuntary manslaughter was a misdemeanor for which punishment could not exceed two years was not sustained in State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967); State v. Efird, 271 N.C. 730, 157 S.E.2d 538 (1967).

III. HEAT OF PASSION.

Heat of Passion Defined. — See State v. Pope, 24 N.C. App. 217, 210 S.E.2d 267 (1974), cert. denied, 286 N.C. 419, 211 S.E.2d 799 (1975).

Heat of passion is defined as rage, anger, hatred or furious resentment rendering the mind incapable of cool reflection. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981).

A killing is without malice if the one who kills acted while under the influence of passion or in the heat of blood produced by adequate provocation. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981).

When one spouse kills the other in a heat of passion engendered by the discovery of the deceased and a paramour in the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was "severely proximate," and the killing follows immediately, it is manslaughter. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1207 (1976).

IV. RECKLESS USE OF FIREARMS.

Deaths Caused by Wanton or Reckless Use of Firearms. — With few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton

or reckless use of firearms, in the absence of intent to discharge the weapon or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty is involuntary manslaughter. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963); State v. Davis, 15 N.C. App. 395, 190 S.E.2d 434 (1972); State v. Adcock, 24 N.C. App. 102, 210 S.E.2d 127 (1974), cert. denied, 286 N.C. 416, 211 S.E.2d 796 (1975); State v. Redfern, 291 N.C. 319, 230 S.E.2d 152 (1976).

One who handles a firearm in a reckless or wanton manner and thereby unintentionally causes the death of another is guilty of involuntary manslaughter. State v. Moore, 275 N.C. 198, 166 S.E.2d 652 (1969); State v. Putnam, 24 N.C. App. 570, 211 S.E.2d 493 (1975).

Ordinarily an unintentional homicide resulting from the reckless use of firearms "in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under the circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter." When the circumstances do show a heart devoid of a sense of social duty, the homicide cannot be involuntary manslaughter. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Oxendine, 300 N.C. 720, 268 S.E.2d 212 (1980).

At common law and under this section one who points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, commits manslaughter. State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

Facts Supporting Charge Concerning Negligent Handling of Gun. — The showing that defendant was seated at a table, deceased was standing near him, defendant pulled the gun from his pocket after which it fired with the bullet striking deceased in the forehead, would certainly be some evidence that defendant intentionally pointed the gun at the deceased even though it may have fired accidentally. There were sufficient facts presented to support the charge concerning whether defendant handled the gun in a criminally negligent manner. State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

V. CULPABLE NEGLIGENCE.

Culpable Negligence Defined. — Culpable negligence in the law of involuntary manslaughter is something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as is incompatible with a proper regard for the safety or rights of others. State v. Gainey, 29 N.C. App. 653, 225 S.E.2d 843 (1976), rev'd on other grounds, 292 N.C. 627, 234 S.E.2d 610 (1977).

In a prosecution for involuntary manslaughter, the violation of a safety statute regulating the use of highways does not constitute culpable negligence unless such violation is intentional, willful or wanton, or unless the violation, though unintentional, is accompanied by recklessness or is under circumstances from which death or injury to others might have been reasonably anticipated. State v. Gainey, 29 N.C. App. 653, 225 S.E.2d 843 (1976), rev'd on other grounds, 292 N.C. 627, 234 S.E.2d 610 (1977).

Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behaviour that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others. There must be negligence of a gross and flagrant character, evincing reckless disregard of human life. State v. Everhart, 291 N.C. 700, 231 S.E.2d 604 (1977); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

An intentional, willful or wanton violation of a statute or ordinance, designed for the protection of human life or limb, which proximately results in injury or death, is culpable negligence. State v. Stewardson, 32 N.C. App. 344, 232 S.E.2d 308, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977); State v. Jones, 32 N.C. App. 408, 232 S.E.2d 475, cert. denied, 292 N.C. 643, 235 S.E.2d 63 (1977); State v. Wilkerson, 295 N.C. 599, 247 S.E.2d 905 (1978).

Deaths Resulting from Culpable Negligence. — Culpable negligence, from which death proximately ensues, makes the actor guilty of manslaughter, and under some circumstances, guilty of murder. State v. Colson, 262 N.C. 506, 138 S.E.2d 121 (1964).

Both involuntary manslaughter and second-degree murder can involve an act of "culpable negligence" that proximately causes death. Culpable negligence, standing alone, will support at most involuntary manslaughter. When, however, an act of culpable negligence also imports danger to another and is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life, it will support a conviction for second-degree murder. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Since the distinction between manslaughter and murder in the second degree is malice, culpable negligence will not support a murder charge unless there are sufficient facts to support a finding of malice. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Evidence tending to show that the deceased said, "Don't shoot me," standing alone, was not sufficent to raise an inference that the defendant intentionally pointed the

weapon at her, or that he handled it in such a careless and reckless manner as to amount to culpable negligence. State v. Holshouser, 15 N.C. App. 469, 190 S.E.2d 420 (1972).

VI. SELF-DEFENSE.

Killing in Self-Defense May Be Voluntary Manslaughter. — Under given circumstances a person may be justified in intentionally killing when he acts in self-defense, yet such person may be guilty of voluntary manslaughter when an intentional killing results from excessive use of force while he is acting in self-defense. State v. Rummage, 280 N.C. 51, 185 S.E.2d 221 (1971).

When excessive force or unnecessary violence is used in self-defense, the killing of the adversary is manslaughter at least. State v. Locklear, 25 N.C. App. 74, 212 S.E.2d 404 (1975).

If the defendant in killing the deceased was acting in self-defense but used more force than was necessary or reasonably appeared necessary under the circumstances, he is guilty of voluntary manslaughter. State v. Burden, 36 N.C. App. 332, 244 S.E.2d 204, cert. denied, 295 N.C. 468, 246 S.E.2d 216 (1978).

Charge of Self-Defense Not Erroneous. — See State v. Pearson, 24 N.C. App. 410, 210 S.E.2d 887, aff'd, 288 N.C. 34, 215 S.E.2d 598 (1975).

Trial court's charge that a person may not ordinarily claim self-defense when he has used deadly force to quell an assault, standing alone, unduly restricted defendant's plea of self-defense. However, any error committed was completely removed by the subsequent instruction detailing what defendant had to show to excuse his act on the ground of self-defense. State v. Pearson, 24 N.C. App. 410, 210 S.E.2d 887, aff'd, 288 N.C. 34, 215 S.E.2d 598 (1975).

Instruction sufficient to apprise jury that defendant did not have the burden of proving self-defense. State v. Sprinkle, 30 N.C. App. 383, 226 S.E.2d 827 (1976).

Punishment Following Plea of Nolo Contendere. — Notwithstanding evidence that defendant shot in self-defense, a plea of nolo contendere permitted the court to impose a sentence of not more than ten years for involuntary manslaughter. State v. Swinney, 271 N.C. 130, 155 S.E.2d 545 (1967).

VII. INSTRUCTIONS TO JURY.

Charge as to Lesser Degrees of Same Crime. — While under the provisions of § 15-170 the trial judge was required to charge upon evidence on the lesser degrees of the same crime for which the prisoner was being tried, it was not required that he charge upon the principles of an assault with a deadly weapon, where the prisoner was charged with murder, and the killing of the deceased by him had been admitted, and the judge had correctly charged upon the crime of manslaughter, the lowest degree of an unlawful killing of a human being. State v. Lutterloh, 188 N.C. 412, 124 S.E. 752 (1924).

Failure to Instruct as to Causal Connection Between Defendant's Act and Death. — Trial judge's failure to instruct jury that a verdict of guilty of manslaughter required proof beyond a reasonable doubt that defendant's act proximately caused the death charged was error, despite plenary evidence upon which the jury could find death was the proximate result of defendant's act. State v. Fowler, 285 N.C. 90, 203 S.E.2d 803 (1974), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3212, 49 L. Ed. 2d 1212 (1976).

Failure to Instruct on Involuntary Manslaughter. — In a prosecution for first-degree murder in which the defendant was found guilty of voluntary manslaughter, the trial judge erred in failing to instruct the jury on involuntary manslaughter where the defendant's testimony was, in its entirety, an account of an unintentional killing. State v. Graham, 38 N.C. App. 86, 247 S.E.2d 300 (1978).

Evidence Requiring Instruction on Proximate Cause. — In a prosecution of a motorist for manslaughter in the deaths of two small boys who were struck by defendant's car as defendant was attempting to pass another vehicle traveling in the same direction, evidence that the children were walking on the hard surface when they were struck and that the preceding car speeded up as defendant attempted to pass it, required the court to instruct the jury upon the conduct of the children in walking on the hard surface and the conduct of the other driver in increasing his speed, as bearing upon the question of whether defendant's negligence was a proximate cause of the deaths. State v. Harrington, 260 N.C. 663, 133 S.E.2d 452 (1963).

Issue of Manslaughter Properly Submitted to Jury. — There was no error in submitting to the jury an issue as to defendant's guilt of manslaughter where the evidence would support a finding that defendant unlawfully killed, but without express or implied malice, or that he acted in self-defense but used excessive force, because either finding would warrant a verdict of manslaughter. State v. Goins, 24 N.C. App. 468, 211 S.E.2d 481, cert. denied, 287 N.C. 262, 214 S.E.2d 434 (1975).

Evidence Sufficient to Go to Jury. — Where there was no real evidence of malice, but the jury could reasonably find from the evidence that deceased's death had to be ascribed to the defendant's unlawful and culpably negligent conduct, which it could reasonably have been foreseen was likely to result in serious injury, the evidence was sufficient to go to the

jury on a charge of involuntary manslaughter. State v. Trueblood, 39 N.C. App. 459, 250 S.E.2d 666 (1979).

Instruction on Manslaughter Held Proper. — Where the trial court instructed that defendant would be guilty of manslaughter if "he intentionally and unlawfully stabbed and killed" the victim, any possibility of prejudice in the defective charge was removed where prior to giving the above instruction, the court properly defined manslaughter as "the unlawful killing of a human being without malice, express or implied, and without deliberation or premeditation," and when the jury later requested repeated instructions on the offenses charged, the court again gave a proper definition of manslaughter. State v. Edwards, 24 N.C. App. 303, 210 S.E.2d 273 (1974).

Definitions of second-degree murder and voluntary manslaughter in the instructions to the jury in a prosecution for second-degree murder were not prejudicially deficient in that they did not require that the killings be intentional since specific intent to kill, while a necessary constituent of the elements of premeditation and deliberation in first-degree murder, is not an element of second-degree murder or manslaughter. State v. Alston, 295 N.C. 629, 247 S.E.2d 898 (1978).

A proper charge on the issue of voluntary manslaughter is required when the evidence would support a finding either (a) that the defendant acted properly in self-defense except for the use of excessive force in repelling the assailant, or (b) that the defendant killed while in the heat of passion brought on by adequate provocation, amounting to an assault or threatened assault, not originating with the defendant. Gardner v. Forister, 468 F. Supp. 761 (W.D.N.C. 1979).

Instruction on Voluntary Manslaughter Held Improper. — Voluntary manslaughter is the intentional unlawful killing of a human being, and therefore an instruction incorporating culpable negligence as an alternative finding is improper, since it does not require intent as a necessary element. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

In a prosecution for second-degree murder involving the death of a child from the so-called "battered child" syndrome, where there was a great disparity in age and size between the victim and her slayer, and particularly where the slayer stood in loco parentis with the child, as a matter of law adequate provocation could not be found to exist so as to justify submission of voluntary manslaughter where the evidence showed that the defendant beat and abused a child unto its death. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, cert. denied, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968, 100 S. Ct. 459, 62 L.Ed.2d 382 (1979).

Instruction on Involuntary Manslaughter Held Proper. — The trial judge, in a prosecution for second-degree murder, properly instructed the jury as to involuntary manslaughter where, in stating that if defendant while caring for his child "intentionally inflicted injury upon that child ... under the age of sixteen years, and if his death directly resulted ... defendant ... would be guilty of involuntary manslaughter," he was referring to an intentional violation of § 14-318.2. State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978).

Evidence was insufficient to be submitted to the jury on charges of second-degree murder and voluntary manslaughter but was sufficient to be submitted on the charge of involuntary manslaughter, where the evidence tended to show that defendant, a 16 year old boy, shot his 10 year old sister, but in showing the events leading up to and preceding the death of the sister, the State relied entirely on voluntary statements of defendant to the effect that he and his sister were fussing; defendant was "messing aroung with a shotgun"; and the gun accidentally went off. State v. Wagner, 50 N.C. App. 286, 273 S.E.2d 33 (1981).

Charge of Involuntary Manslaughter Held Error. — If there is evidence of self-defense and no evidence of involuntary manslaughter, it is prejudicial error to submit a charge of involuntary manslaughter in a trial for second-degree murder. State v. Brooks, 46 N.C. App. 833, 266 S.E.2d 3 (1980).

Evidence did not justify a charge on involuntary manslaughter where defendant intentionally discharged the gun under circumstances naturally dangerous to human life. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1207 (1976).

VIII. SUFFICIENCY OF EVIDENCE.

A plea of guilty or nolo contendere to automobile manslaughter does not establish intentional homicide. United Servs. Auto. Ass'n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965).

Evidence Sufficient to Sustain Conviction. — Evidence that defendant was handling gun in a culpably negligent manner at the time it fired and killed another was sufficient to support a conviction of involuntary manslaughter. State v. Brooks, 260 N.C. 186, 132 S.E.2d 354 (1963).

Evidence that a nephew badly beat his uncle with a stove-lid lifter and, at the instance of a third person, desisted and left, that the uncle stated that if the nephew came back he was going to shoot him, and that when the nephew returned the uncle shot the unarmed nephew as the nephew stepped in the door, inflicting fatal injury, was sufficient to sustain conviction of manslaughter. State v. Dunlap, 268 N.C. 301, 150 S.E.2d 436 (1966).

Although there was a conflicting version of the shooting from defense witnesses, the State's evidence was clearly sufficient to sustain a verdict of voluntary manslaughter. State v. Carver, 22 N.C. App. 674, 207 S.E.2d 299, rev'd on other grounds, 286 N.C. 179, 209 S.E.2d 785 (1974).

In a prosecution for manslaughter, evidence was sufficient to show that the assault by defendants was a proximate cause of the victim's death where the victim was knocked to the sidewalk on his back and, because of his intoxicated condition, was unable to expel vomitus from his mouth and died as a result of aspiration of vomitus. State v. Cummings, 46 N.C. App. 680, 265 S.E.2d 923 (1980).

Insufficient Evidence to Sustain Verdict of Manslaughter. — See State v. Harrington, 22 N.C. App. 473, 206 S.E.2d 768, aff'd, 286 N.C. 327, 210 S.E.2d 424 (1974).

Evidence would not support a verdict of voluntary manslaughter where the killing did not result from the use of excessive force in the exercise of the right of self-defense, nor was it the result of anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice. State v. Ward, 286 N.C. 304, 210 S.E.2d 407 (1974), death sentence vacated, 428 U.S. 903, 96 S. Ct. 3206, 49 L. Ed. 2d 1207 (1976).

Insufficient Evidence of Sudden Provocation. — In a prosecution for murder while there was evidence that defendants' mother may have been assaulted, there was no evidence whatsoever as to who may have assaulted her and, furthermore, the evidence was clear that the events giving rise to defendants' mother's wounds were considerably removed in time from the events surrounding the death of the victim; therefore, accepting, arguendo, that an assault or threatened assault on a close relative may provide adequate or legal provocation to arouse heat of passion, the evidence did not show anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice. State v. Spicer, 50 N.C. App. 214, 273 S.E.2d 521 (1981).

§ 14-19: Repealed by Session Laws 1979, c. 760, s. 5, effective July 1, 1981.

Editor's Note. — Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-20. Killing adversary in duel; aiders and abettors declared accessories.

If any person fight a duel in consequence of a challenge sent or received, and either of the parties shall be killed, then the survivor, on conviction thereof, shall be punished as a Class C felon. All their aiders and abettors shall be considered accessories before the fact.

Any person charged with killing an adversary in a duel may enter a plea of guilty to said charge in the same way and manner and under the conditions and restrictions set forth in G.S. 15-162.1 relating to pleas of guilty for first degree murder, first degree burglary, arson and rape. (1802, c. 608, s. 2, P. R.; R. C., c. 34, s. 3; Code, s. 1013; Rev., s. 3629; C. S., s. 4203; 1955, c. 1198; 1965, c. 649; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to sending, accepting or bearing a challenge to fight a duel, or aiding and abetting a duel, see § 14-270.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class C felon" for "by imprisonment for life in the State's prison" at the end of the first sentence of the first paragraph. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides; "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Section 15-162.1, referred to in this section, was repealed by Session Laws 1971, c. 1225. See now §§ 15A-1021 to 15A-1027.

§§ 14-21 to 14-23: Repealed by Session Laws 1979, c. 682, s. 7, effective January 1, 1980.

Cross References. — As to rape and other sex offenses, see now § 14-27.1 et seq.

Editor's Note. — Session Laws 1979, c. 682, ss. 13 and 14, provide: "Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws, 1979, c. 682, s. 12, contains a severability clause.

Article 7.

Rape and Kindred Offenses.

§§ 14-24, 14-25: Repealed by Session Laws, 1975, c. 402.

Cross References. — As to rape and other sex offenses, see now § 14-27.1 et seq.

Editor's Note. — Session Laws 1979, c. 682, ss. 13 and 14, provide: "Sec. 13. All laws and clauses of laws in conflict with this act are hereby repealed, provided however, nothing in this act shall be construed to repeal any portion of Article 26 of Chapter 14 which relates to offenses against public morality and decency.

"Sec. 14. This act shall become effective January 1, 1980, and shall apply to offenses occurring on and after that date. Nothing herein shall be construed to render lawful acts committed prior to the effective date of this act [January 1, 1980] and unlawful at the time the said acts occurred; and nothing contained herein shall be construed to affect any prosecution instituted under any section repealed by this act pending on the effective date hereof."

Session Laws 1979, c. 682, s. 12, contains a severability clause.

§§ 14-26, 14-27: Repealed by Session Laws 1979, c. 682, s. 7, effective January 1, 1980.

Article 7A.

Rape and Other Sex Offenses.

§ 14-27.1. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Mentally defective" means (i) a victim who suffers from mental retardation, or (ii) a victim who suffers from a mental disorder, either of which temporarily or permanently renders the victim substantially incapable of appraising the nature of his or her conduct, or of resisting the act of vaginal intercourse or a sexual act, or of communicating unwillingness to submit to the act of vaginal intercourse or a sexual act.

(2) "Mentally incapacitated" means a victim who due to any act committed upon the victim is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act.

(3) "Physically helpless" means (i) a victim who is unconscious; or (ii) a victim who is physically unable to resist an act of vaginal intercourse or a sexual act or communicate unwillingness to submit to an act of vaginal intercourse or a sexual act.

(4) "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes. (1979, c. 682, s. 1.)

§ 14-27.2. First-degree rape.

(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

(1) With a victim who is a child of the age of 12 years or less and the defendant is of the age of 12 years or more and is four or more years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 4; 1981, c. 106, ss. 1, 2.)

Cross References. — As to restrictions on evidence in rape or sex offense cases, see § 8-58.6. As to essentials of bill of indictment for rape, see § 15-144.1. As to exclusion of bystanders during trial for rape or other sex offense, see § 15-166. As to venue for trial of sex offenses where victim was transported, see § 15A-136. As to office of coordinator of services for victims of sexual assault, see §§ 143B-394.1 through 143B-394.3.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class B felony" for "felony and upon conviction shall be imprisoned in the State's prison for life" in subsection (b). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

The 1981 amendment designated former subdivision (2) of subsection (a) as subdivision (1) and former subdivision (1) of subsection (a) as subdivision (2), and in present subdivision (1) of subsection (a) inserted "is of the age of 12 years or more and." In subsection (b), the amendment substituted "an offense" for "the offense."

Legal Periodicals. — For comment on constitutional restrictions on the imposition of capital punishment, see 5 Wake Forest Intra. L. Rev. 183 (1969).

For note on United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), and its impact upon State capital punishment legislation, see 47 N.C.L. Rev. 421 (1969).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
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Editor's Note. — Many of the annotations under this section are from cases decided under former § 14-21.

I. GENERAL CONSIDERATION.

Constitutionality of Former § 14-21. — See State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

History of Offense. — See State v. Dick, 6 N.C. 388 (1818); State v. Jesse, 20 N.C. 95 (1838); State v. Johnston, 76 N.C. 209 (1877).

Generally, rape is not a continuous offense, but each act of intercourse constitutes a distinct and separate offense. State v. Small, 31 N.C. App. 556, 230 S.E.2d 425 (1976), cert. denied, 291 N.C. 715, 232 S.E.2d 207 (1977).

Applied in State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980).

Cited in State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980).

II. WHO MAY BE GUILTY OF RAPE.

Aiders and Abettors Are Guilty of Rape. — Two or more persons may be guilty of the single crime of rape by being present, aiding and abetting in its commission. State v. Jordan, 110 N.C. 491, 14 S.E. 752 (1892).

One who is present, aiding and abetting, in a rape actually perpetrated by another, is equally guilty with the actual perpetrator of the crime. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967); State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973).

One holding the husband of prosecutrix while another is perpetrating the crime of rape is guilty as principal in the offense. State v. Jordan, 110 N.C. 491, 14 S.E. 752 (1892).

Thus, even a woman may be convicted of rape. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967); State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973).

A woman, who is physically incapable of committing rape upon another woman, may be convicted of rape where she aids and abets a male assailant in the rape of another woman. State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973).

A man and a woman are both guilty of raping a female child where both caused the child to become drunk and the man had intercourse with the child while being held by the woman. State v. Hairston, 121 N.C. 579, 28 S.E. 492 (1897).

And a husband may be guilty of the rape of his wife. (But see § 14-27.8). State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967); State v. Martin, 17 N.C. App. 317, 194 S.E.2d 60, cert. denied, 283 N.C. 259, 195 S.E.2d 691 (1973).

III. ELEMENTS OF THE OFFENSE.

Elements Where Victim Aged Twelve or Less. — The use of deadly force or infliction of serious bodily injury is not an essential element of the crime of rape of a female under the age of 12 (now 12 years or less). State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978).

Force is conclusively presumed in the case of carnal knowledge of a female under the age of ten (now twelve or less). State v. Dancy, 83 N.C. 608 (1880).

Neither force nor intent is an element of rape of a female child under the age of twelve years (now twelve years or less). State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Strickland, 254 N.C. 658, 119 S.E.2d 781 (1961); State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970).

"By Force". — The force necessary to constitute rape need not be actual physical force. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969).

By "force" does not necessarily mean by actual physical force. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

The force necessary to meet the requirement need not be physical force but may take the form of fear, fright or coercion. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

The mere threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Fear, fright, or duress, may take the place of force. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Fear, fright, or coercion may take the place of force. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

"Serious Personal Injury." — Some guidance to the meaning of the phrase "serious bodily injury" (now "serious personal injury") can be found by reference to cases construing § 14-32 (assault with a deadly weapon with intent to kill inflicting serious injury) and by viewing similar cases from other jurisdictions. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

"Serious bodily injury" (now "serious personal injury") is not the equivalent of "by force and against her will." State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Penetration without Emission of Seed Sufficient. — In rape the least penetration of the person is sufficient, and the emission of seed is unnecessary. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

The slightest penetration of the sexual organ of the female by the sexual organ of the male amounts to carnal knowledge in a legal sense. State v. Sneeden, 274 N.C. 498, 164 S.E.2d 190 (1968).

It shall not be necessary upon the trial of any indictment for the offense of rape to prove the actual emission of seed in order to constitute the offense, but the offense shall be completed upon proof of penetration only. State v. Monds, 130 N.C. 697, 41 S.E. 789 (1902).

IV. DEFENSE OF CONSENT.

Victims Twelve Years Old or Less Incapable of Consent. — Force and will of the victim when the victim is a child under the age of 12 (now 12 or less) have nothing to do with the crime. A child of such age is presumed incapable of consent. State v. Summitt, 45 N.C. App. 481, 263 S.E.2d 612 (1980), aff'd, 301 N.C. 591, 273 S.E.2d 425, cert. denied, — U.S. —, 101 S. Ct. 2048, 68 L. Ed. 2d 349 (1981).

Carnal knowledge of any female child under the age of twelve years (now 12 years or less), regardless of consent, is rape. State v. Crawford, 260 N.C. 548, 133 S.E.2d 232 (1963).

Consent of prosecutrix is no defense in a prosecution for carnal knowledge of a female child under the age of twelve years (now 12 years or less). State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1967).

Consent is not a defense where one is accused of raping a female child under the age of twelve years (now 12 years or less). State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

Consent Induced by Fear and Violence Is Void. — Consent of prosecutrix which is induced by fear and violence is void and is no legal consent. State v. Carter, 265 N.C. 626, 144 S.E.2d 826 (1965).

While consent by the female is a complete defense, consent which is induced by fear of violence is void and is no legal consent. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

Consent of the woman from fear of personal violence is void. Even though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

Although consent is a perfect defense to a charge of rape, there is no legal consent when it is induced by violence or threat of violence. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

Proof of Lack of Consent. — Evidence of physical resistance is not necessary to prove lack of consent in a rape case. State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

V. PRACTICE AND PROCEDURE.

A. In General.

A verdict of guilty of rape in the first degree necessarily includes the jury's determination that the defendant is guilty of each element of rape in the second degree. State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

Separate Crimes Arising Out of Same Events. — Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy, since the four offenses were legally separate and distinct crimes, no one of which was a lesser included offense of the other; each clearly required the proof of at least one essential element not embodied in any of the other three offenses at issue; and the four felonies where factually distinct and independent crimes in this case. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

Where a burglar, after breaking and entering, proceeds to rape someone inside the dwelling, he can be convicted of both burglary and rape. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

B. Indictment.

Allegation of Intent. — Intent is not an element of the offense of raping a female child under the age of twelve years (now 12 years or less), and a motion to quash an indictment therefor on the ground that it failed to allege "intent" is properly denied. State v. Gibson, 221 N.C. 252, 20 S.E.2d 51 (1942).

Allegation of "By Force and Against The Will". — An indictment for rape must use the words "by force" or their equivalent in describing the manner in which the assault was accomplished. State v. Benton, 226 N.C. 745, 40 S.E.2d 617 (1946).

The absence of both "forcibly" and "against her will" in the indictment is fatal, but "forcibly" can be supplied by any equivalent word. It is not supplied by the use of the word "ravish," but is sufficiently charged by the words "feloniously and against her will." State v. Johnson, 226 N.C. 266, 37 S.E.2d 678 (1946).

Separate Indictment Required As to Earlier Incidents. — When a defendant charged with rape admits that he had sexual intercourse with the prosecutrix, neither the State nor the defendant is entitled to have the jury consider a lesser included offense on the basis of incidents which might have preceded the sexual intercourse because the bill of indictment charging only rape does not encompass such earlier incidents but is directed only to the sexual intercourse itself; thus, if the State contends defendant committed some other crime, such as assault, prior to the rape itself, it should file a separate indictment or add a count to the rape indictment charging this other crime. State v. Edmondson, 302 N.C. 169, 273 S.E.2d 659 (1981).

Effect of Verdict Where Indictment Insufficient. — Where an indictment is insufficient to charge first-degree rape, but is sufficient to charge second-degree rape, and the evidence is clearly sufficient to support a guilty verdict for that offense, the verdict must be regarded as a verdict of guilty of second-degree rape, and the defendant may not be sentenced for first-degree rape. The case must be remanded for entry of a verdict of guilty of second-degree rape and for a proper judgment on that verdict. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

C. Evidence.

1. Admissibility of Evidence Generally.

The unsupported testimony of the prosecutrix in a prosecution for rape is sufficient to require submission of the case to the jury. State v. Bailey, 36 N.C. App. 728, 245 S.E.2d 97 (1978).

Consent Not Shown Where Woman Visits Disreputable Places Unescorted. — Contributory negligence by the victim is no bar to prosecution by the State for the crime of rape. Hence, the fact that a woman goes, without proper escort, to a place where men of low morals might reasonably be expected to congregate does not establish her consent to have sexual relations with them, although it is competent evidence to be considered by the jury on that question. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

Opinion Testimony as to Age of Defendant. — Lay witnesses with an adequate opportunity to observe and who have in fact observed may state their opinion regarding the age of a defendant in a criminal case when the fact that he was at the time in question over a certain age is one of the essential elements to be proved by the State. State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977).

Evidence of Penetration. — Testimony by the prosecutrix in a rape case that defendant had "sex" and "intercourse" with her was sufficient to support a finding by the jury that there was penetration. State v. Ashford, 301 N.C. 512, 272 S.E.2d 126 (1980).

Sufficiency of Evidence to Show Serious Bodily Injury. — The evidence in a first-degree rape prosecution was sufficient to support a finding that the victim suffered a serious bodily injury where the victim suffered a hard blow to her upper jaw that left her stunned and dazed and knocked five teeth out of alignment, breaking the root of one tooth, where the teeth had to be deadened, forced back into line and secured with a metal brace, and where expert medical testimony predicted that the teeth would die and that root canals or actual extraction would be necessary. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

Testimony of Witnesses to Victim's Physical Condition. — Evidence of independent witnesses as to the physical condition of the prosecutrix on the night the intercourse occurred corroborates her testimony. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

Use of Term "Rape" in Testimony. — Victim's use of the term "rape" in her testimony was clearly a convenient shorthand term, amply defined by the balance of her testimony, and did not constitute an opinion on a question of law. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

Testimony by the prosecutrix that defendant raped her did not invade the province of the jury since (1) the court sustained an objection to the testimony and (2) the testimony was competent as a shorthand statement of fact. State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980).

Testimony as to Odors and Voices of Assailants. — There was no merit to defendant's contention in a rape case that the trial court erroneously allowed the prosecutrix to identify the defendant by body odor and voice since prosecutrix never identified defendant but simply testified that she knew four men were involved because her assailants had four different body odors and she heard four different voices, and defendant admitted he was present with three other men. State v.

Hammonds, 301 N.C. 713, 272 S.E.2d 856 (1981).

Improper Advances Made Four Years Before. — In a prosecution for rape of a female child under the age of twelve years, testimony of the prosecuting witness that the defendant had made improper advances to her approximately four years prior to the offense charged is competent evidence in corroboration of the offense charged. Gasque v. State, 271 N.C. 323, 156 S.E.2d 740 (1967), cert. denied, 390 U.S. 1030, 88 S. Ct. 1423, 20 L. Ed. 2d 288 (1968).

Evidence of Discussion of Sexual Matters in Child's Presence. — In a prosecution for the rape of a six-year-old child, evidence that the victim's father had discussed sexual matters in her presence was not competent as bearing upon consent, since consent is no defense, or to impugn the credibility of the victim's testimony, or for any other purpose. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

Testimony as to Assault on Others at Time of Rape. — Testimony as to the events that occurred in a home from the time of defendant's violent entry until the consummation of rape was competent and relevant as part of the res gestae, including testimony that persons other than the rape victim had been assaulted by the defendant. State v. Burleson, 280 N.C. 112, 184 S.E.2d 869 (1971).

Garments worn by the victim of a rape and murder showing the location of a wound upon the person of the deceased, or which otherwise corroborate the State's theory of the case, are competent. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (1971).

When relevant, articles of clothing identified as worn by the victim at the time the crime was committed are always competent evidence. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (1971).

Photographs. — Color photographs depicting the condition of the rape victim's body when examined by the doctor were competent for the purpose of illustrating the doctor's testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (1971).

Use of Map Drawn by Defendant. — Where officers testified that defendant drew a map and that they followed it to the scene where defendant had buried the victim's body, that map was admissible to illustrate their testimony. State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410, death sentence vacated, 403 U.S. 948, 91 S. Ct. 292, 29 L. Ed. 2d 861 (1971).

Pregnancy as Tending to Show Penetration. — Testimony of the prosecutrix concerning her pregnancy tended to show penetration, one of the elements of rape. Defendant's plea of not guilty placed upon the State the burden of proving beyond a reasonable doubt all the essential elements of the offense charged. Hence, evidence tending to prove penetration, an essential element of the offense, was properly admitted. State v. Cross, 284 N.C. 174, 200 S.E.2d 27 (1973).

2. Character of Victim.

Character Bears on Question of Consent. — The general character of the prosecutrix in a rape case may be shown as bearing upon the question of consent. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

And May Be Shown by Evidence of Reputation. — The most generally permissible method of proving character in a prosecution for rape is by evidence of the witness' reputation. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

The character of the alleged victim in a rape prosecution may be shown by evidence of her reputation as bearing upon the question of consent. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

Testimony of Stranger Investigating Reputation. — A stranger who has investigated a person's reputation in the appropriate community may testify to the result of his investigation. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

Unchastity Bears on Credibility and Consent. — In the case of a prosecuting witness over the age of twelve years the general character of the prosecuting witness for unchastity may be shown for the purpose of attacking the credibility of her testimony, and has bearing upon the likelihood of her consent. State v. Cox, 280 N.C. 689, 187 S.E.2d 1 (1972).

When a defendant has been charged with rape or with assault with intent to commit rape, evidence of the prosecutrix's reputation for unchastity is admissible both to attack her credibility as a witness and to show the likelihood of consent. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

In a prosecution for rape, the general character of the prosecutrix for unchastity may be shown both to attack the credibility of her testimony and as bearing upon the likelihood of consent. State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959), cert. denied, 362 U.S. 917, 80 S. Ct. 670, 4 L. Ed. 2d 738 (1960).

Testimony of Specific Acts of Unchastity with Person Other Than Defendant. — A witness called by the defendant cannot be asked about specific acts of misconduct by prosecutrix. This witness must confine himself to testimony concerning general reputation for chastity. State v. Tuttle, 28 N.C. App. 199, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

The testimony of specific acts of unchastity with someone other than defendant is incompetent evidence in a prosecution for rape or assault with intent to commit rape. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

Testimony of specific acts of unchastity with person other than defendant is properly excluded. State v. Grundler, 251 N.C. 177, 111 S.E.2d 1 (1959), cert. denied, 362 U.S. 917, 80 S. Ct. 670, 4 L. Ed. 2d 738 (1960).

Specific acts of unchastity with persons other than defendant are inadmissible in rape cases. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

The prosecutrix may be cross-examined concerning specific acts of unchastity for the sole purpose of impeaching credibility, but the defendant is bound by her answer. State v. Tuttle, 28 N.C. App. 198, 220 S.E.2d 630 (1975), cert. denied, 291 N.C. 716, 232 S.E.2d 207 (1977).

Evidence of Victim's Character Improperly Excluded. — Where the evidence of the victim's character was offered in a rape case according to the standard permissible method of proving character, since the witness's testimony was directed to the "general reputation and character" of the victim and not to his personal opinion, it was error for the court not to allow the jury to consider the witness's testimony on the issue of consent. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

3. Witnesses.

Competence of Child. — Whether a five-year-old child is competent to testify in a rape prosecution is a matter resting in the sound discretion of the trial judge, and where the evidence upon the voir dire as well as the child's testimony upon the trial negates abuse of discretion the ruling of the trial court that the child was a competent witness will not be disturbed on appeal. State v. Merritt, 236 N.C. 363, 72 S.E.2d 754 (1952).

In a prosecution for rape of a female under 12 years of age, her testimony to the effect that defendant had repeatedly had intercourse with her during the prior several years is competent in corroboration of the offense charged, and the first such occasions will not be held too remote when the evidence discloses that such acts were repeated with regularity up to the date specified in the indictment. State v. Browder, 252 N.C. 35, 112 S.E.2d 728 (1960).

Taking Testimony of Child in Absence of Jury. — In a prosecution for rape of an eight-year-old child, it was error to have the court reporter take the testimony of the child in the absence of the jury and then read to the jury the examination which had been conducted in its absence. State v. Payton, 255 N.C. 420, 121 S.E.2d 608 (1961).

An accused in a prosecution for rape has a right to impeach the State's witness by competent evidence of bad reputation of the witness. State v. Cole, 20 N.C. App. 137, 201 S.E.2d 100 (1973).

D. Instructions.

Failure to Instruct as to Force. — An instruction which fails to charge that the carnal knowledge of the prosecutrix must have been accomplished by force and against her will to constitute the crime of rape must be held reversible error. State v. Simmons, 228 N.C. 258, 45 S.E.2d 121 (1947).

Charge Limiting Consideration of Character. — There was no prejudice to the defendant in the technically erroneous charge in a rape case limiting consideration of the victim's character to the issue of credibility and not allowing the jury to consider character on the issue of consent where the credibility of the victim's testimony that she did not consent was the key to the State's case, and there was no real distinction between the issue of the victim's credibility and the issue of her consent. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

Failure to Charge on Lesser Offense. — Where all the evidence in a prosecution for rape revealed a completed act of sexual intercourse and the only dispute between the State and the defendant was whether the act was accomplished by consent or by force, there was no necessity to submit the lesser included offenses of assault with intent to commit rape and assault on a female. State v. Hall, 293 N.C. 559, 238 S.E.2d 473 (1977).

Where all the evidence reveals a completed act of sexual intercourse and the only dispute is whether the act was accomplished by consent or by force, the lesser included offenses of assault with intent to commit rape and assault upon a female need not be submitted to the jury because lesser included offenses must be submitted only where there is evidence to support them. State v. Edmondson, 302 N.C. 169, 273 S.E.2d 659 (1981).

The court's failure to charge the jury on a lesser crime than rape as principals and to submit guilt of a lesser offense as a permissible verdict was not error since there was no evidence from which the jury could find that any defendant committed an included crime of lesser degree. State v. Dawson, 281 N.C. 645, 190 S.E.2d 196 (1972).

Where there was no evidence of any included lesser offenses embraced within the indictments for rape and kidnapping, the court was under no duty to charge on lesser included offenses. State v. Bynum, 282 N.C. 552, 193 S.E.2d 725, cert. denied, 414 U.S. 836, 94 S. Ct. 182, 38 L. Ed. 2d 72 (1973).

The trial court did not err in failing to submit the lesser included offenses of assault with intent to commit rape and assault on a female where all the State's evidence tended to show commission of rape and the defendant's evidence was that he had never had intercourse with the prosecutrix nor did he touch her in a manner constituting an assault. State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975), cert. denied, 428 U.S. 909, 96 S. Ct. 3220, 49 L. Ed. 2d 1216 (1976).

In prosecutions for rape, when all the evidence tended to show a completed act of intercourse and the only issue was whether the act was with the prosecuting witness's consent or by force and against her will, it was not proper to submit to the jury lesser offenses included within a charge of rape. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

Instruction on Defendant's Admission as to Presence. — In a prosecution for first-degree rape where the trial court instructed that the defendant's admission that he was in the car with the rape victim could be considered by the jury as an admission of a fact relating to the crime charged, there was no merit to defendant's contention that such instruction could have led the jury to believe that his mere presence was sufficient for conviction and that he had therefore committed the crime, since the trial court's instructions made clear what the jury must find in order to convict defendant. State v. Hammonds, 301 N.C. 713, 271 S.E.2d 856 (1981).

Prejudicial Expression of Opinion by Judge. — The trial judge committed prejudicial error by expressing his opinion on the evidence when he instructed the jury that there was "considerable evidence" that defendant had committed the crime charged, and when he further went on to say "not satisfied with that, the evidence tends to show that he, the defendant, again had intercourse with her" intimating to the jury that it was his opinion that the defendant was guilty. State v. Head, 24 N.C. App. 564, 211 S.E.2d 534 (1975).

§ 14-27.3. Second-degree rape.

(a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class D felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 5.)

Cross References. — As to restrictions on evidence in rape or sex offense cases, see § 8-58.6. As to essentials of bill of indictment for rape, see § 15-144.1. As to venue of trial of sex offenses where victim was transported, see § 15A-136. As to office of coordinator of services for victims of sexual assault, see §§ 143B-394.1 through 143B-394.3.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class D felony" for "felony and upon conviction shall be punished by imprisonment in the State's prison for a term of not more than 40 years" in subsection (b). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Editor's Note. — Many of the annotations under this section are from cases decided under former § 14-21.

Elements of the Offense. Force is an essential element of the offense of rape. State v. Smith, 45 N.C. App. 501, 263 S.E.2d 371 (1980).

The element of "by force and against her will" has long been present in North Carolina rape statutes, and is still sufficient to support a conviction of second-degree rape under this section. State v. Roberts, 293 N.C. 1, 235 S.E.2d 203 (1977).

"By Force". — The force necessary to constitute rape need not be actual physical force. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976); State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977).

Fear, fright, or coercion may take the place of force. State v. Primes, 275 N.C. 61, 165 S.E.2d 225 (1969); State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976); State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975); State v. Yancey, 291 N.C. 656, 231 S.E.2d 637 (1977).

The force necessary to constitute rape need not be physical force. State v. Hines, 286 N.C. 377, 211 S.E.2d 201 (1975).

The "force" necessary to constitute an offense need not be actual physical force. Constructive force is sufficient, and the female's submission under fear or duress takes the place of actual physical force. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, 428 U.S. 404, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

Withdrawal of Consent. — Consent can be withdrawn. This concept ordinarily applies, however, to those situations in which there is evidence of more than one act of intercourse between the prosecutrix and the accused. State v. Way, 297 N.C. 293, 254 S.E.2d 760 (1979).

In a prosecution for second-degree rape where, under the court's instruction, the jury could have found the defendant guilty of rape if they believed the victim had consented to have intercourse with the defendant and in the middle of that act, she changed her mind, the court committed error requiring a new trial. If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape, although he may be guilty of another crime because of his subsequent actions. State v. Way, 297 N.C. 293, 254 S.E.2d 760 (1979).

Discretion as to the punishment for rape in the second degree is vested in the trial court, not the Supreme Court. State v. Goss, 293 N.C. 147, 235 S.E.2d 844 (1977).

Sufficiency of Indictment. — An indictment which charges that the defendant "did, unlawfully, willfully and feloniously ravish and carnally know, by force and against her will," the prosecuting witness, a female, charges all of the elements of second-degree rape. State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

The indictment upon which defendant was tried charged common-law rape, and its language was clearly sufficient to embrace second-degree rape as defined by this section. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

Use of Term "Rape" in Testimony. — Testimony by the prosecutrix that defendant raped her did not invade the province of the jury since (1) the court sustained an objection to the testimony and (2) the testimony was competent as a shorthand statement of fact. State v. See, 301 N.C. 388, 271 S.E.2d 282 (1980).

§ 14-27.4. First-degree sexual offense.

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child of the age of 12 years or less and the defendant is of the age of 12 years or more and is four or more years older than the victim; or

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(b) Any person who commits an offense defined in this section is guilty of a Class B felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 6; 1981, c. 106, ss. 3, 4.)

Cross References. — As to restrictions on evidence in rape or sex offense cases, see § 8-58.6. As to essentials of bill of indictment for sexual offense, see § 15-144.2. As to venue of trial of sex offenses where victim was transported, see § 15A-136. As to office of coordinator of services for victims of sexual assault, see §§ 143B-394.1 through 143B-294.3.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class B felony" for "felony and upon conviction shall be imprisoned

in the State's prison for life" in subsection (b). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

The 1981 amendment designated former subdivision (2) of subsection (a) as subdivision (1) and former subdivision (1) of subsection (a) as subdivision (2), and in present subdivision (1) of subsection (a) substituted "with a victim who" for "The victim" and inserted "is of the age of 12 years or more and." The amendment also substituted "an offense" for "the offense" in subsection (b).

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 14-27.5. Second-degree sexual offense.

(a) A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:

(1) By force and against the will of the other person; or

(2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally defective, mentally incapacitated, or physically helpless.

(b) Any person who commits the offense defined in this section is guilty of a Class D felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 7.)

Cross References. — As to restrictions on evidence in rape or sex offense cases, see § 8-58.6. As to essentials of bill of indictment for sexual offenses, see § 15-144.2. As to venue of trial of sexual offenses where victim was transported, see § 15A-136. As to office of coordinator of services for victims of sexual assault, see §§ 143B-394.1 through 143B-394.3.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class D felony" for "felony and upon conviction shall be punished by imprisonment in the State's prison for a term of not more than 40 years" in subsection (b). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 14-27.6. Penalty for attempt.

An attempt to commit first-degree rape as defined by G.S. 14-27.2, or an attempt to commit a first-degree sexual offense as defined by G.S. 14-27.4 is a Class F felony. An attempt to commit second-degree rape as defined by G.S. 14-27.3, or an attempt to commit a second-degree sexual offense as defined by G.S. 14-27.5 is a Class H felony. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 8.)

Cross References. — As to essentials of bill of indictment for sexual offenses, see § 15-144.2. As to venue for trial of sexual offenses where victim was transported, see § 15A-136. As to office of coordinator of services for victims of sexual assault, see §§ 143B-394.1 through 143B-394.3.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class F felony" for "felony, and upon conviction, the defendant shall be punished by imprisonment in the State's prison for not more than 20 years" in the first sentence and "Class H felony" for "felony, and upon conviction the defendant shall be punished by imprisonment in the State's prison for not more than 10 years" in the second sentence. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Assault with Intent to Commit Rape under Former § 14-22. — See State v. Harris, 277 N.C. 435, 177 S.E.2d 865 (1970); State v. Hudson, 280 N.C. 74, 185 S.E.2d 189 (1971), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974); State v. Norman, 14 N.C. App. 394, 188 S.E.2d 667 (1972); State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972); State v. Rice, 18 N.C. App. 575, 197 S.E.2d 245, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (1973); State v. Dais, 22 N.C. App. 379, 206 S.E.2d 759, appeal dismissed, 285 N.C. 664, 207 S.E.2d 758 (1974); State v. Webb, 26 N.C. App. 526, 216 S.E.2d 382, cert. denied, 288 N.C. 251, 217 S.E.2d 676 (1975); State v. Bradshaw, 27 N.C. App. 485, 219 S.E.2d 561 (1975); cert. denied, 289 N.C. 299, 222 S.E.2d 699 (1976); State v. Giles, 34 N.C. App. 112, 237 S.E.2d 305 (1977); State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

§ 14-27.7. Intercourse and sexual offenses with certain victims; consent no defense.

If a defendant who has assumed the position of a parent in the home of a minor victim engages in vaginal intercourse or a sexual act with a victim who is a minor residing in the home, or if a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class G felony. Consent is not a defense to a charge under this section. (1979, c. 682, s. 1; 1979, 2nd Sess., c. 1316, s. 9.)

Cross References. — As to office of coordinator of services for victims of sexual assault, see §§ 143B-394.1 through 143B-394.3.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class G felony" for "felony and shall be punished by imprisonment in the State's prison for not less than two nor more than 15 years" at the end of the first sentence. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 14-27.8. Defense that victim is spouse of person committing act.

A person may not be prosecuted under this Article if the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense unless the parties are living separate and apart pursuant to a written agreement or a judicial decree. (1979, c. 682, s. 1.)

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 14-27.9. No presumption as to incapacity.

In prosecutions under this Article, there shall be no presumption that any person under the age of 14 years is physically incapable of committing a sex offense of any degree or physically incapable of committing rape, or that a male child under the age of 14 years is incapable of engaging in sexual intercourse. (1979, c. 682, s. 1.)

CASE NOTES

Infants of fourteen and over are not entitled to any presumption of incapacity to commit rape. State v. Rogers, 275 N.C. 411, 168 S.E.2d 345 (1969), cert. denied, 39 U.S. 1024, 90 S. Ct. 599, 24 L. Ed. 2d 518 (1970), decided under former § 14-21.

§ 14-27.10. Evidence required in prosecutions under this Article.

It shall not be necessary upon the trial of any indictment for an offense under this Article where the sex act alleged is vaginal intercourse or anal intercourse to prove the actual emission of semen in order to constitute the offense; but the offense shall be completed upon proof of penetration only. Penetration, however slight, is vaginal intercourse or anal intercourse. (1979, c. 682, s. 1.)

Cross References. — As to restrictions on evidence in rape or sex offense cases, see § 8-58.6.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Penetration is an essential element of both rape and sodomy. State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Penetration without Emission of Semen Sufficient. — There is "carnal knowledge" or "sexual intercourse" in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male. It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient. State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970); State v. Jackson, 18 N.C. App. 234, 196 S.E.2d 568 (1973), decided under former § 14-21.

The terms carnal knowledge and sexual intercourse are synonymous. There is carnal knowledge or sexual intercourse in a legal sense if there is any slightest penetration of the sexual organ of the female by the sexual organ of the male. State v. Jones, 249 N.C. 134, 105 S.E.2d 513 (1958); State v. Burell, 252 N.C. 115, 113 S.E.2d 16 (1960); State v. Temple, 269 N.C. 57, 152 S.E.2d 206 (1967).

Evidence Sufficient to Support Finding of Penetration. — Testimony by the prosecutrix in a rape case that defendant had "sex" and "intercourse" with her was sufficient to support a finding by the jury that there was penetration. State v. Ashford, 301 N.C. 512, 272 S.E.2d 126 (1980).

ARTICLE 8.

Assaults.

§ 14-28. Malicious castration.

If any person, of malice aforethought, shall unlawfully castrate any other person, or cut off, maim or disfigure any of the privy members of any person, with intent to murder, maim, disfigure, disable or render impotent such person, the person so offending shall be punished as a Class D felon. (1831, c. 40, s. 1; R. C., c. 34, s. 4; 1868-9, c. 167, s. 6; Code, s. 999; Rev., s. 3627; C. S., s. 4210; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "be punished as a Class D felon" for "suffer imprisonment in the State's prison for not less than five nor more than sixty years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Elements of the offense of maliciously maiming a privy member as condemned by this section are: (1) The accused must act with malice aforethought, (2) the act must be done on purpose and unlawfully, (3) the act must be done with intent to maim or disfigure a privy member of the person assaulted, and (4) there must be permanent injury to the privy member of the person assaulted. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Intent. — An intent to maim or disfigure a privy member is prima facie to be inferred from an act which does in fact disfigure, unless the presumption be repelled by evidence to the contrary. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

The offense of maiming a privy member condemned by § 14-29 is a lesser included offense of this section, proof of malice aforethought, or of a preconceived intention to commit the maiming of the privy member, not being necessary to conviction under § 14-29. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Nonsuit Denied Where Evidence Sufficient to Show Maiming without Malice. — In a prosecution upon an indictment charging a malicious maiming of a privy member in violation of this section, defendant's motion for nonsuit of the "felony charge" was properly denied where there was sufficient evidence to support conviction under § 14-29 of maiming a privy member without malice aforethought, both offenses being felonies, and the offense condemned by § 14-29 being a lesser included offense of this section. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Appeal from Sentence for Punishment. — Upon conviction of the criminal offense inhibited by this section, sentence of the court for a period within that allowed by statute will not be considered on appeal as a cruel or unusual punishment against the provision of N.C. Const., Art. I, § 14 (now see N.C. Const., Art. I, § 27), or discriminatory against the principal actor in committing the crime, when the others participating therein to a lesser extent have been sentenced for shorter terms, the sentences imposed being left largely in the discretion of the trial court, and in the absence of an abuse of this discretion not reviewable on appeal. State v. Griffin, 190 N.C. 133, 129 S.E. 410 (1925).

Cited in State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

§ 14-29. Castration or other maiming without malice aforethought.

If any person shall, on purpose and unlawfully, but without malice aforethought, cut, or slit the nose, bite or cut off the nose, or a lip or an ear, or disable any limb or member of any other person, or castrate any other person, or cut off, maim or disfigure any of the privy members of any other person, with intent to kill, maim, disfigure, disable or render impotent such person, the person so offending shall be punished as a Class H felon. (1754, c. 56, P. R.; 1791, c. 339, ss. 2, 3, P. R.; 1831, c. 40, s. 2; R. C., c. 34, s. 47; Code, s. 1000; Rev., s. 3626; C. S., s. 4211; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14.1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "imprisoned in the county jail or State's prison not less than six months nor more than ten years, and fined, in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or

after that date, unless specific language of the act indicates otherwise."

CASE NOTES

History of Section. — See State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

The words "without malice aforethought" were included in this section to differentiate it from § 14-30, and make it clear and definite that allegation and proof of premeditation (prepense) are not a requirement in the prosecution of offenses under this section. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

Proof of Malice Aforethought Not Necessary. — Proof of malice aforethought, or of a preconceived intention to commit the maiming, is not necessary. State v. Girkin, 23 N.C. 121 (1840).

Intent is an essential element of the offense under this section. State v. Haulk, 38 N.C. App. 357, 247 S.E.2d 798 (1978).

This section does not purport to define an offense based on negligence or carelessness; it condemns an intentional offense. State v. Haulk, 38 N.C. App. 357, 247 S.E.2d 798 (1978).

Where the import of instructions to the jury in a prosecution under this section was that something less than intentional conduct, gross carelessness or criminal negligence, for example, would suffice for conviction, a new trial was necessary. State v. Haulk, 38 N.C. App. 357, 247 S.E.2d 798 (1978).

Lesser Included Offense of § 14-28. — The offense of maiming a privy member condemned by this section is a lesser included offense of § 14-28, proof of malice aforethought, or of a preconceived intention to commit the maiming of the privy member not being necessary to conviction under this section. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Nonsuit Denied Where Evidence Sufficient to Show Maiming without Malice. — In a prosecution upon an indictment charging a malicious maiming of a privy member in violation of § 14-28, defendant's motion for nonsuit of the "felony charge" was properly denied where there was sufficient evidence to support conviction under this section of maiming a privy member without malice aforethought, both offenses being felonies, and the offense condemned by this section being a lesser included offense of § 14-28. State v. Beasley, 3 N.C. App. 323, 164 S.E.2d 742 (1968).

Consent of Victim No Defense. — Under this section the elements of the offense of mayhem are the same as under the common law, and the consent of the victim does not constitute a defense in a prosecution under this statute. State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

§ 14-30. Malicious maiming.

If any person shall, of malice aforethought, unlawfully cut out or disable the tongue or put out an eye of any other person, with intent to murder, maim or disfigure, the person so offending, his counselors, abettors and aiders, knowing of and privy to the offense, shall be punished as a Class H felon. (22 and 23 Car. II, c. 1 (Coventry Act); 1754, c. 56, P. R.; 1791, c. 339, s. 1, P. R.; 1831, c. 12; R. C., c. 34, s. 14; Code, s. 1080; Rev., s. 3636; C. S., s. 4212; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class H felon" for provisions specifying the punishment for first and subsequent offenses. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

History of Section. — See State v. Bass, 255 N.C. 42, 120 S.E.2d 580 (1961).

When Corpus Delicti Complete. — Under this section the corpus delicti is complete, if the maim be committed on purpose, and with intent to disfigure, although without malice prepense. State v. Crawford, 13 N.C. 425 (1830).

Indictment — Necessary Allegations. — An indictment, for biting off ear, must state the offense to be done on purpose, as well as unlawfully. State v. Ormond, 18 N.C. 119 (1834).

Same — Unnecessary Allegations. — But it need not be alleged whether it was the right or left ear. State v. Green, 29 N.C. 39 (1846).

Same — Sufficient Allegations. — An indictment charging the defendant with unlawfully, willfully, feloniously and with malice aforethought putting out the right eye of named person with her thumbs with intent to maim and disfigure named person charged a violation of this section. State v. Atkins, 242 N.C. 294, 87 S.E.2d 507 (1955).

"Malice Aforethought" Construed. — The words "malice aforethought" do not mean an actual, express or preconceived disposition; but import an intent, at the moment, to do, without lawful authority, and without the pressure of necessity, that which the law forbids. State v. Crawford, 13 N.C. 425 (1830).

Malicious Intent Express or Implied. — The malicious intent to maim or disfigure may either be expressed or implied from circumstances. State v. Irwin, 2 N.C. 112 (1794).

Proof of Grudges or Threatenings Not Necessary. — Proof of antecedent grudges, threatenings or an express design is not necessary. State v. Irwin, 2 N.C. 112 (1794).

What Constitutes Maiming. — To constitute maiming under this statute, by biting off an ear, it is not necessary that the whole ear shall be bitten off — it is sufficient if a part only is taken off, provided enough is taken off to alter and impair the natural personal appearance, and, to ordinary observation, to render the person less comely. State v. Girgin, 23 N.C. 121 (1840).

Presumptions. — An intent to disfigure is prima facie to be inferred from an act which does in fact disfigure, unless that presumption be repelled by evidence on the part of the accused of a different intent, or at least of the absence of the intent mentioned in the statute. State v. Girgin, 23 N.C. 121 (1840).

"To wound" is distinguished from "to maim" in that the latter implies a permanent injury to a member of the body or renders a person lame or defective in bodily vigor. State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946).

Where there was no evidence of permanent injury to the privy parts of the prosecuting witness, it was error for the court to submit to jury the question of the guilt of defendant under this section. State v. Malpass, 226 N.C. 403, 38 S.E.2d 156 (1946).

First Blow or Sudden Affray. — The first blow, or a sudden affray, does not palliate the offense of maiming under the act of 1791; for if it did, the statute would be of little avail. State v. Crawford, 13 N.C. 425 (1830).

Same — Accident or Self-Defense. — When the act is proved, the law presumes that it was done on purpose. The burden is therefore upon defendant to show that it was done accidentally or in self-defense. State v. Evans, 2 N.C. 281 (1796); State v. Skidmore, 87 N.C. 509 (1882).

§ 14-30.1. Malicious throwing of corrosive acid or alkali.

If any person shall, of malice aforethought, knowingly and willfully throw or cause to be thrown upon another person any corrosive acid or alkali with intent to murder, maim or disfigure and inflicts serious injury not resulting in death, he shall be punished as a Class H felon. (1963, c. 354; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and shall be punished by imprisonment in the State prison for a term of not less than four months nor more than ten years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Unnecessary for Jury to Find Defendant's Motive Was Intent to Murder. — In a prosecution for maliciously throwing a corrosive acid or alkali, it is not necessary for the jury to find that the intent to murder, maim, or disfigure was the sole or even the dominant motivation for defendant's actions. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

Defendant May Not Complain if Jury Finds Intent to Murder. — One who, without provocation, deliberately throws corrosive acid or alkali into the face and eyes of another, thereby causing serious injuries, is in no position to complain if a jury finds that he intended his act to produce the very result which it did produce, to murder, maim, or disfigure. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

Error in Charging on Lesser Included Offense Not Prejudicial. — In a prosecution for the malicious throwing of corrosive acid or alkali with the intent to murder, maim, or disfigure, any error by the trial court in charging on the lesser included offense of assault could not have been prejudicial to the defendant. State v. Wingard, 10 N.C. App. 101, 177 S.E.2d 765 (1970), appeal dismissed, 277 N.C. 727, 178 S.E.2d 494 (1971).

Cited in Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-31. Maliciously assaulting in a secret manner.

If any person shall in a secret manner maliciously commit an assault and battery with any deadly weapon upon another by waylaying or otherwise, with intent to kill such other person, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, he shall be punished as a Class F felon. (1887, c. 32; Rev., s. 3621; 1919, c. 25; C. S., s. 4213; 1969, c. 602, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to an assault in this State injuring person in another State, see § 15-132.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class F felon" for "guilty of a felony punishable by fine or imprisonment for not less than one nor more than twenty years, or both such fine and imprisonment" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

The felony described in this section is often referred to as malicious secret assault and battery with a deadly weapon. State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968).

Elements of Offense — Burden of Proof. — On a trial under a criminal indictment the burden is on the State to show beyond a reasonable doubt the ingredients or elements necessary to constitute the statutory offense, or the lower degree of the same crime for which a verdict is permissible and where assault and battery, prohibited by this section, are charged, the State must accordingly show that it was maliciously done with a deadly weapon, secretly by waylaying or otherwise, etc., with intent to kill, and when the evidence was conflicting, it was an expression of opinion inhibited by § 1-180 (now see § 1-180.1), for the judge to charge the jury that if they believed the evidence, a cold-blooded and cruel assault had been committed. State v. Kline, 190 N.C. 177, 129 S.E. 417 (1925).

The following elements must be proven beyond a reasonable doubt in order to establish the crime of secret assault: (1) secret manner; (2) malice; (3) assault and battery; (4) deadly weapon; and (5) intent to kill. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Intent is a prescribed element of secret assault under this section. State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Infliction of serious injury need not be shown at all in a prosecution under this section. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Effect of Words "or Otherwise." — The legislature, after denouncing as criminal secret assaults with intent to kill, and after giving one explicit illustration, added the words "or otherwise," in order to prevent the application of the maxim expressio unius exclusio alterrius, thus including every other manner of making secret attempts, regardless of the attendant circumstances. State v. Shade, 115 N.C. 757, 20 S.E. 537 (1894).

Indictment — Necessary Allegation. — Indictment omitting the words "by waylaying or otherwise," was held sufficient. State v. Shade, 115 N.C. 757, 20 S.E. 537 (1894).

Assault with Intent to Commit Murder. — Attempts to commit any of the four capital offenses were formerly felonies, but during the prosecution for "Ku Klux" troubles the offense of assault with intent to commit murder was reduced to a simple misdemeanor. The act of 1887, ch. 32, restored the grade of the offense to a felony, except in those cases in which it is committed openly, giving the assailed an opportunity to know his assailant. State v. Telfair, 109 N.C. 878, 13 S.E. 726 (1891); State v. Harris, 120 N.C. 577, 26 S.E. 774 (1897).

What Constitutes Secret Assault. — While it is not required for the conviction of a secret assault, under the provisions of this section, that the assailed should not have been aware of the presence of his assailant, it is necessary that the purpose of the assailant be not previously made known to him; and where the evidence did not tend to show that it was a secret assault, within the intent and meaning of the statute, an instruction to the contrary was reversible error. State v. Oxendine, 187 N.C. 658, 122 S.E. 568 (1924).

Same — Assault from Behind. — An assault made from behind and in such a manner as to prevent the person assaulted from knowing who his assailant is, or that the blow is about to be struck, is a secret assault. State v. Harris, 120 N.C. 577, 26 S.E. 774 (1897).

Same — Assault by Means of Poison. — An assault by means of poison comes within the intent of our statutes making an assault with a deadly weapon with intent to kill punishable as a felony. State v. Alderman, 182 N.C. 917, 110 S.E. 59 (1921).

Same — Assault Facing Victim. — Where one, facing another or walking up in front of him, draws a pistol from a hip-pocket and shoots him without warning, it is not a secret assault, within the meaning of this section. State v. Patton, 115 N.C. 753, 20 S.E. 538 (1894).

Same — Sufficiency. — For sufficiency of evidence to prove a secret assault, see State v. Bridges, 178 N.C. 733, 101 S.E. 29 (1919).

Evidence Permissible to Show Malice. — As bearing on the question of malice and felonious intent, the State was allowed to show that, a week or two before the happening of the offenses charged in the bill of indictment, the defendant had been seen about the home of the prosecuting witness; that he had shot at his house and threatened to shoot him. State v. Miller, 189 N.C. 695, 128 S.E. 1 (1925).

Instruction. — For charge not sufficiently explaining the offense, see State v. Vanderburg, 200 N.C. 713, 158 S.E. 248 (1931).

Verdict for Simple Assault. — Upon the trial of an indictment charging a secret felonious assault, verdict may be rendered for simple assault. State v. Jennings, 104 N.C. 774, 10 S.E. 249 (1889).

An indictment charging a felonious assault with intent to kill as defined in this section, embraces as a lesser degree of the crime charged the offense of assault with a deadly weapon, and where the evidence is sufficient to sustain a verdict of the offense charged, defendant may not complain of a verdict of guilty of the lesser offense. State v. High, 215 N.C. 244, 1 S.E.2d 563 (1939).

Secret assault is not a higher degree of felonious assault with a deadly weapon with the intent to kill or inflict serious bodily injury. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Submission of Lesser Included Offense. — Where there was positive evidence that the defendant committed every element of the offense under this section charged in the bill of indictment, and there was no conflicting evidence as to any element of the offense, the defendant's contention that the jury might have convicted the defendant of the lesser included offense of assault with a deadly weapon if they had been given the opportunity did not support the submission of the lesser included offense to the jury. State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 844 (1978).

When Defendant Entitled to Judgment of Nonsuit. — If the State sought a conviction under this section and only proved that the assault was made in a secret manner, defendant would be entitled to a judgment of nonsuit. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Applied in State v. Brock, 234 N.C. 390, 67 S.E.2d 282 (1951); State v. Stevens, 264 N.C. 737, 142 S.E.2d 588 (1965); State v. Lewis, 1 N.C. App. 296, 161 S.E.2d 497 (1968).

Cited in State v. Strickland, 192 N.C. 253, 134 S.E. 850 (1926); State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948); State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951).

§ 14-32. Felonious assault with deadly weapon with intent to kill or inflicting serious injury; punishments.

(a) Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class F felon.

(b) Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class H felon.

(c) Any person who assaults another person with a deadly weapon with intent to kill shall be punished as a Class H felon. (1919, c. 101; C. S., s. 4214; 1931, c. 145, s. 30; 1969, c. 602, s. 2; 1971, c. 765, s. 1; c. 1093, s. 12; 1973, c. 229, ss. 1-3; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to an assault in this State resulting in injury in another state, see § 15-132.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class F felon" for "is guilty of a felony punishable by a fine, imprisonment for not more than 20 years, or both such fine and imprisonment" at the end of subsection (a), substituted "shall be punished as a Class H felon" for "is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment" at the end of subsection (b) and substituted "shall be punished as a Class H felon" for "is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment" at the end of subsection (c). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For note on the erosion of the retreat rule and self-defense, see 12 Wake Forest L. Rev. 1093 (1976).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Elements of Offense.
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I. GENERAL CONSIDERATION.

Section Creates New Offense. — By the enactment of this section the legislature intended to create a new offense of higher degree than the common-law crime of assault with intent to kill. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

The felony described in this section is often referred to as felonious assault. State v. Lewis, 274 N.C. 438, 164 S.E.2d 177 (1968).

Lesser Included Offenses. — Assault with a deadly weapon under § 14-33 is an essential element of the felony created and defined by this section, being an included "less degree of the same crime." State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

An indictment which sufficiently charged defendant with assault with a deadly weapon, to wit, a pistol, with intent to kill and inflicting serious injury not resulting in death, included the offense of assault with a deadly weapon. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

An indictment charging an assault with a deadly weapon, with intent to kill, inflicting serious injury, not resulting in death, includes the lesser offense of assault with a deadly weapon. State v. Lane, 1 N.C. App. 539, 162 S.E.2d 149 (1968).

The offense of an assault with a deadly weapon with intent to kill under § 14-33, a general misdemeanor, is a lesser included offense of the felony charged in a bill of indictment drawn under this section. State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

The offense defined in subsection (b) is a lesser included offense of the offense defined in subsection (a). State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971); State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (1974).

Subsection (c) of this section creates another lesser offense of subsection (a), that of assault with a firearm with intent to kill. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Guilt of Lesser Degree of Offense. — Where the defendants were tried for violating this section in making an assault with a deadly weapon with intent to kill, etc., the action would not be dismissed when the undisputed evidence tended to show the assault was made with a deadly weapon. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

Secret assault is not a higher degree of felonious assault with a deadly weapon with the intent to kill or inflict serious bodily injury. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Convictions of Armed Robbery and Felonious Assault Based on Separate Features of One Continuous Course of Conduct. — When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, and verdicts of guilty as charged are returned, these verdicts provide support for separate judgments. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Offense under this Section Is Not Included in Offense of Armed Robbery. — The crime of armed robbery defined in § 14-87 includes an assault on the person with a deadly weapon. The crime of felonious assault defined in subsection (a) of this section is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in § 14-87. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

A conviction of armed robbery does not establish a defendant's guilt of felonious assault. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974).

An assault with a deadly weapon inflicting serious injury, defined by subsection (b) of this section is not a lesser offense included in the offense of armed robbery, because the infliction of serious injury is not an essential ingredient of armed robbery. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972); State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

Assault with a deadly weapon inflicting serious injury is not a lesser included offense of attempted armed robbery. State v. Wilson, 26 N.C. App. 188, 215 S.E.2d 167 (1975).

Assault with a deadly weapon with intent to kill inflicting serious injury under this section cannot be considered a lesser included offense of armed robbery. The two offenses are separate and complete and an acquittal on the assault charge would not bar a conviction on the armed robbery charge. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

Although Felonious Assault May Be Committed during Perpetration of Armed Robbery. — The fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Discharging Firearm into Occupied Building Distinguished. — Discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury are entirely separate and distinct offenses. To prove the one, the State must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove the second charge, it must show the infliction of serious injury, which is not an element of the first charge. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Since assault with a deadly weapon and assault by pointing a gun each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses of that offense. State v. Bland, 34 N.C. App. 384, 238 S.E.2d 199 (1977), cert. denied, 294 N.C. 183, 241 S.E.2d 518 (1978).

Facts Not Showing Two Offenses. — In a felonious assault case, the mere fact that some of the shots entered from the front and some entered from the back did not make two offenses. State v. Dilldine, 22 N.C. App. 229, 206 S.E.2d 364 (1974).

Conviction on Two Separate Counts Not Double Jeopardy. — Conviction and sentence of defendant for assault with a deadly weapon with intent to kill inflicting serious injury, and assault with intent to commit rape, did not subject him to double jeopardy, since the elements

for the two crimes are not the same. State v. Herring, 50 N.C. App. 298, 273 S.E.2d 29 (1981).

Prosecution under § 14-34.2 and This Section Not Double Jeopardy. — Prosecution of defendants under § 14-34.2 for assault on a law-enforcement officer with a firearm and under this section for assault with a deadly weapon with intent to kill did not violate the prohibition against double jeopardy, nor did it require the State to elect prosecution under a single statute, though the facts underlying defendants' indictment under each statute were the same, since each offense required proof of an element which did not exist in the other charge. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

Election Between Charges. — The trial court did not err in denying defendant's pretrial motion to require the State to elect between the charges of felonious assault with a deadly weapon upon a law enforcement officer in the performance of his duties and felonious assault with a deadly weapon with intent to kill inflicting serious injury, since a defendant may be charged with more than one offense based on a given course of conduct, and even when an election ultimately will be necessary, the State is not required to elect prior to the introduction of evidence. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Admissibility of Evidence. — See State v. Oxendine, 224 N.C. 825, 32 S.E.2d 648 (1945).

Evidence of communicated threats was received with apparent approval in State v. Scott, 26 N.C. 409 (1844), and with explicit approval in State v. Turpin, 77 N.C. 473, 24 Am. R. 455 (1877). It was denied in State v. Byrd, 121 N.C. 684, 28 S.E. 353 (1897) and in State v. Skidmore, 87 N.C. 509 (1882), in an opinion which overlooked the two cases first cited. See 11 N.C.L. Rev. 20.

Evidence that defendant said nothing to prosecutrix at the time he shot her, but that two weeks before he shot her he told her he was going to kill her, was competent and properly admitted in evidence in a prosecution under this section. State v. Heard, 262 N.C. 599, 138 S.E.2d 243 (1964).

Testimony Properly Admitted Absent Showing of Prejudice. — In the appeal of a conviction for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury, where defendant assigned as error the failure of the trial court to sustain three objections made by defendant during the testimony of the victim, in which the victim stated that she was not sure how good her husband's hearing was on the side where he had been shot; that she could still see the defendant's face when she closed her eyes; and that she had let the defendant take the money becasue he had a gun, the defendant may have been correct in his assertion that these answers were in places speculative or unresponsive, but neither the defendant nor the record showed that the errors were material or prejudicial, and absent such a showing defendant was not entitled to a new trial. State v. Billups, 301 N.C. 607, — S.E.2d — (1981).

Applied in State v. Jones, 229 N.C. 276, 49 S.E.2d 463 (1948); State v. Muse, 229 N.C. 536, 50 S.E.2d 311 (1948); State v. Way, 231 N.C. 716, 58 S.E.2d 716 (1950); State v. Cooper, 238 N.C. 241, 77 S.E.2d 695 (1953); State v. Bridgers, 238 N.C. 677, 78 S.E.2d 756 (1953); State v. Cauley, 244 N.C. 701, 94 S.E.2d 915 (1956); State v. Williams, 246 N.C. 688, 99 S.E.2d 919 (1957); State v. Bullard, 253 N.C. 809, 117 S.E.2d 722 (1961); State v. Spencer, 256 N.C. 487, 124 S.E.2d 175 (1962); State v. Rorie, 258 N.C. 162, 128 S.E.2d 229 (1962); State v. Godwin, 260 N.C. 580, 133 S.E.2d 166 (1963); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Cooper, 266 N.C. 644, 146 S.E.2d 663 (1966); Housing Auth. v. Thorpe, 267 N.C. 431, 148 S.E.2d 290 (1966); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Howard, 272 N.C. 144, 157 S.E.2d 665 (1967); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Hinton, 14 N.C. App. 253, 188 S.E.2d 17 (1972); State v. Kinsey, 17 N.C. App. 57, 193 S.E.2d 430 (1972); State v. Moses, 17 N.C. App. 115, 193 S.E.2d 288 (1972); State v. Williams, 282 N.C. 576, 193 S.E.2d 738 (1973); State v. Coleman, 19 N.C. App. 389, 198 S.E.2d 764 (1973); State v. Brown, 19 N.C. App. 480, 199 S.E.2d 134 (1973); State v. Goff, 19 N.C. App. 588, 199 S.E.2d 502 (1973); State v. Brown, 21 N.C. App. 552, 204 S.E.2d 861 (1974); State v. Harding, 22 N.C. App. 66, 205 S.E.2d 544 (1974); State v. White, 24 N.C. App. 318, 210 S.E.2d 261 (1974); State v. Lunsford, 26 N.C. App. 78, 214 S.E.2d 619 (1975); State v. Ware, 31 N.C. App. 292, 229 S.E.2d 249 (1976); State v. Best, 31 N.C. App. 389, 229 S.E.2d 202 (1976); State v. Pugh, 48 N.C. App. 175, 268 S.E.2d 242 (1980); State v. Bailey, 49 N.C. App. 377, — S.E.2d — (1980).

Quoted in State v. McLaurin, 12 N.C. App. 23, 182 S.E.2d 280 (1971).

Stated in State v. Goff, 205 N.C. 545, 172 S.E. 407 (1934); State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

Cited in State v. Colson, 194 N.C. 206, 139 S.E. 230 (1927); State v. Potter, 221 N.C. 153, 19 S.E.2d 257 (1942); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Williams, 229 N.C. 348, 49 S.E.2d 617 (1948); State v. Werst, 232 N.C. 330, 59 S.E.2d 835 (1950); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); State v. Wagstaff, 235 N.C. 69, 68 S.E.2d 858 (1952); Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App.

490, 181 S.E.2d 727 (1971); State v. Pearson, 288 N.C. 34, 215 S.E.2d 598 (1975); State v. Hill, 34 N.C. App. 347, 238 S.E.2d 201 (1977); State v. Harris, 34 N.C. App. 491, 238 S.E.2d 642 (1977); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Chapman, 294 N.C. 407, 241 S.E.2d 667 (1978); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Nelson, 36 N.C. App. 235, 243 S.E.2d 392 (1978); State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978); State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979); State v. Tise, 39 N.C. App. 495, 250 S.E.2d 674 (1979); State v. Farrington, 40 N.C. App. 341, 253 S.E.2d 24 (1979); State v. Stephenson, 43 N.C. App. 323, 258 S.E.2d 806 (1979); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

II. ELEMENTS OF OFFENSE.

In order for a conviction of crime under the provisions of this section as it stood before the 1969 amendment, there had to be a charge and evidence thereon of five essential elements: an assault, the use of a deadly weapon, the intent to kill, infliction of serious injury, death not resulting, and while an assault did not necessarily include a battery, where serious injury was inflicted a battery was necessarily implied. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

To warrant the conviction of an accused of a felonious assault and battery under this section, as it stood before the 1969 amendment, on the theory that he participated in the offense as a principal in the first degree, the State had to produce evidence sufficient to establish beyond a reasonable doubt that he did these four things: (1) committed an assault and battery upon another; (2) committed the assault and battery with a deadly weapon; (3) committed the assault and battery with intent to kill the victim of his violence; and (4) thus inflict on the person of his victim serious injury not resulting in death. State v. Birchfield, 235 N.C. 410, 70 S.E.2d 5 (1952).

The statutory offense under this section as it stood before the 1969 amendment, embodied (1) assault, (2) with a deadly weapon, (3) the use of the weapon must be with intent to kill, (4) the result of the use had to be the inflicting of serious injury, (5) which fell short of causing death. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

The crime of felonious assault, created and defined by this section as it stood before the 1969 amendment, consisted of these essential elements: (1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death. State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972).

A serious injury and an intent to kill were both essential elements of the crime of felonious assault under this section as it stood prior to the 1969 amendment. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

Intent Is Not Prescribed Element under Subsection (b). — Intent is not a prescribed element of assault with a deadly weapon inflicting serious injury under subsection (b) of this section. State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

But Is Prescribed under Subsection (c). — Intent is a prescribed element of assault with firearm with intent to kill under subsection (c) of this section. State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Secret manner and malice need not be shown at all in a prosecution under this section. State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975).

Defendant Must Be Present at Scene of Assault. — Where the evidence showed that defendant procured, counseled, commanded or encouraged others to commit an attempted armed robbery and that he was absent from the scene when the others committed a felonious assault in their attempt to carry out the armed robbery, the felonious assault charge against defendant should not have been submitted to the jury and the trial court should have arrested the judgment on that charge since, in order to be guilty of a felonious assault, a defendant must be present at the scene of the assault either actually or constructively. State v. Allen, 34 N.C. App. 260, 237 S.E.2d 869, cert. denied, 293 N.C. 741, 241 S.E.2d 516 (1977).

III. INDICTMENT.

Necessity of. — A charge of assault with a deadly weapon with intent to kill, resulting in serious injury, is a charge of a felony, under this section, and defendant may not be put to answer thereon but by indictment. State v. Clegg, 214 N.C. 675, 200 S.E. 371 (1939).

An indictment which follows substantially the language of this section as to its essential elements meets the requirements of law. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967); State v. Lane, 1 N.C. App. 539, 162 S.E.2d 149 (1968).

Injury Need Not Be Described in Indictment. — In an indictment, under this section, it is not necessary to describe the injury further than in the words of the statute. State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943).

Effect of Omitting Averment of Serious Injury. — An indictment charging assault with intent to kill, without averment of the infliction of serious injury, charged a misdemeanor under this section as it stood prior to the 1969 amendment. State v. Floyd, 241 N.C. 298, 84 S.E.2d 915 (1954).

An indictment which does not incorporate the word "feloniously" or charge that the offense is a felony cannot support a conviction of an offense greater than a misdemeanor. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

Sufficiency of Indictment. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

"A certain knife" was a sufficient description of the weapon in an indictment for assault with a deadly weapon with intent to kill. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967).

In an indictment charging an assault with intent to kill "and murder" the words "and murder" were surplusage and placed no additional burden on the State. State v. Plemmons, 230 N.C. 56, 52 S.E.2d 10 (1949).

Indictment Held Sufficient. — An indictment charging that defendant assaulted a named person with intent to kill and did inflict serious and permanent bodily injuries not resulting in death by setting his victim afire, was sufficient to charge an assault where serious injury was inflicted. State v. Price, 265 N.C. 703, 144 S.E.2d 865 (1965).

Offenses Not Included under Indictment for Assault with Firearm with Intent to Kill. — An indictment for assault with a firearm with intent to kill would not support a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury and did not support the verdict of guilty of assault with a deadly weapon inflicting serious injury. State v. Bryant, 19 N.C. App. 676, 199 S.E.2d 744 (1973).

The allegation in a warrant that defendant assaulted his wife "by threatening to kill her" fell short of charging that he acted with the specific intent to kill required to make the offense a felony under this section; the offense charged was a misdemeanor under § 14-33. State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972).

IV. DEADLY WEAPON.

What Is a Deadly Weapon. — Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitaker, 29 N.C. App. 602, 225 S.E.2d 129 (1976); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

A deadly weapon is not one which must kill but one which under the circumstances of its use is likely to cause death or great bodily harm. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

A deadly weapon is any instrument which is likely to produce death or great bodily harm, under the circumstances of its use. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

May Depend upon Manner of Use. — The deadly character of a weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

And May Be Question of Law or Fact. — Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Where the instrument may or may not be likely to produce death or great bodily harm, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. State v. Whitaker, 29 N.C. App. 602, 225 S.E.2d 129 (1976); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must resolve the conflict. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

The deadly character of a weapon may be inferred by the jury from the manner of its use and the injury inflicted, and evidence of slashes with a knife across the upper arm and lower back along the belt line, producing cuts requiring 16 stitches to close, was sufficient for the jury to infer that the knife was a deadly weapon. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947).

The introduction into evidence of the weapon used is not requisite to the admission of testimony as to the manner of its use, and the injuries inflicted, in establishing the character of the weapon as deadly. State v. Randolph, 228 N.C. 228, 45 S.E.2d 132 (1947).

The trial judge correctly submitted to the jury, under proper instructions, the questions whether the bottle involved was a deadly

weapon and whether serious injury was inflicted where a lone woman, attacked by five males, was held down by defendant while an accomplice rammed a bottle into her rectum with such force as to cause excesssive bleeding, dilation of the rectum, and the infliction of multiple cuts, some deep and long, about the rectum. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

A pistol or a gun is a deadly weapon. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

A pistol is a deadly weapon per se. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

An unexplained misfiring of a loaded pistol does not change its deadly character. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Knife. — Under the case law of this State, a knife with a three-inch blade constitutes a deadly weapon per se when used as a weapon in an assault. State v. Cox, 11 N.C. App. 377, 181 S.E.2d 205 (1971).

A baseball bat should be denominated a deadly weapon if viciously used. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

Plastic Bag. — Given proper surrounding circumstances, a plastic bag is a deadly weapon. State v. Strickland, 290 N.C. 169, 225 S.E.2d 531 (1976).

V. INTENT TO KILL.

An intent to kill is a matter for the State to prove, and is ordinarily shown by proof of facts from which an intent to kill may be reasonably inferred. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972).

No Presumption of Felonious Intent. — The admission or proof of an assault with a deadly weapon, resulting in serious injury, but not in death, cannot be said, as a matter of law, to establish a presumption of felonious intent, or intent to kill. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

A person might intentionally and without justification or excuse assault another with a deadly weapon and inflict upon him serious injury not resulting in death, but such an assault would not establish a presumption of felonious intent, or the intent to kill. Such intent must be found by the jury as a fact from the evidence. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill. Such intent must be found by the jury as a fact from the evidence. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (1974).

The mere proof of an assault with a deadly weapon inflicting serious injury does not by itself establish an intent to kill. State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979).

Intent to Kill May Be Inferred from Circumstances. — An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

An intent to kill is a mental attitude, and ordinarily it must be proved, if proven at all, by circumstantial evidence; that is, by proving facts from which the fact sought to be proven may be reasonably inferred. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

The requisite intent to kill can be inferred from the nature of the assault on the victim, the manner in which it was made, and the conduct of the parties under the circumstances. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

A person who deliberately fired a pistol into the face of his victim at point-blank range has to be held to intend the normal and natural results of his deliberate act. The fact that the victim's life was spared could be cause for a salute to medical science, but it hardly changed the intent apparently present when defendant pulled the trigger. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Ordinarily, a specific intent to do an act is shown by the proof of facts and circumstances from which such an intent may be inferred. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

In a prosecution for assault with a deadly weapon with intent to kill, an altercation, the shooting and resulting death of decedent soon after defendant pointed the pistol at another's chest and pulled the trigger, and other circumstances, were sufficient evidence of intent to kill. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

The nature of the assault, the manner in which it was made, and the surrounding circumstances are all matters from which an intent to kill may be inferred. State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979).

An intent to kill, being a state of mind of the defendant not easily susceptible of proof, ordinarily must be proved by circumstantial evidence from which a jury may reasonably infer intent. State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979).

VI. SERIOUS INJURY.

The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972); State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Whether the assault is calculated to create a breach of the peace that would outrage the sensibilities of the community does not adequately or correctly describe the infliction of serious injury contemplated by this section. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

Injury Must Fall Short of Causing Death. — The injury must be serious but it must fall short of causing death. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Meadows, 272 N.C. 327, 158 S.E.2d 638 (1968); State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972); State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Facts of Particular Case Are Determinative. — Whether serious injury has been inflicted must be determined according to the particular facts of each case. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962); State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964); State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972); State v. Pearson, 27 N.C. App. 157, 218 S.E.2d 192, cert. denied, 425 U.S. 938, 96 S. Ct. 1671, 48 L. Ed. 2d 179 (1975); State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

Whether serious injury has been inflicted must be determined according to the particular facts of each case and is a question the jury must answer under proper instruction. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969); State v. Whitted, 14 N.C. App. 62, 187 S.E.2d 391 (1972); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

The rule that whether serious injury has been inflicted must be determined according to the particular facts of each case applies to a prosecution under subsection (b) of this section for assault with a deadly weapon inflicting serious injury. State v. Parker, 7 N.C. App. 191, 171 S.E.2d 665 (1970).

"Serious injury" under subsection (b) of this section is the same as under subsection (a) of this section. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

Evidence that the victim was hospitalized is not necessary for proof of serious injury. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

A "whiplash" injury may or may not be a serious injury, depending upon its severity and the painful effect it may have on the injured victim. State v. Ferguson, 261 N.C. 558, 135 S.E.2d 626 (1964).

Evidence of Infliction of Serious Injury. — A pistol wound in the neck, close to the spinal cord, resulting in unconsciousness, with the bullet lodging in the neck, was sufficient evidence of serious injury, within the meaning of the statute, to submit the question of serious injury to the jury. State v. Marshall, 5 N.C. App. 476, 168 S.E.2d 487 (1969).

VII. SELF-DEFENSE.

Applicability. — The law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. It follows that where an accused has inflicted wounds upon another with intent to kill such other, he may be absolved from criminal liability for so doing upon the principle of self-defense only in case he was in actual or apparent danger of death or great bodily harm at the hands of such other. State v. Anderson, 230 N.C. 54, 51 S.E.2d 895 (1949); State v. Barnette, 8 N.C. App. 198, 174 S.E.2d 82 (1970); State v. Hall, 31 N.C. App. 34, 228 S.E.2d 637 (1976).

A defendant could assault a person with intent to kill only if such force was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. Likewise, a defendant could be absolved from criminal liability for the assault with intent to kill only if he acted in self-defense when he was in actual or apparent danger of suffering death or great bodily harm. State v. Barnette, 8 N.C. App. 198, 174 S.E.2d 82 (1970).

If a person voluntarily, that is, aggressively and willingly, without legal provocation or excuse, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight and withdraws from it and gives notice to his adversary that he has done so. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

An assault with the intent to kill is justified under the doctrine of self-defense only when the defendant is in actual or apparent danger of death or great bodily harm at the hands of the person he assaults. State v. Dial, 38 N.C. App. 529, 248 S.E.2d 366 (1978).

In certain cases, a defendant may justify an intentional assault on the ground that it was made in an effort to defend his home from attack or to evict trespassers. State v. Dial, 38 N.C. App. 529, 248 S.E.2d 366 (1978).

The right of self-defense is available only to a person who is without fault. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

Burden of Proof. — In prosecutions for felonious assault and for assault with a deadly weapon, it is not incumbent on a defendant to satisfy the jury he acted in self-defense. On the contrary, the burden of proof rests on the State throughout the trial to establish beyond a reasonable doubt that defendant unlawfully assaulted the alleged victim. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966); State v. Turner, 29 N.C. App. 33, 222 S.E.2d 745 (1976).

It has long been the rule in North Carolina that a defendant, in cases not involving homicide, does not have the burden of satisfying the jury that he acted in self-defense. State v. Smith, 28 N.C. App. 314, 220 S.E.2d 858 (1976).

Failure to instruct the jury with reference to defendant's right of self-defense in respect to repelling a nonfelonious assault was prejudicial error. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

Jury Question on Amount of Force Used. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where defendant contended that the victim grabbed defendant by the hair and t-shirt to drag him into a cell for the purpose of a homosexual act, and that defendant then swung at the victim with a razor to get the victim to remove his hands, a jury question was raised as to whether defendant reasonably felt he was in imminent danger of a homosexual assault and whether he used more force than was reasonably necessary to repel the assault. State v. Molko, 50 N.C. App. 551, — S.E.2d — (1981).

VIII. INSTRUCTIONS TO JURY.

Defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (1972).

Right to Instruction on Lesser Included Offense. — When the lesser included offense of assault with a firearm resulting in serious bodily injury is supported by some evidence, a defendant is entitled to have the different permissible views arising on the evidence presented to the jury under proper instructions. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 726 (1973).

Assault with a deadly weapon, which is a misdemeanor under § 14-33(b)(1), is a lesser included offense of the felonies described in this section. However, the necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Williams, 31 N.C. App. 111, 228 S.E.2d 668, cert. denied, 291 N.C. 450, 230 S.E.2d 767 (1976).

The failure of the trial court to submit to the jury the lesser offense of simple assault was not error where the evidence showed that the defendant struck the victim in the head with a blackjack, since a blackjack is a deadly weapon per se. State v. Daniels, 38 N.C. App. 382, 247 S.E.2d 770 (1978).

Submission of Lesser Offense Only Where All Evidence Shows Felonious Assault. — In a prosecution for two offenses of assault with a deadly weapon with intent to kill inflicting serious injury, wherein all the evidence showed that a deadly weapon was used in both assaults and that serious injury was inflicted on both victims, the trial court erred (1) in failing to submit defendant's guilt or innocence of assault with a deadly weapon inflicting serious injury, and (2) in submitting the misdemeanors of assault inflicting serious injury and assault with a deadly weapon. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (1974).

Failure to Submit Lesser Offense Held Not Error. — Where all the evidence presented showed a shooting with a deadly weapon with an intent to kill and none of the evidence showed the lack of such intent, it was not error for the court to fail to submit to the jury the lesser offense described in subsection (b). State v. Jennings, 16 N.C. App. 205, 192 S.E.2d 46, appeal dismissed, 282 N.C. 428, 192 S.E.2d 838 (1972); State v. Turner, 21 N.C. App. 608, 205 S.E.2d 628, appeal dismissed, 285 N.C. 668, 207 S.E.2d 751 (1974).

Where the uncontradicted evidence was that defendant shot a police officer at close range in the face, this evidence did not justify submission of the issue of guilt of a lesser included offense. State v. Jones, 18 N.C. App. 531, 197 S.E.2d 268, cert. denied, 283 N.C. 756, 198 S.E.2d 756 (1973).

Defendants in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury were not entitled to an instruc-

tion on the lesser included offense of assault with a deadly weapon where the evidence showed that the victim had been struck in the back of the head with a stick about two feet long; that he was hospitalized for nine days; that a neurosurgeon had to operate in order to repair the injuries to his skull; that fragments of bone had to be peeled back; and that his head was still indented from the injuries. State v. Davis, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

Conviction of Simple Assault. — An instruction directing verdict of guilty of at least simple assault was not erroneous when the prosecuting witness had been injured by being struck by some hard metallic substance in the defendant's hand, which he did not see, causing his nose to be broken and other serious injuries. State v. Strickland, 192 N.C. 253, 134 S.E. 850 (1926).

Omission of "Assault with a Deadly Weapon" from Charge to Jury. — When accused was indicted, under this section, for an assault with intent to kill and with a deadly weapon, the omission, by the court in its charge, of "assault with a deadly weapon" from the catalogue of permissible verdicts, did not deprive the jury of the statutory authority to consider it. State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943).

Instruction on Meaning of "Assault". — It is incumbent upon the trial judge to define or otherwise explain to a jury the meaning of the legal term "assault." State v. Hickman, 21 N.C. App. 421, 204 S.E.2d 718 (1974).

Failure to Instruct Jury on Shooting by Accident. — Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily harm, all of the evidence indicated that defendant intended to fire and did fire the shot or shots which resulted in injury to the victim, defendant was not entitled to an instruction on shooting by accident or misadventure. State v. Efird, 37 N.C. App. 66, 245 S.E.2d 226 (1978).

Failure to Define Accident. — In a prosecution for murder and assault with a deadly weapon with intent to kill where the trial judge instructs the jury on the defense of accident it is not error if the court does not define the word "accident." State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Deadly Weapons. — Instruction was erroneous and prejudicial because it invaded the province of the jury to determine whether nightstick used by the defendant was a "deadly weapon." State v. Buchanan, 28 N.C. App. 163, 220 S.E.2d 207 (1975), cert. denied, 289 N.C. 452, 223 S.E.2d 161 (1976).

State Must Prove Murderous Intent. — Upon a trial of one charged with using a deadly weapon in inflicting a serious injury not resulting in death, under this section, an instruction that the use of such weapon raised a presumption of felonious intent was reversible error, the fact of murderous intent being for the State to prove. State v. Gibson, 196 N.C. 393, 145 S.E. 772 (1928).

The term "intent to kill" is self-explanatory and the trial court is not required to define the term in its charge. State v. Plemmons, 230 N.C. 56, 52 S.E.2d 10 (1949).

In the absence of a special request for instructions from the defendant, the judge is not required to define "intent to kill." The meaning is obvious and no explanation is necessary. However, when a trial judge undertakes to define the term, he must do so correctly. State v. Parks, 290 N.C. 748, 228 S.E.2d 248 (1976).

Instruction as to Serious Injury. — Where the evidence was sufficient of an assault with a deadly weapon with intent to kill, not resulting in death, a charge by the judge to the jury that "serious injury" included "anything that would cause a breach of the peace," was held not to be reversible error to the defendant's prejudice where all the evidence tended to show that serious injury was inflicted in violation of this section. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial judge's instruction to the jury that a serious injury was any physical injury that caused great pain and suffering was not error since it imposed a greater degree of injury than necessary. State v. Williams, 29 N.C. App. 24, 222 S.E.2d 720, cert. denied, 289 N.C. 728, 224 S.E.2d 676 (1976).

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where the State's evidence with respect to the injuries is uncontradicted and the injuries could not conceivably be considered anything but serious, the trial judge may instruct the jury that if they believe the evidence as to the injuries, then they will find that there was serious injury. State v. Davis, 33 N.C. App. 262, 234 S.E.2d 762 (1977).

Self-Defense. — Instructions implying that defendant could not lawfully use force in self-defense unless he was threatened with death or great bodily harm were erroneous. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

Instructions implying that the burden of proof was on defendant to satisfy the jury that he acted in self-defense have no application in criminal prosecutions for felonious assault or assault with a deadly weapon. State v. Fletcher, 268 N.C. 140, 150 S.E.2d 54 (1966).

Instruction on self-defense was erroneous which told the jury that defendant could use no more force than necessary in defending himself. The law is that the defendant could use such force as was reasonably necessary or

apparently necessary. One may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. State v. Hearns, 9 N.C. App. 42, 175 S.E.2d 376 (1970).

In a felonious assault prosecution, the language used by the court in instructing the jury on self-defense effectively conveyed to the jury that it had to determine the reasonableness of defendant's belief in the necessity of force from the circumstances as they appeared to him at the time of the assault. State v. Cantrell, 24 N.C. App. 575, 211 S.E.2d 525 (1975).

The failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury was not cured by the discussion of the law of self-defense in the body of the charge. By failing to so charge, the jury could have assumed that a verdict of not guilty by reason of self-defense was not a permissible verdict in the case. State v. Girley, 27 N.C. App. 388, 219 S.E.2d 301 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 799 (1976).

Where there was evidence that defendant acted in defense of his home, an instruction on the defendant's right to act in self-defense without an instruction also on the defendant's right to act in defense of home contained prejudicial error. State v. Edwards, 28 N.C. App. 196, 220 S.E.2d 158 (1975).

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, an instruction on self-defense was not warranted where defendant never abandoned the fight and never withdrew, but simply drove off a short distance out of sight of the victim and then stepped from his car and shot the victim. State v. Plemmons, 29 N.C. App. 159, 223 S.E.2d 549 (1976).

Evidence Sufficient to Require Instruction as to Defense of Third Person. — Evidence was sufficient to require an instruction as to the right of the defendant, indicted for a felonious assault with a deadly weapon with intent to kill, as a private citizen to interfere with and prevent the prosecuting witness from committing a felonious assault on a third person. State v. Hornbuckle, 265 N.C. 312, 144 S.E.2d 12 (1965).

Where defendant saw the victim force his former girl friend from a dance hall and down the street several blocks, knew that victim had threatened to kill the girl and that he was a dangerous man with a propensity for violent conduct, observed that the victim was acting in a wild and irrational manner as if he had been drinking or taking some drugs and observed that the victim reached for his pocket just before defendant shot him, the trial court committed prejudicial error in failing to instruct upon the right of defendant to go to the defense of a third person to prevent a felonious assault, since the court must instruct the jury on all substantial features of the case that arise from the evidence. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Instruction on Defendant's Right to Evict Prosecuting Witness. — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in failing to charge the jury on defendant's right to evict the prosecuting witness from defendant's home and in failing to define the force which could have been used to accomplish such eviction, since defendant did not present any evidence that he tried to remove the victim by a gentle laying on of hands prior to the shooting, nor was there any evidence that the victim ever threatened or used deadly physical force upon defendant. State v. Myers, 49 N.C. App. 197, 270 S.E.2d 574 (1980).

IX. VERDICT.

Terms of Verdict. — In a prosecution under this section a verdict of guilty of "assault with intent to harm but not to kill" was a complete and sensible verdict, and supported judgment for a simple assault, the words "without intent to kill but with intent to harm" being mere surplusage. State v. Sumner, 269 N.C. 555, 153 S.E.2d 111 (1967).

Erroneous Instruction — Not Cured by Verdict. — An instruction that defendant's admission of assault with a deadly weapon, which resulted in serious injury, raised the presumption of defendant's guilt of assault with a deadly weapon with intent to kill, resulting in serious injury, as charged, and placed the burden on defendant to satisfy the jury of matters in mitigation or excuse, was not cured by a verdict of guilty of the misdemeanor of an assault with a deadly weapon, since the instruction required defendant to show to the satisfaction of the jury, matters in mitigation or excuse before he could successfully ask for a verdict of not guilty. State v. Carver, 213 N.C. 150, 195 S.E. 349 (1938).

Same — Cured by Conviction of Lesser Included Offense. — Any error in instructing the jury as to defendant's guilt or innocence of felonious assault under subsection (a) of this section was cured by the jury's verdict which found defendant guilty of the lesser included offense described in subsection (b). State v. Hearns, 9 N.C. App. 42, 175 S.E.2d 376 (1970).

Verdict Insufficient to Support Sentence under This Section. — Although the indictment charged and the evidence showed that the deadly weapon used in an assult was a firearm, the jury's verdict of guilty of "assault with a deadly weapon with intent to kill" would not support a sentence of five years for assault with a firearm with intent to kill pursuant to subsec-

tion (c) but would support a maximum sentence of two years under § 14-33. State v. Edmondson, 283 N.C. 533, 196 S.E.2d 505 (1973), decided prior to the 1973 amendment to this section.

X. SUFFICIENCY OF EVIDENCE.

Evidence Sufficient to Support Conviction. — See State v. Cody, 225 N.C. 38, 33 S.E.2d 71 (1945); State v. Williams, 272 N.C. 273, 158 S.E.2d 85 (1967); State v. Strater, 272 N.C. 276, 158 S.E.2d 60 (1967); State v. Burns, 24 N.C. App. 392, 210 S.E.2d 524 (1975).

Evidence of Infliction of Serious Injury. — Evidence that several defendants indicted under the provisions of this section were discovered selling liquor in violation of our prohibition law, and that they were armed with pistols and blackjacks and acted in concert, and that one of them threatened the life of the officer attempting to arrest them, and that the others participated by carrying the officer to a room of a garage where they beat him with a blackjack into unconsciousness, and carried him out into a field and left him there where later and alone he recovered consciousness, was sufficient for the conviction of them all of an assault with a deadly weapon with intent to kill, resulting in serious injury, in violation of this section. State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

Evidence Insufficient to Sustain Verdict against Defendant. — See State v. Jarrell, 233 N.C. 741, 65 S.E.2d 304 (1951).

§ 14-32.1. Assaults on handicapped persons; punishments.

(a) For purposes of this section, a "handicapped person" is a person who has:

(1) A physical or mental disability, such as decreased use of arms or legs, blindness, deafness, mental retardation or mental illness; or

(2) Infirmity

which would substantially impair that person's ability to defend himself.

(b) Any person who assaults a handicapped person with a deadly weapon with intent to kill and inflicts serious injury is guilty of a Class F felony.

(c) Any person who assaults a handicapped person with a deadly weapon and inflicts serious injury is guilty of a Class G felony.

(d) Any person who assaults a handicapped person with a deadly weapon with intent to kill is guilty of a Class G felony.

(e) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any aggravated assault or assault and battery on a handicapped person is guilty of a Class I felony. A person commits an aggravated assault or assault and battery upon a handicapped person if, in the course of the assault or assault and battery, that person:

(1) Uses a deadly weapon or other means of force likely to inflict serious injury or serious damage to a handicapped person; or

(2) Inflicts serious injury or serious damage to a handicapped person; or

(3) Intends to kill a handicapped person.

(f) Any person who commits a simple assault or battery upon a handicapped person is guilty of a misdemeanor punishable by a fine, imprisonment for not more than one year, or both. (1981, c. 780, s. 1.)

Editor's Note. — Session Laws 1981, c. 780, s. 2, makes the act effective Oct. 1, 1981.

§ 14-33. Misdemeanor assaults, batteries, and affrays, simple and aggravated; punishments.

(a) Any person who commits a simple assault or a simple assault and battery or participates in a simple affray is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days.

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault

and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:

(1) Inflicts, or attempts to inflict, serious injury upon another person or uses a deadly weapon; or
(2) Assaults a female, he being a male person over the age of 18 years; or
(3) Assaults a child under the age of 12 years; or
(4) Assaults a law-enforcement officer, a custodial officer of the State Department of Correction, personnel of a detention facility or personnel of a training school, while the officer or personnel is discharging or attempting to discharge a duty of his office; or
(5) Assaults an officer of the North Carolina General Court of Justice while engaged in official judicial duties or on account of the performance of official judicial duties; or
(6) Assaults a school administrator, school teacher, substitute school teacher, or school teacher aide when any of these persons is discharging or attempting to discharge his official duties. (1870-1, c. 43, s. 2; 1873-4, c. 176, s. 6; 1879, c. 92, ss. 2, 6; Code, s. 987; Rev., s. 3620; 1911, c. 193; C. S., s. 4215; 1933, c. 189; 1949, c. 298; 1969, c. 618, s. 1; 1971, c. 765, s. 2; 1973, c. 229, s. 4; c. 1413; 1979, cc. 524, 656; 1981, c. 180.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added subdivision (6) of subsection (b).

Legal Periodicals. — For note as to the "show of violence" rule in North Carolina relative to an assault on a female, see 36 N.C.L. Rev. 198 (1958).

As to credit for time served under a vacated judgment upon retrial and second conviction, see 44 N.C.L. Rev. 458 (1966).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Included Offenses.
III. Assaults on Females.
IV. Assaults on Law-Enforcement Officers.
V. Sufficiency of Evidence.
VI. Punishment.

I. GENERAL CONSIDERATION.

Constitutionality. — When the punishment does not exceed the limits fixed by this section, it cannot be considered cruel and unusual punishment in a constitutional sense. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

A sentence of imprisonment which is within the limitation authorized by statute cannot be held cruel or unusual in the constitutional sense. State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common-law rules. State v. Roberts, 270 N.C. 655, 155 S.E.2d 303 (1967).

In North Carolina, there is no statutory definition of assault and the crime remains one governed by the rules of the common law. State v. Hill, 6 N.C. App. 365, 170 S.E.2d 99 (1969).

Common Law Definition. — An assault is an intentional offer or attempt by force or violence to do injury to the person of another. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

An assault is a show of violence causing a reasonable apprehension of immediate bodily harm. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

The common-law offense of assault is an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. State v. Sawyer, 29 N.C. App. 505, 225 S.E.2d 328 (1976).

Emphasis Either on Intent of Accused or Apprehension of Victim. — In this State a criminal assault may be accomplished either by an overt act on the part of the accused evidencing an intentional offer or attempt by force and violence to do injury to the person of another or by the "show of violence" on the part of the accused sufficient to cause a reasonable apprehension of immediate bodily harm on the part of the person assailed which causes him to engage in a course of conduct which he would not otherwise have followed. Thus, either or both of two rules may be applied in prosecuting a person accused of an assault. The first places emphasis on the intent or state of mind of the person accused. Under the second, which is sometimes referred to as the "show of violence" rule, emphasis is shifted to a consideration of the apprehension of the person assailed and the reasonablensss of that apprehension. State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979).

An affray is defined by the common law as a fight between two or more persons in a public place so as to cause terror to the people. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Serious damage includes serious physical injury. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

But May Include Damage Other Than Bodily Injury. — Serious damage may include damage other than bodily injury. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

And Does Not Necessarily Involve Use of Deadly Weapon. — The term serious damage done embraces results other than those arising from the use of a deadly weapon. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

"Deadly Weapon". — A deadly weapon is any instrument which is likely to produce death or great bodily harm, and the deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly is one of law, and the court must take the responsibility of so declaring. But where it may or may not be likely to produce fatal results, according to the manner of its use or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

A criminal assault may be committed with an automobile. State v. Sawyer, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

Sufficiency of Indictment. — It is sufficient for indictments or warrants seeking to charge a crime in which one of the elements is the use of a deadly weapon (1) to name the weapon and (2) either to state expressly that the weapon used was a "deadly weapon" or to allege such facts as would necessarily demonstrate the deadly character of the weapon. State v. Palmer, 293 N.C. 633, 239 S.E.2d 406 (1977).

"Show of Violence" Rule. — In some cases of assault, North Carolina has adopted the "show of violence" rule which requires a reasonable apprehension on the part of the assailed witness of immediate bodily harm or injury which caused him to engage in a course of conduct he would not have otherwise followed. State v. Sawyer, 28 N.C. App. 490, 221 S.E.2d 518 (1976).

Intent is not a prescribed element of assault with a deadly weapon. See State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Where evidence discloses actual battery, whether victim is "put in fear" is inapposite. State v. Thompson, 27 N.C. App. 576, 219 S.E.2d 566 (1975), cert. denied, 289 N.C. 141, 220 S.E.2d 800 (1976).

Applied in State v. Barham, 251 N.C. 207, 110 S.E.2d 894 (1959); State v. Higgins, 266 N.C. 589, 146 S.E.2d 681 (1966); State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969); State v. Haith, 7 N.C. App. 552, 172 S.E.2d 912 (1970); State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Harrell, 281 N.C. 111, 187 S.E.2d 789 (1972); State v. Harris, 14 N.C. App. 270, 188 S.E.2d 2 (1972); In re Potts, 14 N.C. App. 387, 188 S.E.2d 643 (1972); State v. Lowery, 15 N.C. App. 596, 190 S.E.2d 282 (1972); State v. Moses, 16 N.C. App. 174, 191 S.E.2d 368 (1972); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); State v. Parrott, 17 N.C. App. 332, 194 S.E.2d 162 (1973); State v. Keziah, 24 N.C. App. 298, 210 S.E.2d 436 (1974); State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975); State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975); State v. Davis, 24 N.C. App. 683, 211 S.E.2d 849 (1975); State v. Thomas, 29 N.C. App. 757, 226 S.E.2d 163 (1976); State v. Mayes, 31 N.C. App. 694, 230 S.E.2d 563 (1976); State v. O'Briant, 43 N.C. App. 341, 258 S.E.2d 839 (1979).

Stated in State v. Walker, 7 N.C. App. 548, 172 S.E.2d 881 (1970).

Cited in State v. Stansberry, 197 N.C. 350, 148 S.E. 546 (1929); State v. Griggs, 197 N.C. 352, 148 S.E. 547 (1929); State v. Perry, 225 N.C. 174, 33 S.E.2d 869 (1945); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Norman, 237 N.C. 205, 74 S.E.2d 602 (1953); State v. Barbour, 243 N.C. 265, 90 S.E.2d 388 (1955); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959); State v. Parrish, 251 N.C.

274, 111 S.E.2d 314 (1959); Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); In re Wilson, 3 N.C. App. 136, 164 S.E.2d 56 (1968); State v. Jeffries, 3 N.C. App. 218, 164 S.E.2d 398 (1968); State v. Rhodes, 275 N.C. 584, 169 S.E.2d 846 (1969); State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970); State v. Walker, 277 N.C. 403, 177 S.E.2d 868 (1970); State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971); State v. Robinson, 15 N.C. App. 155, 189 S.E.2d 567 (1972); State v. Sasser, 21 N.C. App. 618, 205 S.E.2d 565 (1974); State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); Denning v. Lee, 35 N.C. App. 565, 241 S.E.2d 706 (1978); State v. Whitted, 38 N.C. App. 603, 248 S.E.2d 442 (1978); State v. Tise, 39 N.C. App. 495, 250 S.E.2d 674 (1979); In re Hardy, 39 N.C. App. 610, 251 S.E.2d 643 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979); State v. Jones, 41 N.C. App. 189, 254 S.E.2d 234 (1979); State v. Williams, 41 N.C. App. 287, 254 S.E.2d 649 (1979); State v. Ransom, 41 N.C. App. 583, 255 S.E.2d 237 (1979); State v. McKoy, 44 N.C. App. 516, 261 S.E.2d 226 (1980).

II. INCLUDED OFFENSES.

Assault with Deadly Weapon an Included Offense under § 14-32. — Assault with a deadly weapon is an essential element of the felony created and defined by § 14-32, being an included "less degree of the same crime." State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

Assault with a deadly weapon, which is a misdemeanor under subdivision (b)(1), is a lesser included offense of the felonies described in § 14-32. However, the necessity for instructing the jury as to an included crime of lesser degree than that charged arises when, and only when, there is evidence from which the jury could find that such included crime of lesser degree was committed. The presence of such evidence is the determinative factor. State v. Williams, 31 N.C. App. 111 S.E.2d 668, cert. denied, 291 N.C. 450, 230 S.E.2d 767 (1976).

The allegation in a warrant that defendant assaulted his wife "by threatening to kill her" fell short of charging that he acted with the specific intent to kill required to make the offense a felony under § 14-32; the offense charged was a misdemeanor under this section. State v. Harris, 14 N.C. App. 268, 188 S.E.2d 1 (1972).

Crime of Armed Robbery Includes Assault with Deadly Weapon. — The crime of armed robbery defined in § 14-87 includes an assault on the person with a deadly weapon. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Convictions of Armed Robbery and Assault with Deadly Weapon Arising Out of Same Conduct. — If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested, because in such case the armed robbery is accomplished by the assault with a deadly weapon and all essentials of this assault charge are essentials of the armed robbery charge. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Any party charged with an affray may be charged with the lesser included offense of an assault. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Failure to Dismiss Charge Held Error. — The affray charge upon which respondent juvenile was convicted had as an essential element the assault charge which had been dismissed for lack of evidence. Consequently, respondent's acquittal on the assault charge barred further petitions based on that charge. Therefore, respondent was twice put in jeopardy for the same offense under § 14-33 and the trial judge erred in failing to dismiss the petition. In re Drakeford, 32 N.C. App. 113, 230 S.E.2d 779 (1977).

Submission of Lesser Offense Only Where All Evidence Shows Felonious Assault. — In a prosecution for two offenses of assault with a deadly weapon with intent to kill inflicting serious injury wherein all the evidence showed that a deadly weapon was used in both assaults and that serious injury was inflicted on both victims, the trial court erred (1) in failing to submit defendant's guilt or innocence of assault with a deadly weapon inflicting serious injury, and (2) in submitting the misdemeanors of assault inflicting serious injury and assault with a deadly weapon. State v. Thacker, 281 N.C. 447, 189 S.E.2d 145 (172).

Failure to Submit Question of Guilt of Simple Assault. — Where in a prosecution for assault with a deadly weapon the evidence tended to show assault on a female at least, it was not error to fail to submit the question of guilt of simple assault. State v. Hill, 6 N.C. App. 365, 170 S.E.2d 99 (1969).

An instruction on simple assault was not necessary in a prosecution for assault with a deadly weapon where the evidence showed that the victim was a female and that the defendant was a male over the age of 18 years, and the trial court included in its charge an instruction on the offense of assault on a female. State v. Barnhill, 37 N.C. App. 612, 246 S.E.2d 579 (1978).

Failure to Instruct as to Lesser Offense Held Not Error. — Since the evidence that defendant used a deadly weapon was uncontradicted, he was not entitled to a charge on assault inflicting serious injury. State v. Springs, 33 N.C. App. 61, 234 S.E.2d 193, cert. denied, 293 N.C. 163, 236 S.E.2d 707 (1977).

Where the only dispute in a rape prosecution is whether an admitted act of sexual intercourse was accomplished by consent or by force, the lesser included offenses of assault with intent to commit rape and assault upon a female need not be submitted to the jury, because lesser included offenses must be submitted only where there is evidence to support them. State v. Edmondson, 302 N.C. 169, 273 S.E.2d 659 (1981).

III. ASSAULTS ON FEMALES.

Subdivision (b)(2) of this section establishes classifications by gender which serve important governmental objectives and are substantially related to achievement of those objectives. Therefore, the statute does not deny males equal protection of law in violation of the Fourteenth Amendment to the Constitution of the United States. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

The General Assembly was entitled to take note of the differing physical sizes and strengths of the sexes, and reasonably to conclude that assaults and batteries without deadly weapons by physically larger and stronger males are likely to cause greater physical injury and risk of death than similar assaults by females. Having so concluded, the General Assembly could choose to provide greater punishment for these offenses, which it found created greater danger to life and limb, without violating the Fourteenth Amendment. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979)

The classifications based upon age found in subdivision (b)(2) of this section do not violate the Fourteenth Amendment. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

The essential elements of the crime of assault upon a female are (1) assault and (2) upon a female person by a male person. State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

The marital relationship does not afford a license to commit assault. State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 836 (1969).

Indictment Need Not Allege That Accused Was Male Person over 18. — Since it is not an essential element of the criminal offense under this section, it is not required that the indictment allege that the defendant was a male person over 18 years of age at the time of the alleged assault. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921); State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Courtney, 248 N.C. 447, 103 S.E. 2d 861 (1958).

It was not necessary for the defendant's age to be stated in the bill of indictment to confict him for an assault on a female, when the proof clearly showed that he was over 18 at the time of the alleged assault, and on the trial no question was made as to that fact. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Presumption That Accused Is over 18. — Where a male defendant is charged with an assault upon a female there is a rebuttable presumption that defendant is over 18 years of age, which presumption, in the absence of evidence to the contrary, is evidence to be considered by the jury; but this does not imply that the jury is not required to determine defendant's age. State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Lewis, 224 N.C. 774, 32 S.E.2d 334 (1944).

The presumption that defendant was over 18 years of age at the time of the alleged assault is evidence for consideration by the jury. State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Lewis, 224 N.C. 774, 32 S.E.2d 334 (1944); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Fact That Accused Is under 18 Is Matter of Defense. — The presumption is that the male person charged is over 18 years of age; and the fact, if it be a fact, that he is not over 18 years of age, relevant solely to punishment, is a matter of defense. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Jones, 181 N.C. 546, 106 S.E. 817 (1921); State v. Lefler, 202 N.C. 700, 163 S.E. 873 (1932); State v. Lewis, 224 N.C. 774, 32 S.E.2d 334 (1944); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Plea of Not Guilty as Putting Accused's Age in Issue. — Although not an essential averment, if in fact the indictment charged that the defendant was a male person over the age of 18 years, it could be considered, nothing else appearing, that the defendant's plea of not guilty was a denial of this nonessential averment; but where as in the instant case the indictment did not so charge it could not be said that the defendant, simply by his plea of not guilty, put in issue whether he was over 18 years of age at the time of the alleged assault. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Age a Collateral Matter — How Determined. — Whether defendant was over 18 years of age is a collateral matter, wholly independent of defendant's guilt or innocence in respect of the assault charged; and it would seem appropriate that his be determined under a special issue. Unless the necessity therefor is eliminated by defendant's admission, this issue must be resolved by a jury, not by a court. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Burden to Prove Age below 18. — The burden is upon the defendant, charged with an assault upon a woman, to show that he was under the age specified in order to except his case, and it is not necessary to the validity of the bill that it state that he was over the age, as an assault upon a woman is a crime without regard to the age of the person who commits it, and the age merely relates to the degree of punishment and is not an element or ingredient of the offense charged. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911).

The burden of establishing the defense that he is under the age of 18 rests on the defendant. State v. Morgan, 225 N.C. 549, 35 S.E.2d 621 (1945); State v. Herring, 226 N.C. 213, 37 S.E.2d 319 (1946); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958); State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

Effect of Admission by Accused That He Is over 18. — When a male defendant, during the progress of his trial on an indictment charging an assault on a female or a more serious crime embracing the charge of assault on a female, testifies that he is over 18 years of age at the time of the alleged assault and there is no evidence or contention to the contrary, the collateral issue as to defendant's age need not be submitted to or answered by the jury. His testimony, under such circumstances, relating to such collateral issue, relevant solely to punishment, must be considered an admission on which the court may rely in the trial of the cause and in pronouncing judgment. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

Amendment of Warrant. — Where defendant entered a plea of guilty to a warrant charging an assault upon a female and nothing more, the trial court was without authority, upon a later amendment of the warrant to charge that defendant was a male person over 18 years of age, to enter judgment on the amended warrant in the absence of a verdict of a jury or a plea of guilty by defendant to the warrant as amended, and sentence in excess of that permitted by law for the offense originally charged in the warrant would be set aside and cause remanded for trial upon the warrant as amended. State v. Terry, 236 N.C. 222, 72 S.E.2d 423 (1952).

The age of defendant relates only to the punishment. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

An assault on a female, committed by a man or boy over 18 years of age, is not simple assault; it is a misdemeanor punishable in the discretion of the court. State v. Barnhill, 37 N.C. App. 612, 246 S.E.2d 579 (1978).

Lesser Offense Included in Indictment for Assault with Intent to Rape. — An indictment charging assault with intent to commit rape includes the lesser offense of assault on a female. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

In a prosecution of a defendant for assault with intent to commit rape, nonsuit of the felony does not entitle the defendant to his discharge, but the State may put defendant on trial under the same indictment for assault on a female, defendant being a male over the age of 18. State v. Gammons, 260 N.C. 753, 133 S.E.2d 649 (1963); State v. Walker, 4 N.C. App. 478, 167 S.E.2d 18 (1969).

Assault on a female by a male person is a lesser included offense in a proper bill of indictment charging an assault with intent to commit rape. State v. Mitchell, 6 N.C. App. 534, 170 S.E.2d 355 (1969).

Murder Indictment Does Not Contain All Elements of Assault upon Female. — Because an indictment for murder did not contain allegations to include the necessary elements of the crime of assault upon a female, the indictment did not support the verdict of guilty of assault upon a female. State v. Craig, 35 N.C. App. 547, 241 S.E.2d 704 (1978).

Sentence under Verdict of "Guilty of Simple Assault on a Female". — In a prosecution for an assault with intent to commit rape a verdict of "guilty of simple assault on a female" supports a sentence for an assault on a female by a male person over the age of 18 years when the defendant's own evidence discloses that he was over 18 years of age at the time of the commission of the assault, and no question of defendant's age is raised during the trial. State v. Mitchell, 6 N.C. App. 534, 170 S.E.2d 355 (1969).

Sentence on Conviction of Assault upon Female. — One lawfully convicted of assault upon a female may be sentenced to a longer term of imprisonment, if the evidence shows him to be, and he is found to be, over 18 years of age, than would be proper in the absence of such evidence and finding, even though the indictment under which he was tried does not allege his age. State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

IV. ASSAULTS ON LAW-INFORCEMENT OFFICERS.

The clear legislative intent in enacting subdivision (b)(4) of this section was to provide greater punishment for those who place themselves in open defiance of duly constituted authority by assaulting public officers who are on duty. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

Assault on Officer Is Primary Conduct Proscribed. — In the offense of assaulting a public officer in the performance of some duty, the assault on the officer is the primary conduct proscribed by the statute and the particular

duty that the officer is performing while being assaulted is of secondary importance. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972); State v. Bradley, 32 N.C. App. 666, 233 S.E.2d 603 (1977).

An assault upon an officer while he is discharging or attempting to discharge a duty of his office is an offense punishable under subdivision (b)(4) of this section, regardless of its effects or intended effects upon the officer's performance of his duties. The particular duty the officer was performing when assaulted is not of primary importance, it only being essential that the officer was performing or attempting to perform any duty of his office. State v. Waller, 37 N.C App. 133, 245 S.E.2d 808 (1978).

Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, although petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest, and petitioner's conviction for assaulting the highway patrolman could survive despite the finding that the officer's initial stop and demand were illegal as an unreasonable search and seizure under the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Under subdivision (b)(4) of this section, the particular duty the officer was performing when assaulted is not of primary importance, it only being essential that the officer was performing or attempting to perform any duty of his office. Thus a magistrate's order failing to allege specifically the duty of office which the public officer was discharging or attempting to discharge is not for that reason defective. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Presumption that Public Officer is Acting Lawfully. — The offense under subdivision (b)(4) of assaulting a public officer when such officer is discharging or attempting to discharge a duty of his office presupposes lawful conduct of the public officer in discharging or attempting to discharge a duty of his office. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

Where the evidence is so conflicting as to raise the question of whether the law officer is acting lawfully, the jury must be properly instructed by the trial judge. State v. Bradley, 32 N.C. App. 666, 233 S.E.2d 603 (1977).

Although a warrant charging a violation of subdivision (b)(4) of this section is sufficient if it alleges only in general terms that the officer was discharging or attempting to discharge a duty of his office at the time the assault occurred, without alleging specifically what that duty was, to sustain a conviction of violating that statute it is still necessary that the State present evidence and that the jury find under appropriate instructions from the court that the officer was discharging or attempting to discharge some duty of his office when the defendant assaulted him. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

A charge under this section requires all the essential elements of a charge under § 14-223. State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Resisting Officer and Assaulting Officer Are Separate Offenses. — The charge of resisting an officer and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses and the trial judge did not err in failing to "merge" them. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

In a prosecution for resisting arrest and assaulting a police officer, where the warrants charge the same conduct and the evidence clearly shows that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn, the assaults being the means by which the resistance was accomplished, the State must elect between the duplicate charges. State v. Hardy, 33 N.C. App. 722, 236 S.E.2d 709 (1977), aff'd in part and rev'd in part, 298 N.C. 191, 257 S.E.2d 426 (1979).

There is a distinction between the offenses of resisting an officer under § 14-223 and assault on an officer under subdivision (b)(4) of this section. In the offense of resisting an officer, the resisting of the public officer in the performance of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense, while in the offense of assaulting a public officer in the performance of some duty, the assault on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

The offense of unlawfully resisting, delaying or obstructing a public officer in the discharge of a duty of his office, under § 14-223, is not a lesser degree of the offense of assaulting a law-enforcement officer while he is discharging or attempting to discharge a duty of his office,

under this section. State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Where Warrants Based on § 14-223 and Subdivision (b)(4) Included Same Elements of Offense. — Where a defendant had been tried under two warrants, one for violating § 14-223 and the other for violating subdivision (b)(4), and where each warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody, the defendant had been twice convicted and sentenced for the same criminal offense, and the constitutional guaranty against double jeopardy protected a defendant from multiple punishments for the same offense. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

Conviction of Both Resisting Arrest and Assault on Officer. — Where the record revealed that defendant was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence, the defendant was twice convicted and sentenced for the same criminal offense. The fact that defendant was given concurrent sentences did not make the duplication of punishment and sentences any less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. State v. Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

It is possible that the facts in a given case might constitute a violation of both this section and § 14-223. In such a case the defendant could not be punished twice for the same conduct. State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Excessive Force by Officer. — In all cases where the charge is assault on a law officer in violation of subdivision (b)(4) of this section, or assault of a law officer with a firearm (§ 14-34.2), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

In a prosecution for assault on a police officer it is not incumbent upon the State to prove that the law officer did not use excessive force in making an arrest, but where there is evidence tending to show the use of such excessive force by the law officer, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

The right to use force to defend oneself against the excessive use of force during an arrest may arise despite the lawfulness of the arrest, and the use of excessive force does not render the arrest illegal. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

One resisting an illegal arrest is not resisting an officer within the discharge of his official duties. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

The bystander coming to the aid of an arrestee is entitled to use only such force as is reasonably necessary to defend the arrestee from the excessive use of force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

One who comes to the aid of an arrestee must do so at his own peril and should be excused only when the individual would himself be justified in defending himself from the conduct of the arresting officers. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Instruction on Use of Reasonable Force to Resist Excessive Force. — When there is evidence tending to show the excessive use of force by a law-enforcement officer in making an arrest, the trial court is required to instruct the jury that the force used against the law-enforcement officer was justified or excused if the assault was limited to the use of reasonable force by defendant in defending himself from excessive force. State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979).

Included Offense under § 14-34.2. — Where defendants were charged with assault on a law-enforcement officer with a firearm under § 14-34.2 and assault with a deadly weapon with intent to kill under § 14-32, arrest of judgment upon their conviction of the lesser offense of assault with a deadly weapon was required, since assault and the use of a deadly weapon were necessarily included in the offense of assault on a law-enforcement officer with a firearm, and this result would punish defendants twice for the same offense. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

V. SUFFICIENCY OF EVIDENCE.

Evidence Held Sufficient — Assault with Deadly Weapon. — The intentional firing of a high-powered rifle into or near a home, frightening the inmates and causing them to seek safety in the back of the house, would be sufficient evidence to make out a case of assault with a deadly weapon. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

Same — Assault on Female. — Evidence that the prisoner wakened the prosecutrix while she was asleep in her own room at night by placing his hand upon her forehead, was sufficient to convict of an assault upon a female,

etc., and a motion as of nonsuit thereon could not be granted, though such evidence was insufficient for a conviction of the intent to ravish her. State v. Hill, 181 N.C. 558, 107 S.E. 140 (1921).

Evidence that a Negro man, 23 years of age, several times accosted a white girl 15 years of age, on the streets of a town, with improper solicitation, which resulted in her fleeing from him in a direction she had not intended to go, and, in her great fear of him, had caused her to become nervous and to lose sleep at night, was held to be such evidence of violence, begun to be executed with ability to effectuate it, as would come within the intent and meaning of this section making it a crime for a man or boy over 18 years of age to assault any female person. State v. Williams, 186 N.C. 627, 120 S.E. 224 (1923).

In a criminal prosecution upon an indictment charging defendant with assault with intent to commit rape wherein defendant tendered to the court a plea of guilty of an assault upon a female, it was held that while the court found that the assault was aggravated, shocking and outrageous to the sensibilities and decencies of right-thinking citizens, the court did not find the offense to be infamous and that the plea tendered by defendant, and accepted by the court, did not constitute a plea of guilty to an infamous offense, but, on the contrary, constituted a plea of guilty of a misdemeanor punishable as provided in this section. State v. Tyson, 223 N.C. 492, 27 S.E.2d 113 (1943).

Where a female was approached at night on a city street by defendant, who made improper proposals and indecently exposed his person, without touching the said female, who thereupon ran a short distance to her home, the evidence was insufficient to support a conviction of assault with intent to commit rape, although it would warrant a conviction of an assault upon a female. State v. Gay, 224 N.C. 141, 29 S.E.2d 458 (1944).

In State v. Moore, 227 N.C. 326, 42 S.E.2d 84 (1947), the court held the evidence sufficient to sustain a verdict of guilty of assault upon a female.

Evidence held sufficient to be submitted to the jury in a prosecution for assault on a female. State v. Allen, 245 N.C. 185, 95 S.E.2d 526 (1956).

Same — Assault on Child. — There was ample evidence to support the verdict of guilty of assault on a child under 12 years of age. State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974).

Evidence Insufficient. — In State v. Silver, 227 N.C. 352, 42 S.E.2d 208 (1947), the court held the evidence insufficient to sustain a verdict of guilty of an assault upon a female.

VI. PUNISHMENT.

The 1911 amendment to this section was not intended to create a separate and distinct offense in law, to be known as an assault and battery by a man, or boy over 18 years of age, upon a woman, for it was always a crime for a man, or a boy over 18 years of age, to assault a woman. State v. Smith, 157 N.C. 578, 72 S.E. 853 (1911); State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958).

This section creates no new offense and relates only to punishment. Under its provisions all assaults and assaults and batteries not made felonious by other statutes are general misdemeanors punishable in the discretion of the court, except that where no deadly weapon has been used and no serious damage done, the punishment may not exceed a fine of $50.00 or imprisonment for 30 days, unless the assault comes within one of the exceptions appearing in this section. Assaults and assaults and batteries upon a female by a man or boy over 18 years of age are expressly excluded from the exceptions and they remain general misdemeanors. State v. Jackson, 226 N.C. 66, 36 S.E.2d 706 (1946).

This section creates no new offense. It relates only to punishment. State v. Courtney, 248 N.C. 447, 103 S.E.2d 861 (1958); State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

That defendant is over 18 years of age does not create a separate and distinct offense in a prosecution of such defendant for assault upon a female. State v. Beam, 255 N.C. 347, 121 S.E.2d 558 (1961).

This section deals with punishment for various types of assault — all common-law offenses. State v. Jones, 258 N.C. 89, 128 S.E.2d 1 (1962).

This section does not create a new offense as to assaults on a female, but only provides for different punishments for various types of assault. State v. Roberts, 270 N.C. 655, 155 S.E.2d 303 (1967).

Punishment — Extent. — While the language of this section authorizes a punishment for assault with or without intent to kill, by fine or imprisonment, or both, in the discretion of the court, it does not at all mean that the judge may change the character of punishment recognized and established by the law for such an offense, but that, within such limits, the extent of the fine and imprisonment, or both, is in the discretion of the trial judge, and his sentence may not be interfered with by the appellate court, except in case of manifest and gross abuse. State v. Smith, 174 N.C. 804, 93 S.E. 910 (1917).

Where in a trial of an indictment, under § 14-32, defendant was convicted of an assault with intent to kill and judgment rendered that defendant serve not less than three nor more than four years in the State's prison, there was error, as the offense described in the verdict was at most a misdemeanor punishable by fine and imprisonment, or both, in the discretion of the

court as provided by this section. State v. Gregory, 223 N.C. 415, 27 S.E.2d 140 (1943).

When no imprisonment time is fixed by the statute, imprisonment for two years, as in the case of an assault with a deadly weapon, will not be held to be cruel and unusual punishment in violation of N.C. Const., Art. I, § 14 (see now N.C. Const., Art. I, § 27). State v. Crandall, 225 N.C. 148, 33 S.E.2d 861 (1945).

Where the offense charged, an assault wherein serious damage was inflicted, was a misdemeanor, conviction thereof did not support judgment of imprisonment in the State's prison from two to five years. State v. Malpass, 266 N.C. 403, 38 S.E.2d 156 (1946).

As long as the punishment rendered is within the maximum provided by law, an appellate court must assume that the trial judge acted fairly, reasonably and impartially in the performance of his office. State v. Cross, 27 N.C. App. 335, 219 S.E.2d 274 (1975).

Subsection (b) of this section and its subdivisions do not create additional or separate offenses. Instead, those subdivisions provide for differing punishments when the presence or absence of certain factors is established. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

Same — Limitation. — In prosecution for assault with a deadly weapon, appealing defendant relied upon and introduced evidence of self-defense and of matters in justification. The trial court instructed the jury that under the indictment and evidence the appealing defendant could be convicted of assault with a deadly weapon or of a simple assault. The jury convicted defendant of simple assault, but in imposing judgment the court found as a fact that said simple assault inflicted serious injury, and imposed a sentence of four months on the roads. It was held that the verdict of simple assault was permissible under the indictment and evidence, and the court was without power to sentence the appealing defendant to more than 30 days' imprisonment. State v. Palmer, 212 N.C. 10, 192 S.E. 896 (1937).

Although not elements of the crimes prohibited, the factors in subsection (b) of this section and its subdivisions must be shown to exist in order for the evidence to support a judgment imposing one of the greater sentences provided. State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 668 (1979).

Assault with a deadly weapon is a general misdemeanor, punishable by fine or imprisonment or both, at the discretion of the court. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

And the maximum legal sentence therefor is two years. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. Burris, 3 N.C. App. 35, 164 S.E.2d 52 (1968).

Effect of Acquittal on Part of Verdict. — The fact that the jury convicted defendant of assault with a deadly weapon, after it had acquitted him in a previous part of the verdict of assault with a deadly weapon doing serious injury, did not entitle him to his discharge on his motion in arrest of judgment. State v. Bentley, 223 N.C. 563, 27 S.E.2d 738 (1943).

Sentence Suspended on Condition of Payment of Fine Improper. — Where defendant was found guilty of simple assault and the judgment imposed a jail sentence of 30 days which was suspended on condition that defendant pay a fine of $50.00 and costs of court, the judgment was not within the limits of this section. The penalty for violation of this section is phrased in the disjunctive. The imposition of a fine in addition to a jail sentence, exceeded the limitations of the statute, and the judgment was improper. State v. Allen, 42 N.C. App. 727, 257 S.E.2d 649 (1979).

OPINIONS OF ATTORNEY GENERAL

Effect of 1969 Amendment. — This section, as rewritten in 1969, did not create new offenses. It merely classified assaults, assault and battery and affray as simple or aggravated and provided the amount of punishment which could be administered depending upon the elements of aggravation found. Opinion of Attorney General to Mr. Charles B. Winberry, 7th Judicial District Prosecutor, 40 N.C.A.G. 154 (1969).

§ 14-33.1. Evidence of former threats upon plea of self-defense.

In any case of assault, assault and battery, or affray in which the plea of the defendant is self-defense, evidence of former threats against the defendant by the person alleged to have been assaulted by him, if such threats shall have been communicated to the defendant before the altercation, shall be competent as bearing upon the reasonableness of the claim of apprehension by the defendant of bodily harm, and also as bearing upon the amount of force which

reasonably appeared necessary to the defendant, under the circumstances, to repel his assailant. (1969, c. 618, s. 2.)

CASE NOTES

Evidence of threats is admissible in assault cases upon a plea of self-defense; therefore, it follows that, under proper factual circumstances, such evidence is admissible upon a plea of defense of others. State v. Graves, 18 N.C. App. 177, 196 S.E.2d 582 (1973).

Prior threats are admissible in assault cases where the defendant claims self-defense when the evidence of the threats is properly presented. State v. Butler, 21 N.C. App. 679, 205 S.E.2d 571 (1974).

§ 14-34. Assaulting by pointing gun.

If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of an assault, and upon conviction of the same shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six months, or both such fine and imprisonment. (1889, c. 527; Rev., s. 3622; C. S., s. 4216; 1969, c. 618, s. $2^1/_2$.)

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Intentional Pointing Pistol Must Be without Legal Justification. — The literal provisions of this section are subject to the qualification that the intentional pointing of a pistol is in violation thereof only if done willfully, that is, without legal justification. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956); State v. Adams, 2 N.C. App. 282, 163 S.E.2d 1 (1968); State v. Spinks, 39 N.C. App. 340, 250 S.E.2d 90 (1979).

An officer, in making a lawful arrest, is not justified in pointing a loaded weapon at the person to be arrested except in good faith upon necessity, real or apparent. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

Legal justification must be made to appear, whether it be an individual who intentionally points a pistol at his assailant in the exercise of a perfect right of self-defense or an officer who does so in good faith in the discharge of his official duty and when necessary or apparently necessary either to defend himself or to make a lawful arrest or otherwise to perform his official duty. But the mere fact that he is an officer engaged in the performance of an official duty does not perforce exempt him from the provisions of this section. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

The pointing of a gun without legal justification is a violation of this section. State v. Walker, 34 N.C. App. 485, 238 S.E.2d 666 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 847 (1978).

The rule is well established that a violation of this section requires the intentional pointing of a gun without legal justification or excuse. State v. Thornton, 43 N.C. App. 564, 259 S.E.2d 381 (1979).

And Is Negligence Per Se. — If any person intentionally points a pistol at any person, this action is in violation of this section and constitutes an assault. Moreover, such action, being in violation of the statute is negligence per se; and if the pistol accidentally discharges, the injured person may recover damages for actionable negligence. Lowe v. Department of Motor Vehicles, 244 N.C. 353, 93 S.E.2d 448 (1956).

And Constitutes Assault with a Deadly Weapon. — It is axiomatic that if the gun or pistol used is in fact a deadly weapon, then the pointing thereof is an assault with a deadly weapon. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

If a pistol is a deadly weapon and is pointed at the person of another, then such pointing is an assault with a deadly weapon. State v. Reives, 29 N.C. App. 11, 222 S.E.2d 727, cert. denied, 289 N.C. 728, 224 S.E.2d 675 (1976).

Gun Need Not Be Loaded. — In an indictment for assault with a deadly weapon an instruction that if the State "had satisfied the

jury beyond a reasonable doubt that the defendant pointed a pistol at the prosecutor, whether loaded or not, this would be an assault," and to find the defendant guilty, was correct under the provisions of this section. State v. Atkinson, 141 N.C. 734, 53 S.E. 228 (1906).

Pointing a gun at another under such circumstances as would not excuse its intentional discharge constitutes, in this and many other states, a statutory misdemeanor, and an accidental killing occasioned by it is manslaughter. In this State it is immaterial whether the gun is loaded or not. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Accidental Discharge of Pointed Gun Resulting in Death Constitutes Manslaughter. — When one causes the death of another by an unlawful act which amounts to an assault on the person, as pointing a gun under circumstances which would not excuse its discharge, he is guilty at least of manslaughter. State v. Stitt, 146 N.C. 643, 61 S.E. 566 (1908).

Where one points a loaded gun at another, though without intention of discharging it, if the gun goes off accidentally and kills, it is manslaughter. State v. Coble, 177 N.C. 588, 99 S.E. 339 (1919); State v. Boldin, 227 N.C. 594, 42 S.E.2d 897 (1947).

Where one engages in an unlawful and dangerous act, such as "fooling with an old gun", i.e., using a loaded pistol in a careless and reckless manner, or pointing it at another, and kills the other by accident, he would be guilty of an unlawful homicide or manslaughter. State v. Hovis, 233 N.C. 359, 64 S.E.2d 564 (1951); State v. Stimpson, 279 N.C. 716, 185 S.E.2d 168 (1971).

With few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon, or in the belief that it is not loaded, and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter. State v. Foust, 258 N.C. 453, 128 S.E.2d 889 (1963).

If a person intentionally pointed the gun at the deceased and it was then discharged, inflicting the wound of which he died, or if the person was at the time guilty of culpable negligence in the way he handled and dealt with the gun, and by reason of such negligence the gun was discharged, causing the death of deceased, in either event the person would be guilty of manslaughter, and this whether the discharge of the gun was intentional or accidental. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

If a person points a pistol at another in sport, as a joke, or to cause fright merely, believing and, perhaps, having some reason to think that it is not loaded, and subsequently pulls the trigger, causing the pistol to be discharged, and resulting in the killing of the person pointed at, he is guilty of manslaughter. State v. Currie, 7 N.C. App. 439, 173 S.E.2d 49 (1970).

Question of Guilt for Jury. — Where one pointed a gun at another and death ensued by its discharge evidence was sufficient to submit to the jury the question of the prisoner's guilt or innocence of the crime of manslaughter. State v. Turnage, 138 N.C. 566, 49 S.E. 913 (1905); State v. Limerick, 146 N.C. 649, 61 S.E. 568 (1908).

Discharging Firearm into Occupied Building Distinguished. — Since assault with a deadly weapon and assault by pointing a gun each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses of that offense. State v. Bland, 34 N.C. App. 384, 238 S.E.2d 199 (1977), cert. denied, 294 N.C. 183, 241 S.E.2d 518 (1978).

Pointing Pistol in Pocket. — An instruction that if the jury were satisfied beyond a reasonable doubt that the defendant had a pistol in his coat pocket and "with pistol and hand on the inside of his pocket, he pointed the pistol at the prosecutor, this would be an assault," is not error. State v. Atkinson, 141 N.C. 734, 53 S.E. 228 (1906).

Defendant Charged with Communicating Threats and Assault Was Not Subject to Double Jeopardy. — Where the defendant was charged with communicating threats and assault by pointing a gun, he was not subjected to double jeopardy, even though the charges arose out of the same incident, since the elements of the two offenses differed. State v. Evans, 40 N.C. App. 730, 253 S.E.2d 590, appeal dismissed, 297 N.C. 456, 256 S.E.2d 809 (1979).

Where there was no evidence that defendant intentionally pointed his pistol at anyone this section did not apply, and an instruction that the violation of the statute, proximately resulting in injury and death, would constitute manslaughter, must be held for error. The State's evidence of a statement by defendant to the effect that he was "dry firing" the pistol did not amount to evidence that defendant intentionally pointed the weapon at deceased, though it was competent upon the question of culpable negligence. State v. Kluckhohn, 243 N.C. 306, 90 S.E.2d 768 (1956).

Evidence Sufficient. — Defendant who pointed gun at the prosecutor was, under the circumstances, guilty of an assault at common law, if not under this section. State v. Scott, 142 N.C. 582, 55 S.E. 69 (1906).

Variance Between Pleading and Proof. — Where warrant charged defendant with assaulting prosecutrix with a deadly weapon, to wit, a pistol, by pointing the pistol at her, her testimony that the defendant pointed a "gun" at

her was sufficient to carry the case to the jury as tending to show a violation of this section. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

Applied in State v. Head, 214 N.C. 700, 200 S.E. 415 (1939); State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953); State v. Hammonds, 1 N.C. App. 448, 161 S.E.2d 749 (1968); State v. Thacker, 18 N.C. App. 547, 197 S.E.2d 248 (1973); State v. Caldwell, 21 N.C. App. 723, 205 S.E.2d 322 (1974).

Quoted in State v. Jones, 15 N.C. App. 537, 190 S.E.2d 278 (1972).

Stated in State v. Blanton, 20 N.C. App. 66, 200 S.E.2d 425 (1973).

Cited in Whitlow v. Southern Ry., 217 N.C. 558, 8 S.E.2d 809 (1940); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950); State v. Newton, 251 N.C. 151, 110 S.E.2d 810 (1959); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250 (1980).

§ 14-34.1. Discharging certain barreled weapons or a firearm into occupied property.

Any person who willfully or wantonly discharges or attempts to discharge:

(1) Any barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second; or

(2) A firearm

into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class H felony. (1969, c. 341; c. 869, s. 7; 1979, c. 760, s. 5; 1981, c. 755.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony punishable as provided in G.S. 14-2" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1981 amendment substituted "or attempt to discharge: (1) Any barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second; or (2) A firearm" for "a firearm" and substituted "guilty of a Class H felony" for "punished as a Class H felon" at the end of the section.

CASE NOTES

Purpose of Section. — The protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted this section. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

This section was enacted for the protection of occupants of the premises, vehicles, and other property described in the statute. A violation is a serious crime. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

When Section Violated. — A person is guilty of the felony created by this section if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Williams, 21 N.C. App. 525, 204 S.E. 864 (1974); State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (1975); State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

Same — Building Must Be Occupied. — This section is not violated unless the accused discharges or attempts to discharge the firearm into a building while it is occupied. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

The attempt to draw a sharp line between a "willful" act and a "wanton" act in the context of this section would be futile. The elements of each are substantially the same. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973); State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (1975).

Assault with Deadly Weapon Distinguished. — Discharging a firearm into an occupied building and assault with a deadly weapon inflicting serious injury are entirely separate and distinct offenses. To prove the one, the State must show that defendant fired into an occupied building, an element which need not be shown to support the second charge. Likewise to prove the second charge, it must show the infliction of serious injury, which is not an element of the first charge. State v. Shook, 293 N.C. 315, 237 S.E.2d 843 (1977).

Assault with Deadly Weapon and Assault by Pointing Gun Are Not Lesser Included Offenses. — Since assault with a deadly weapon and assault by pointing a gun each involve the element of assault on a person, these two criminal offenses contain an element not essential to discharging a firearm into an occupied building and are not, therefore, lesser included offenses of that offense. State v. Bland, 34 N.C. App. 384, 238 S.E.2d 199 (1977), cert. denied, 294 N.C. 183, 241 S.E.2d 518 (1978).

Violation of this section is an unspecified felony within the purview of § 14-17. State v. Williams, 284 N.C. 67, 199 S.E.2d 409 (1973).

And Can Result in Conviction of First-Degree Murder. — A homicide committed in the perpetration of the felony under this section can result in conviction for murder in the first degree under the felony-murder rule of § 14-17. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

Indictment. — An indictment under this section, which charges the offense substantially in the words of the statute, contains allegations sufficient to apprise an accused of the offense with which he is charged and to enable the court to proceed to judgment. State v. Walker, 34 N.C. App. 271, 238 S.E.2d 154 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 847 (1978).

Indictment which failed to state that the defendant knew or should have known that the dwelling was occupied by one or more persons was not defective, and the trial court did not err in denying the defendant's motion to dismiss for failure of the indictment to charge a crime under this section. State v. Walker, 34 N.C. App. 271, 238 S.E.2d 154 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 847 (1978).

Instruction Held Proper. — Where the court instructed the jury that the intent required under this section was a specific intent which could be negated by the voluntary intoxication of the defendant, the charge to the jury is free from prejudicial error. State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (1975).

Where the trial judge specifically instructed the jury that before it could find the defendant guilty it must find beyond a reasonable doubt that the defendant acted "intentionally," this was clearly proper. State v. Gunn, 24 N.C. App. 561, 211 S.E.2d 508, cert. denied, 286 N.C. 724, 213 S.E.2d 724 (1975).

A correct charge under this section would provide that the accused would be guilty if the defendant intentionally, without legal justification or excuse, discharged a firearm into an occupied vehicle with knowledge that the vehicle was occupied by one or more persons or when he had reasonable grounds to believe that the vehicle might be occupied by one or more persons. State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

A correct charge would provide that the accused would be guilty if he intentionally, without legal justification or excuse, discharged a firearm into an occupied building with knowledge that the building was then occupied by one or more persons, or when the accused had reasonable grounds to believe that the building might be occupied by one or more persons. State v. Burris, 27 N.C. App. 656, 219 S.E.2d 807 (1975).

Although a preferable instruction to the jury would use the language "intentionally discharged a firearm," there was no prejudicial error by the use of the language "intentionally used a firearm." State v. Swift, 290 N.C. 383, 226 S.E.2d 652 (1976).

Instruction Held Erroneous. — It was held that an instruction to the jury on a charge under this section was erroneous where it contained provision that the jury must find that "the gun was discharged; and first and last, that the defendant acted willfully or wantonly which means that he must have known that one or more persons were in the dwelling or apartment," in that it equated willful and wanton conduct with knowledge of occupancy of the building. State v. Williams, 21 N.C. App. 525, 204 S.E.2d 864 (1974).

Instruction that equates willful and wanton conduct with knowledge of occupancy of the building and thereby attempts to condense two separate elements of the crime into one is in error. State v. Furr, 26 N.C. App. 335, 215 S.E.2d 840 (1975).

In a prosecution for willfully or wantonly discharging a firearm into an occupied dwelling in violation of this section, the trial court erred in giving an instruction which equated willful or wanton conduct with knowledge that the house in question was occupied by one or more persons when the defendant fired the shot. State v. Leeper, 27 N.C. App. 420, 219 S.E.2d 253 (1975).

Applied in State v. Tripp, 9 N.C. App. 518, 176 S.E.2d 892 (1970); State v. Lowery, 12 N.C. App. 538, 183 S.E.2d 797 (1971); State v. Snipes, 16 N.C. App. 416, 192 S.E.2d 62 (1972); State v. Tinsley, 283 N.C. 564, 196 S.E.2d 746 (1973); State v. Evans, 19 N.C. App. 731, 200 S.E.2d 213 (1973); State v. Locklear, 26 N.C.

App. 300, 215 S.E.2d 859 (1975); State v. Butcher, 31 N.C. App. 572, 230 S.E.2d 191 (1976).

Quoted in State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

Cited in State v. Hewitt, 34 N.C. App. 109, 237 S.E.2d 311 (1977), 294 N.C. 316, 239 S.E.2d 833 (1978); State v. Heaton, 39 N.C. App. 233, 249 S.E.2d 856 (1978).

§ 14-34.2. Assault with a firearm or other deadly weapon upon law-enforcement officer, fireman, or emergency medical services personnel.

Any person who commits an assault with a firearm or any other deadly weapon upon any:

(1) Law-enforcement officer;

(2) Fireman; or

(3) Emergency medical services personnel certified to transport patients, including ambulance attendants, emergency medical technicians, emergency medical technician intermediates, and emergency medical technician paramedics, when responding to a call;

in the performance of his duties shall be guilty of a Class I felony. (1969, c. 1134; 1977, c. 829; 1979, c. 760, s. 5; 1981, c. 535, s. 1.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony and shall be fined or imprisoned for a term not to exceed five years in the discretion of the court" in the penalty provisions of the section as it stood before the 1981 amendment. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1981 amendment, effective Oct. 1, 1981, rewrote this section, making it applicable to emergency medical services personnel, and making other changes of form.

CASE NOTES

Effect of Use of Excessive Force by Officer in Making Lawful Arrest. — While the use of excessive force in a lawful arrest may subject a law-enforcement officer to civil or criminal liability, it does not take the officer outside the performance of his duties for purposes of this section. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

In all cases where the charge is assault on a law officer in violation of § 14-33(b)(4), or assault on a law officer with a firearm (this section), the use of excessive force by the law officer in making an arrest or preventing escape from custody does not take the officer outside the performance of his duties, nor does it make the arrest unlawful. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

State Need Not Prove Lack of Excessive Force. — In a prosecution for assault on a police officer, it is not incumbent upon the State to prove that the law officer did not use excessive force in making an arrest. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

Assault May Be Justified If Excessive Force Used. — Where there is evidence tending to show the use of excessive force by the law officer in making an arrest, the trial court should instruct the jury that the assault by the defendant upon the law officer was justified or excused if the assault was limited to the use of reasonable force by the defendant in defending himself from that excessive force. State v. Mensch, 34 N.C. App. 572, 239 S.E.2d 297 (1977), cert. denied, 294 N.C. 443, 241 S.E.2d 845 (1978).

Prosecution under This Section and § 14-32 Not Double Jeopardy. — Prosecution of defendants under this section for assault on a law-enforcement officer with a firearm and under § 14-32 for assault with a deadly weapon with intent to kill did not violate the prohibi-

tion against double jeopardy, nor did it require the State to elect prosecution under a single statute, though the facts underlying defendants' indictment under each statute were the same, since each offense required proof of an element which did not exist in the other charge. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

And Election Between Charges Not Required. — The trial court did not err in denying defendant's pretrial motion to require the State to elect between the charges of felonious assault with a deadly weapon upon a law-enforcement officer in the performance of his duties and felonious assault with a deadly weapon with intent to kill inflicting serious injury since a defendant may be charged with more than one offense based on a given course of conduct, and even when an election ultimately will be necessary, the State is not required to elect prior to the introduction of evidence. State v. Ward, 301 N.C. 469, 272 S.E.2d 84 (1980).

Assault with Deadly Weapon Is Lesser Included Offense. — Where defendants were charged with assault on a law-enforcement officer with a firearm and assault with a deadly weapon with intent to kill, arrest of judgment upon their conviction of the lesser offense of assault with a deadly weapon was required, since assault and the use of a deadly weapon were necessarily included in the offense of assault on a law-enforcement officer with a firearm, and this result would punish defendants twice for the same offense. State v. Partin, 48 N.C. App. 274, 269 S.E.2d 250, appeal dismissed, 301 N.C. 404, 273 S.E.2d 449 (1980).

Intent Is Presumed from Act. — In order to return a verdict of guilty of assault with a firearm upon a law-enforcement officer in the performance of his duties, the jury is not required to find the defendant possessed any intent beyond the intent to commit the unlawful act, and this will be inferred or presumed from the act itself. State v. Mayberry, 38 N.C. App. 509, 248 S.E.2d 402 (1978).

Admissibility of Result of Breathalyzer Test. — Where defendant was not driving or operating a vehicle at the time of the alleged assault on a police officer, the court erred in admitting testimony showing the result of a breathalyzer test. State v. Powell, 18 N.C. App. 732, 198 S.E.2d 70, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (1973).

Applied in State v. Jenkins, 12 N.C. App. 387, 183 S.E.2d 268 (1971); State v. Berry, 13 N.C. App. 310, 185 S.E.2d 463 (1971); State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972); State v. Norton, 14 N.C. App. 136, 187 S.E.2d 364 (1972); State v. Hammock, 22 N.C. App. 439, 206 S.E.2d 773 (1974); State v. Polk, 29 N.C. App. 360, 224 S.E.2d 272 (1976); State v. Thomas, 29 N.C. App. 757, 226 S.E.2d 163 (1976); State v. Spellman, 40 N.C. App. 591, 253 S.E.2d 320 (1979).

Cited in State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973); State v. Dunlap, 298 N.C. 725, 259 S.E.2d 893 (1979).

ARTICLE 9.

Hazing.

§ 14-35. Hazing; definition and punishment.

It shall be unlawful for any student in any college or school in this State to engage in what is known as hazing, or to aid or abet any other student in the commission of this offense. For the purposes of this section hazing is defined as follows: "to annoy any student by playing abusive or ridiculous tricks upon him, to frighten, scold, beat or harass him, or to subject him to personal indignity." Any violation of this section shall constitute a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1913, c. 169, ss. 1, 2, 3, 4; C. S., s. 4217; 1969, c. 1224, s. 1.)

§ 14-36. Expulsion from school; duty of faculty to expel.

Upon conviction of any student of the offense of hazing, or of aiding or abetting in the commission of this offense, he shall, in addition to any punishment imposed by the court, be expelled from the college or school he is attending. The faculty or governing board of any college or school charged with the duty of expulsion of students for proper cause shall, upon such conviction at once expel the offender, and a failure to do so shall be a misdemeanor. (1913, c. 169, ss. 5, 6; C. S., s. 4218.)

§ 14-37: Repealed by Session Laws 1979, c. 7, s. 1.

§ 14-38. Witnesses in hazing trials; no indictment to be founded on self-criminating testimony.

In all trials for the offense of hazing any student or other person subpoenaed as a witness in behalf of the State shall be required to testify if called upon to do so: Provided, however, that no student or other person so testifying shall be amenable or subject to indictment on account of, or by reason of, such testimony. (1913, c. 169, s. 8; C. S., s. 4220.)

Article 10.

Kidnapping and Abduction.

§ 14-39. Kidnapping.

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a hostage or using such other person as a shield; or

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

(c) Any firm or corporation convicted of kidnapping shall be punished by a fine of not less than five thousand dollars ($5,000) nor more than one hundred thousand dollars ($100,000), and its charter and right to do business in the State of North Carolina shall be forfeited. (1933, c. 542; 1975, c. 843, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote subsection (b). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For case law survey on kidnapping, see 41 N.C.L. Rev. 445 (1963).

For a note analyzing the recent amendment codifying the definition of kidnapping, see 12 Wake Forest L. Rev. 434 (1976).

For a survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. What Constitutes Kidnapping.
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A. Charges.
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I. GENERAL CONSIDERATION.

Editor's Note. — Many of the cases cited in the following annotation were decided under this section as it stood prior to the 1975 amendment. At that time the statute did not specifically define kidnapping and was construed as incorporating common-law elements of kidnapping. They should be read in light of State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977) and State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978) which held that the 1975 amendment superseded the common law.

All of the cases cited in the following annotation were decided prior to the effective date (July 1, 1981) of the 1979 amendment which created two degrees of kidnapping.

History. — A former statute, C.S., s. 4221, provided that any person who forcibly or fraudulently kidnapped any person should be guilty of a felony, and upon conviction might be punished in the discretion of the court, not exceeding 20 years in the State's prison. As a result of the kidnapping and death in the Lindbergh tragedy, the General Assembly of North Carolina repealed C.S., s. 4221 by the enactment of Public Laws 1933, c. 542, now codified as this section. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

The effect of the section as it stood prior to the 1975 amendment, repealing C.S., s. 4221, was to increase within the discretion of the court the maximum punishment for kidnapping from twenty years to life, and not to make a life term mandatory upon conviction, the intent of this section to this effect being shown by the use of the word "punishable" in prescribing the sentence. State v. Kelly, 206 N.C. 660, 175 S.E. 294 (1934); State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

Effect of 1975 Amendment. — Though this section, as amended in 1975, is broader than common-law kidnapping in that it eliminates asportation as a necessary element of the crime, it is restrictive in that, by limiting kidnapping to unlawful confinement, restraint or asportation for the purposes enumerated it does not include some of the situations covered by the common-law crime. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

The present statutory definition of the crime of kidnapping, enacted in 1975, must be construed in the light of recent decisions of the Supreme Court decided prior to the rewriting of the statute. When so considered, it is clear that the legislature intended to change the law as therein declared. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Common Law Superseded. — This section, as amended in 1975, supersedes the common-law crime of kidnapping. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

Since this section supersedes the common-law crime of kidnapping, common-law kidnapping no longer exists in North Carolina. State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978).

The present statutory definition of the crime of kidnapping enacted in 1975 changed the law as theretofore declared by the Supreme Court. State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

This section follows the pattern of the kidnapping provision, § 212.1, of the Model Penal Code. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Constitutionality. — This section, on its face, does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, or the law of the land clause of N.C. Const., Art. I, § 19, or the cruel or unusual punishment clause of either Constitution. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

This section, as herein construed, is not vague. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

This section applies to all who violate it without exception or classification. Consequently, it does not, upon its face, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United

States or the like clause contained in N.C. Const., Art. I, § 19. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

This section does not interfere with or prohibit any activity protected by the First Amendment or any other federal or State constitutional provision. It is a penal statute completely within the State's police power. The doctrine of overbreadth has no application to it. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

This section is neither unconstitutionally vague nor "overbroad." State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

The procedure here outlined comports with both State and federal constitutional requirements. The procedures prescribed for the sentencing hearing in § 15A-1334(b) accord due process. That the judge rather than the jury makes the crucial factual determinations upon which the ultimate sentence is based does not contravene either State or federal constitutional guaranties of a jury trial in criminal cases. Neither is it violative of constitutional due process to place the burden of persuasion as to the existence of the mitigating factors on the defendant. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

This section prima facie violates no provision of the State or federal Constitutions. State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

Applied in State v. Mallory, 266 N.C. 31, 145 S.E.2d 335 (1965); State v. McClain, 282 N.C. 396, 193 S.E.2d 113 (1972); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Robertson, 284 N.C. 549, 202 S.E.2d 157 (1974); State v. Conrad, 293 N.C. 735, 239 S.E.2d 260 (1977); State v. Vawter, 33 N.C. App. 131, 234 S.E.2d 438 (1977); State v. Sampson, 34 N.C. App. 305, 237 S.E.2d 883 (1977); State v. Jones, 294 N.C. 642, 243 S.E.2d 118 (1978); State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

Quoted in State v. Cobb, 295 N.C. 1, 243 S.E.2d 759 (1978); State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890 (1979); State v. Hoskins, 42 N.C. App. 108, 256 S.E.2d 290 (1979).

Cited in State v. Streeton, 231 N.C. 301, 56 S.E.2d 649 (1949); State v. Tatum, 291 N.C. 73, 229 S.E.2d 562 (1976); State v. Sharratt, 29 N.C. App. 199, 223 S.E.2d 906 (1976); State v. Gunther, 296 N.C. 578, 251 S.E.2d 462 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

II. WHAT CONSTITUTES KIDNAPPING.

A. In General.

Subsection (a) of this section defines the offense of kidnapping. Proof of the elements set forth therein is all that the statute requires for a conviction of kidnapping. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

"Kidnapping" Defined. — Subsection (a) of this section defines kidnapping as (1) an unlawful, nonconsensual restraint, confinement or removal from one place to another (2) for the purpose of committing or facilitating the commission of certain specified acts. On its face, this is all this section requires for a conviction of kidnapping. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

The gist of the offense proscribed by this section is the unlawful, nonconsensual confinement, restraint or removal of victim, for the purposes of committing certain acts specified in the statute. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35 (1980).

Same — "Aggravated Kidnapping" a Misnomer. — While some of the opinions of the Supreme Court refer to the crime defined in subsection (a) as "aggravated kidnapping," this is a misnomer. The proper term for the crime there defined is "kidnapping." State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

As used in this section, the term "confine" connotes some form of imprisonment within a given area, such as a room, a house or a vehicle. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

The term "restrain," while broad enough to include a restriction upon freedom of movement by confinement, connotes also such a restriction, by force, threat or fraud, without a confinement. Thus, one who is physically seized and held, or whose hands or feet are bound, or who, by the threatened use of a deadly weapon, is restricted in his freedom of motion, is restrained within the meaning of this statute. Such restraint, however, is not kidnapping unless it is (1) unlawful (i.e., without legal right), (2) without the consent of the person restrained (or of his parent or guardian if he be under 16 years of age), and (3) for one of the purposes specifically enumerated in the statute. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

The word "restrain," as used in this section connotes a restraint separate and apart from that which is inherent in the commission of the other felony. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. This section was not intended by the legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

The term "hostage" as used in subdivision (a)(1) of this section implies the unlawful

taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance or forbearance of some act by a third person. State v. Lee, 33 N.C. App. 162, 234 S.E.2d 482 (1977).

The victim's age is not an essential element of the crime of kidnapping itself, but it is, instead, a factor which relates to the State's burden of proof in regard to consent. If the victim is shown to be under 16, the State has the burden of showing that he or she was unlawfully confined, restrained, or removed from one place to another without the consent of a parent or legal guardian. Otherwise, the State must prove that the action was taken without his or her own consent. State v. Hunter, 299 N.C. 29, 261 S.E.2d 189 (1980); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35 (1980).

Asportation Not Essential. — This section, as amended in 1975, removes asportation as an essential element of the crime of kidnapping. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978); see State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

The legislature rejected the decision in State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971) to the effect that there must be both detention and asportation of the victim, the statute plainly stating that confinement, restraint or removal of the victim for any one of the three specified purposes is sufficient to constitute the offense of kidnapping. Thus, no asportation whatever is now required where there is the requisite confinement or restraint. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Substantiality of Time or Distance Not Essential. — The legislature in 1975 rejected the determinations in State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973), and in State v. Roberts, 286 N.C. 265, 210 S.E.2d 396 (1974), to the effect that, where the State relies upon asportation of the victim to establish a kidnapping, the asportation must be for a substantial distance and where the State relies upon "dominion and control," i.e., "confinement" or "restraint," such must continue "for some appreciable period of time." Thus, it was clearly the intent of the legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978); State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

For cases on immateriality of distance where kidnapping is by asportation, see analysis line II (B).

The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping, as the word "kidnap" is used in this section and as it is defined at common law. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966).

The use of actual physical force or violence is not always essential to the commission of the offense of kidnapping. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

And Threats Are Equivalent to Actual Force. — The crime of kidnapping is frequently committed by threats and intimidation and appeals to the fears of the victim which are sufficient to put an ordinarily prudent person in fear for his life or personal safety, and to overcome the will of the victim and secure control of his person without his consent and against his will, and are equivalent to the use of actual force or violence. State v. Bruce, 268 N.C. 174, 150 S.E.2d 216 (1966); State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

Threats and intimidation are equivalent to the use of actual force or violence. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

Same — Threats by actions may be more effective than when made by mere words, and defendant's uninvited entrance into the car in itself constituted a threat under this section. State v. Ballard, 28 N.C. App. 146, 220 S.E.2d 205 (1975).

Defendant's conduct on first entering a car and in directing the driver/victim where to drive constituted such a threat as to put an ordinarily prudent person in fear for her life or personal safety so as to secure control of her person against her will, and from that point on there was an ample showing of asportation to constitute the crime of kidnapping. State v. Ballard, 28 N.C. App. 146, 220 S.E.2d 205 (1975).

Likewise Crime May Be Committed by Means of Fraud Which Is Considered Equivalent to Force. — The crime of kidnapping by its very nature cannot ordinarily be committed by an act to which a person, being capable in law of consenting, consents in a legally valid manner. But where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim. In brief, under those circumstances the law has long considered fraud and violence as the same in the kidnapping of a person. State v. Gough, 257 N.C. 347, 126 S.E.2d 118 (1962),

overruled on other grounds, State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971), superseded by statute as stated in State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), error denied, 294 N.C. 503, 243 S.E.2d 338 (1978).

The use of fraud instead of force to effect a kidnapping is a violation of the kidnapping statute. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Where false and fraudulent representations or fraud amounting substantially to a coercion of the will of the kidnapped person are used as a substitute for force in effecting kidnapping, there is, in truth and in law, no consent at all on the part of the victim; and under those circumstances the law has long considered fraud and violence as the same in the kidnapping of a person. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Under the pristine law of kidnapping, actual physical force was contemplated to accomplish the crime — fraud was not considered; however the Supreme Court has recognized that one's will may be coerced as effectually by fraud as by force. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

Where false and fraudulent representations amounting substantially to a coercion of the will of the victim are used in lieu of force in effecting kidnapping, there is in law no consent at all on the part of the victim. Under those circumstances the law considers fraud the equivalent of force. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

Apparent consent, having been obtained by fraud, was no consent at all but simply the fruit of fraud amounting substantially to a coercion of the victim's will. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

In the kidnapping of a person the law considers the use of fraud as synonymous with force. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

A person may be kidnapped by fraud as well as by force. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Same — Legislative Intent. — Nothing in this section, as now written, indicates any legislative intent to change the holding in State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974), to the effect that the use of fraud, threats or intimidation is equivalent to the use of force or violence so far as a charge of kidnapping is concerned. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

It is not necessary for the unlawfulness to exist from the beginning of the transaction. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

Purpose of Exposure to Danger Must Be Among Those Enumerated in Statute. — Regardless of the danger to which the victims are exposed, unless the purpose of the exposure is either felonious, or otherwise enumerated, not merely unlawful, the statutory crime of kidnapping has not been committed. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

When Person Is Guilty of Kidnapping. — Under this section a person is guilty of kidnapping (1) if he kidnaps or causes to be kidnapped any human being, or (2) if he demands a ransom of any person, firm or corporation, male or female, to be paid on account of kidnapping, or (3) if he holds any human being for ransom. State v. Gough, 257 N.C. 348, 126 S.E.2d 118 (1962), overruled on other grounds, State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971), superseded by statute as stated in State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), error denied, 294 N.C. 503, 243 S.E.2d 338 (1978).

False Imprisonment Distinguished. — The common-law crime of false imprisonment, a general misdemeanor, has not been superseded by this section, as amended in 1975, because there may be an unlawful restraint without the purposes specified in the statute. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

There could be no kidnapping without there first being a false imprisonment. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (1975).

Same — At common law forcible detention was false imprisonment, not kidnapping. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

False imprisonment was indictable as a specific crime at common law, and this doctrine still applies in states where the common law has been adopted. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

North Carolina does not have a criminal statute making false imprisonment a crime. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

B. Kidnapping by Asportation.

Unlawful Removal Constitutes Kidnapping. — Where a defendant by force and threat of violence took a person and carried him where he did not consent to go, this constitutes kidnapping under this section. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971).

The unlawful taking and carrying away of a human being fraudulently is kidnapping within the meaning of this section. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1972).

Distance of Removal Immaterial. — It is the fact, not the distance, of forcible removal of the victim that constitutes kidnapping. State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, cert. denied, 382 U.S. 22, 86 S. Ct. 227, 15 L. Ed. 2d 16 (1965); State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969); State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

The asportation requirement has been relaxed so that any carrying away is sufficient, and the distance the victim is carried is immaterial. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971); State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

Where the gravamen of the crime is the carrying away of the person, the place from or to which the person is transported is not material, and an actual asportation of the victim is sufficient to constitute the offense without regard to the extent or degree of such movement; it is the fact, not the distance, of forcible removal which constitutes kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974); State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

Any carrying away is sufficient; the distance the victim is carried is immaterial. State v. Murphy, 280 N.C. 1, 184 S.E.2d 845 (1971).

The distance the victim is carried is not material. Any carrying away is sufficient. State v. Hudson, 281 N.C. 100, 187 S.E.2d 756 (1972), cert. denied, 414 U.S. 1160, 94 S. Ct. 920, 39 L. Ed. 2d 112 (1974).

In a proper case, the removal of the victim only a few feet could be sufficient to constitute kidnapping. State v. Owen, 24 N.C. App. 598, 211 S.E.2d 830, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (1975).

Same — Shift of Location within Same Structure May Constitute Carrying Away. — Where the shift of location or removal was done within a physical structure such a removal constituted a carrying away and sufficiently established the offense of kidnapping. State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

Same — Essential Element Is "Removal". — Since distance is not material to the "carrying away," the essential element must be the term "removal." State v. Dix, 14 N.C. App. 328, 188 S.E.2d 737 (1972), rev'd on other grounds, 282 N.C. 490, 193 S.E.2d 897 (1973).

Manner of Asportation Immaterial. — Under this section, regardless of the means used, by which the taking and carrying away of a human being is effected, there must be further finding that such taking and carrying away was unlawful or done without lawful authority, or effected by fraud. State v. Witherington, 226 N.C. 211, 37 S.E.2d 497 (1946), overruled on other grounds, State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971), superseded by statute as stated in State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), error denied, 294 N.C. 503, 243 S.E.2d 338 (1978).

Standing alone, the fact that the taking and carrying away of the victim was accomplished by means of a truck owned and operated by the victim is of no avail as a defense to the alleged kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

C. Kidnapping to Facilitate Commission of Felony.

There is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony. Such independent and separate restraint need not be, itself, substantial in time, under this section as now written. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

Under this section it is necessary to prove that the confinement, restraint, or removal is for the purpose of, among other alternatives, "facilitating the commission of any felony," and if the intended felony is actually completed, the defendant can be convicted and sentenced for kidnapping and the intended felony without violating the Double Jeopardy Clause of the Fifth Amendment. State v. Handsome, 300 N.C. 313, 266 S.E.2d 670 (1980).

Elements of Kidnapping and Felony Held to Be Distinct. — The argument that assault and assault on a female are essential elements of rape and since the defendants were convicted of assault and assault on a female, respectively, when tried under the indictment for kidnapping, they have been formerly in jeopardy with reference to the offenses now charged in the indictments for rape, is ingenious but without merit. In the first place, a simple assault is probably not, and an assault on a female is certainly not, an essential element of the crime of kidnapping, since the victim of a kidnapping need not be a female and may be enticed away by fraud rather than forced by violence or threat to accompany the abductor. State v. Overman, 269 N.C. 453, 153 S.E.2d 44 (1967).

In a prosecution for aggravated kidnapping the felonious assault alleged in the indictment as being one of the purposes for which defen-

dant removed the victim from one place to another was not an element of the kidnapping offense, since it was not necessary for the State to prove the felonious assault in order to convict the defendant of kidnapping, but only to prove that the purpose of the removal was a felonious assault. The felonious assault was, consequently, a separate and distinct offense and the defendant could be convicted and sentenced on both the assault and the kidnapping charges. State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35 (1980).

Where the restraint of the two victims was for the purpose of facilitating the commission of the felony of crime against nature and for the purpose of facilitating the flight of the defendant from the room after the perpetration of the two crimes, the restraint of each woman was separate and apart from, and not an inherent incident of the crime against nature, though closely related thereto in time, and either of such purposes satisfied the statutory definition of kidnapping. State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

When the State proves the elements of kidnapping and the purpose for which the victim was confined or restrained, conviction of the kidnapping may be sustained. Thus, the crimes of crime against nature, assault with intent to commit rape and robbery with a dangerous weapon are separate and distinct offenses and are punishable as such. State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978).

The principal that when a criminal offense in its entirety is an essential element of another offense a defendant may not be punished for both offenses was not applicable in a prosecution for two counts of kidnapping and for robbery and other felonies for which the victims were kidnapped since in order to prove kidnapping it was only necessary to prove a purpose of robbery and the other felonies and not the commission of the felonies themselves. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Even though both the prosecution and the trial court treated the "serious injury" arising out of the felonious assault charge and the "sexual assault" arising out of the rape charge as elements of the respective kidnappings in a prosecution for two counts of kidnapping, first-degree rape, two counts of armed robbery, and assault with a deadly weapon with the intent to kill inflicting serious bodily injury, the convictions and sentencing of the defendant for the kidnappings, and the assault and rape were not violations of the Double Jeopardy Clause of the United States Constitution or the Law of the Land Clause of the North Carolina Constitution. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

In a prosecution for kidnapping and armed robbery, the restraint and asportation of the victim consisting of moving her from the store to a hallway in the rear of the building and tying her to a grocery cart was not necessary to and not a part of the armed robbery, and the elements of the two offenses were not the same. Thus, conviction of both crimes did not violate due process and equal protection standards. State v. Vert, 39 N.C. App. 26, 249 S.E.2d 476 (1978), cert. denied, 296 N.C. 739, 254 S.E.2d 181 (1979).

In a prosecution for rape and kidnapping, where the victim was by trick enticed into defendant's automobile and transported about six blocks away where by force and by threat of the use of a knife, she was raped, and during a period of about 45 minutes, the victim was under the complete dominion and control of defendant, the restraint accompanying the rape was not an inherent, inevitable feature of the kidnapping. Under these circumstances, the kidnapping was a separate, complete act independent of the later committed crime of rape. Thus, the constitutional problem of double jeopardy did not arise and defendant failed to show denial of due process. State v. Wilson, 296 N.C. 298, 250 S.E.2d 621 (1979).

The restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

Where a defendant is charged with kidnapping, rape and crime against nature, an essential element of each offense being a restraint, the defendant can be convicted for each offense without violating the constitutional prohibition against double jeopardy where there is also a showing of asportation as an element of kidnapping. State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Double jeopardy did not result when defendant was tried and convicted of kidnapping for the purpose of facilitating flight following his participation in an armed robbery and of armed robbery, since the intent of the legislature in establishing the punishment for kidnapping was to impose an indivisible penalty for restraint and removal for specified purposes, no hypothetical part of which penalty represents a punishment for the felony which gave rise to the flight of defendant and his removal of the victim, and the crimes of armed robbery and kidnapping involve vastly different social implications. State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35 (1980).

III. PRACTICE AND PROCEDURE.

A. Charges.

Prosecutorial Discretion in Choice of Crime. — When kidnapping, by definition

overruns other crimes for which the prescribed punishment is less severe, a prosecutor has the naked and arbitrary power to choose the crime for which he will prosecute. State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

Consolidation of Kidnapping and Assault Charges. — Where the kidnapping and assault charges arose out of the same transaction and elements of the assault charge were essentials of the kidnapping charge, the consolidation of the assault and kidnapping charges was permissible under § 15-152 (now § 15A-926(a)). State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

State Not Required to Elect between Charges of Kidnapping and Armed Robbery. — Where a victim was forced from his residence at gunpoint and transported by a car for a distance of eight miles, where he was robbed, there was sufficient asportation and evidence to support both kidnapping and armed robbery, and the State was not required to elect between charges. State v. Sommerset, 21 N.C. App. 272, 204 S.E.2d 206, cert. denied, 285 N.C. 594, 205 S.E.2d 725 (1974).

Charge May Be Confined to "Kidnapping by Unlawful Restraint". — Since "confinement" and "restraint" are practically synonymous, and there must be restraint if there is confinement, and since unlawful removal from one place to another must involve unlawful restraint, in any kidnapping case the State may confine the charge against the defendant to kidnapping by unlawful restraint. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd, 294 N.C. 503, 243 S.E.2d 338 (1978).

B. Indictment.

Indictments Held Sufficient Prior to 1975 Amendment. — A bill of indictment charging that defendant "unlawfully, willfully, feloniously and forcibly did kidnap" a named person is sufficient to withstand a motion to quash, since the word "kidnap" has a definite legal meaning. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Where the bill of indictment was drafted in the language of this section as it stood prior to the 1975 amendment, charging a defendant with kidnapping without defining the word, this is sufficient. If an indictment charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. State v. Penley, 277 N.C. 704, 178 S.E.2d 490 (1971); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

An indictment charging that defendant "unlawfully, did feloniously and forcibly kidnap" a person named was not defective or violative of North Carolina Const., Art. I, §§ 22 and 23 for failure to charge additionally that the victim was forcibly carried away against her will. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

Indictment Using Common-Law Definition No Longer Sufficient. — An indictment which would have been sufficient under this section prior to the 1975 Amendment because the term "kidnap" was given the common-law definition did not allege the elements required under this section which statutorily defines kidnapping and supersedes the common-law definition of kidnapping. The indictment could not be considered sufficient even to charge common-law kidnapping as a lesser included offense. State v. Holmon, 36 N.C. App. 569, 244 S.E.2d 491 (1978).

C. Burden of Proof.

The State has the burden of proof concerning those factors in this section which would subject the defendant to increased punishment. Where the State alleges in the bill of indictment the additional factor that will support the increased punishment, the State has accepted the burden of proof as to that factor. State v. Gunther, 38 N.C. App. 279, 248 S.E.2d 97 (1978), aff'd in part and rev'd in part on other grounds, 296 N.C. 578, 251 S.E.2d 462 (1979).

In order for the State to subject a defendant to a punishment of greater than 25 years (now punishment as a Class D felon) upon conviction of kidnapping, the State must allege and prove beyond a reasonable doubt that in the course of the kidnapping the defendant either sexually assaulted the victim, or seriously injured the victim, or released the victim in an unsafe place. State v. Gunther, 38 N.C. App. 279, 248 S.E.2d 97 (1978), aff'd in part and rev'd in part on other grounds, 296 N.C. 578, 251 S.E.2d 462 (1979).

Burden on Defendant to Show Mitigation. — There is no constitutional infirmity in placing the burden of persuasion as to the mitigating factors on the defendant. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

D. Evidence.

Inferring Intent to Rape. — On a charge of kidnapping with the intent to rape, the intent to commit rape may be inferred from the evidence without a showing of an actual physical attempt to have intercourse. State v. Lang, 46 N.C. App. 138, 264 S.E.2d 821, rev'd on other grounds, 301 N.C. 508, 272 S.E.2d 123 (1980).

Evidence held sufficient to be submitted to the jury on the charge of kidnapping. State v. Dorsett, 245 N.C. 47, 95 S.E.2d 90 (1956), overruled on other grounds, State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

There was ample evidence to support convictions of kidnapping in State v. Williams, 275 N.C. 77, 165 S.E.2d 481 (1969).

Where a motorist who invited a hitchhiker to ride with him is compelled by the force and intimidation exerted upon him by the hitchhiker to abandon his own desired course of travel and to drive his car as commanded by the hitchhiker, there is a kidnapping. State v. Barbour, 278 N.C. 449, 180 S.E.2d 115 (1971), cert. denied, 404 U.S. 1023, 92 S. Ct. 699, 30 L. Ed. 2d 673 (1974).

In a prosecution for first-degree rape and kidnapping where the defendant told the prosecutix she would not live to be 19 if she did not cooperate with him, and she had every reason to believe that he would carry out his threat to kill her, and the defendant had exhibited a knife and threatened the life of the prosecutrix with it, and the knife continued in use as long as it was accessible to him, there was ample evidence to submit the case to the jury on first-degree rape and kidnapping. State v. Dull, 289 N.C. 55, 220 S.E.2d 344 (1975), death sentence vacated, 428 U.S. 904, 96 S. Ct. 3211, 49 L. Ed. 2d 1211 (1976).

Evidence held sufficient for submission to jury on charge of aggravated kidnapping. See State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

Evidence held sufficient for submission to jury on charge of kidnapping. See State v. Hoots, 33 N.C. App. 258, 234 S.E.2d 764 (1977).

There was ample evidence of kidnapping in a prosecution for kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious bodily harm when defendant produced a pistol and forced the victim to walk 50 feet or more into the woods where he committed the felonious assault. State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

Defendant's evidence was insufficient to meet his burden of providing the mitigating circumstances set forth in subsection (b) of this section, as it stood prior to the effective date of the 1979 amendment, by a preponderance of the evidence, and the trial judge acted properly within his discretion in sentencing defendant to life imprisonment for kidnapping, where the State presented substantial evidence tending to show that the victim was kidnapped, repeatedly raped by defendant and three other males and released near her home, and defendant's evidence to the contrary consisted of his own testimony denying participation in the offenses charged and the testimony of several witnesses which tended to show an alibi for defendant at the time the crimes were committed. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

E. Instructions to Jury.

Instructions which merely list but do not define and explain the elements of kidnapping to the jury are not sufficient. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd on other grounds, 294 N.C. 503, 243 S.E.2d 338 (1978).

Instructions on Elements of Kidnapping Held Improper. — Where the trial judge instructed the jury that kidnapping was the taking and carrying away without lawful authority of a human being by force, threat of force, or fraud, the trial judge failed to properly instruct the jury on the elements of kidnapping. State v. Wingo, 30 N.C. App. 123, 226 S.E.2d 221 (1976).

An instruction permitting the jury to find either of the defendants guilty of kidnapping if they found from the evidence that he confined, restrained or removed from one place to another either of the victims for the purpose of obtaining information, even though such a purpose is not one of the proscribed purposes set out in subsection (a) of this section was error and entitled the defendants to a new trial. State v. Hoots, 33 N.C. App. 258, 234 S.E.2d 764 (1977).

Instruction on Elements of Kidnapping Minor Not Prejudicial. — Defendant was not prejudiced by a portion of the charge in which the court stated that two of the essential elements of kidnapping a person under the age of 16 were that the victim did not consent, that the victim had not reached his sixteenth birthday, where the court in other portions of the charge instructed the jury that before it could find defendant guilty of kidnapping the State must prove beyond a reasonable doubt, among other things, that he had not reached his sixteenth birthday; and that his parents did not consent to his confinement or restraint. State v. McGuire, 49 N.C. App. 70, 270 S.E.2d 526, appeal dismissed, 301 N.C. 529, 273 S.E.2d 457 (1980).

Instruction Requiring Substantiality in Terms of Distance and Time Is Error. — The Court of Appeals erred in its holding that "substantiality" in terms of distance or time is an essential of kidnapping and in its pronouncements that the trial judge must instruct the jury that "confinement" or "restraint," as used in this statute, means confinement or restraint "for a substantial period" and that "removal," as used in this statute, requires a movement "for a substantial distance." State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).

The failure of the trial court to instruct that kidnapping by unlawful confinement means confinement for a substantial period and not merely incidental to the commission of another crime; that kidnapping by unlawful restraint means restraint for a substantial period of time

and not merely incidental to the commission of another crime; or that kidnapping by unlawfully moving one from one place to another means movement for a substantial distance and not merely incidental to the commission of another crime was not error in light of State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978). State v. Alston, 294 N.C. 577, 243 S.E.2d 354 (1978).

A charge to the jury that in order to constitute kidnapping under subsection (a) any unlawful confinement, restraint, or removal from one place to another must involve a substantial period or distance would be improper. State v. Silhan, 297 N.C. 660, 256 S.E.2d 702 (1979).

Instruction on "Distance Carried Away" Held Proper. — In prosecution for kidnapping, where the distance the victim was carried is immaterial, the court's instructing the jury that "any carrying away is sufficient, members of the jury, that is the distance he is carried is immaterial," though disapproved, did not constitute reversible error. State v. Owen, 24 N.C. App. 598, 212 S.E.2d 830, cert. denied, 287 N.C. 263, 214 S.E.2d 435 (1975).

Charge on Unlawful Restraint Sufficient. — Any unlawful asportation involves unlawful restraint, and any unlawful confinement must involve unlawful restraint. Therefore, if a case were to involve asportation or confinement, it would not be necessary to charge on either. A charge on unlawful restraint would be sufficient. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd on other grounds, 294 N.C. 503, 243 S.E.2d 338 (1978).

Instruction on Kidnapping by Fraud. — If it be conceded arguendo that the evidence in this case was sufficient to require a charge on kidnapping by fraud as well as kidnapping by force, it is not perceived how a failure to charge on the fraudulent aspect of the matter was prejudicial to defendant, since kidnapping effected by fraud is still kidnapping, and failure to so charge would have been advantageous to defendant. State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Instruction Defining Terror. — In a prosecution for kidnapping, the trial judge was correct in defining terror for purposes of this section, as involving more than ordinary fear. State v. Jones, 36 N.C. App. 447, 244 S.E.2d 709 (1978).

Instructions as to Lesser Included Offenses. — Where there was no evidence of any included lesser offenses embraced within the indictments for rape and kidnapping, the court was under no duty to charge on lesser included offenses. State v. Bynum, 282 N.C. 552, 193 S.E.2d 725, cert. denied, 414 U.S. 836, 94 S. Ct. 182, 38 L. Ed. 2d 72 (1973).

In appropriate cases the trial judge should instruct the jury on false imprisonment as a lesser offense of kidnapping. State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977), aff'd on other grounds, 294 N.C. 503, 243 S.E.2d 338 (1978).

Instructions on Theories Not Charged or Substantiated Held Improper. — Where theories of the crime neither supported by the evidence nor charged in the bill of indictment were included in the trial court's instructions to the jury in a prosecution for aggravated kidnapping, the defendant was entitled to a new trial. State v. Dammons, 293 N.C. 263, 237 S.E.2d 834 (1977).

In a prosecution for kidnapping upon an indictment charging defendant with unlawfully removing the victim from one place to another for the purpose of facilitating the commission of the felony of rape and for the purpose of facilitating the flight of defendant following the commission of a felony, the trial judge improperly instructed the jury on possible theories of conviction not charged in the indictment when he instructed that defendant would be guilty of kidnapping if the jury found that defendant's confinement or constraint of the victim was for the purpose of facilitating his flight from apprehension for another crime, or to obtain the use of her vehicle. State v. Taylor, 301 N.C. 164, 270 S.E.2d 409 (1980).

F. Sentencing.

Editor's Note. — All of the following cases concerning sentencing under subsection (b) were decided prior to the effective date (July 1, 1981) of the 1979 amendment to this section, which rewrote subsection (b) so as to create two degrees of the offense of kidnapping and which substituted the present felony classifications for each degree of kidnapping for former provisions concerning minimum and maximum sentences.

Purpose of Subsection (b). — Subsection (b) of this section seeks to reduce the possibility of harm to a victim who is in an already dangerous situation. In other words, it is intended to offer a kidnapper the inducement of a lesser sentence if he refrains from injuring or permitting injury to his victim. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

It is reasonable to assume that the General Assembly had a purpose similar to that of the Model Penal Code, which was to maximize the kidnapper's incentive to return the victim alive, in providing reduced punishment under subsection (b) of this section when the victim has been released in a safe place and has not been sexually assaulted or seriously injured. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Nature of Mitigating Factors. — The mitigating factors in subsection (b) of this section are not the antithesis of any essential element of the crime of kidnapping. Proof of these

factors does not negate any element of the crime of kidnapping which the state must prove. The mitigating factors are, in reality, pleas in avoidance or mitigation of punishment and not pleas in negation. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

No Jury Determination Required. — Since the mitigating factors to be found under subsection (b) of this section relate solely to the severity of the sentence and not to any element of the offense itself, a defendant is not entitled to a jury determination under either the federal or State Constitution. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Determination Made by Judge. — The judge may make the determination with regard to the existence of the factors in subsection (b) of this section relating to sentencing from evidence adduced at the trial of the kidnapping case itself or at the sentencing hearing provided for in § 15A-1334 following the trial, or at both proceedings. If at either or both proceedings evidence of the existence of the mitigating factors has been presented, the judge must consider this and all other evidence bearing on the question. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

Since the mitigating factors in subsection (b) of this section are not elements of any substantive criminal offense but bear solely on the question of punishment, having the judge determine these matters is not violative of N.C. Const., Art. I, § 24. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Normally a jury need only determine whether a defendant has commited the substantive offense of kidnapping as defined in subsection (a) of this section. The factors set forth in subsection (b) of this section relate only to sentencing; therefore, their existence or nonexistence should properly be determined by the trial judge. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

No Findings Required. — If no evidence either at trial or at the sentencing hearing is adduced tending to show the existence of the mitigating factors in subsection (b) of this section then the judge, without making findings, may proceed to impose a sentence. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

Same — Where Separate Criminal Charges Tried Jointly with Kidnapping. — When the question of the existence of the mitigating factors in subsection (b) of this section has, in effect, been submitted to the jury in the form of separate criminal charges tried jointly with the kidnapping case, and the jury finds defendant guilty, there is no need for the judge to make separate findings. The nonexistence of mitigating factors will already have been determined beyond a reasonable doubt. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978); State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980).

The trial court properly sentenced defendant to life imprisonment for kidnapping without making findings of fact concerning the mitigating circumstances as to whether the victim was released by the defendant in a safe place and had not been sexually assaulted or seriously injured, where charges of kidnapping and assault with intent to commit rape were submitted to the jury, the jury found defendant guilty of both charges, and the nonexistence of the mitigating factors of subsection (b) of this section was thus already established beyond a reasonable doubt. State v. Bright, 301 N.C. 243, 271 S.E.2d 368 (1980)

The State may stipulate to the presence of all the mitigating factors in subsection (b) of this section and thereby avoid determination of the question. State v. Williams, 295 N.C. 655, 249 S.E.2d 709 (1978).

Imposition of Concurrent Sentences Not Unconstitutional. — The imposition on defendant of two concurrent terms of life imprisonment for kidnapping and first-degree rape did not constitute cruel and unusual punishment since the sentences were authorized by this section and the former § 14-21; furthermore, the sentences did not violate defendant's equal protection rights because other persons involved in the same offenses received lesser punishments. State v. Squire, 302 N.C. 112, 273 S.E.2d 688 (1981).

§ 14-40. Enticing minors out of the State for the purpose of employment.

If any person shall employ and carry beyond the limits of this State any minor, or shall induce any minor to go beyond the limits of this State, for the purpose of employment without the consent in writing, duly authenticated, of the parent, guardian or other person having authority over such minor, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. The fact of the employment and going out of the State of the minor, or of the

going out of the State by the minor, at the solicitation of the person for the purpose of employment, shall be prima facie evidence of knowledge that the person employed or solicited to go beyond the limits of the State is a minor. (1891, c. 45; Rev., s. 3630; C. S., s. 4222; 1969, c. 1224, s. 4.)

CASE NOTES

Count Joined with One under § 14-41. — An indictment for abduction, containing two counts, one under this section and the second under § 14-41, cannot be quashed for misjoinder of two different offenses, as the two counts are merely statements of the same transaction to meet the different phases of proof. State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

§ 14-41. Abduction of children.

If anyone shall abduct or by any means induce any child under the age of fourteen years, who shall reside with its father, mother, uncle, aunt, brother or elder sister, or shall reside at a school, or be an orphan and reside with a guardian, to leave such person or school, he shall be punished as a Class G felon. (1879, c. 81; Code, s. 973; Rev., s. 3358; C. S., s. 4223; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class G felon" for "guilty of a felony, and on conviction shall be fined or imprisoned in the State's prison for a period not exceeding fifteen years." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

This section is broad and comprehensive in its terms, and embraces all means by which the child may be abducted. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890).

The proviso in § 14-42 must be read in harmony with this section. State v. Walker, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

Definition. — Abduction under this section, is the taking and carrying away of a child, ward, etc., either by fraud, persuasion, or open violence. The consent of the child is no defense. If there is no force or inducement and the departure of the child is entirely voluntary, there is no abduction. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890); State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

Intent Not Required. — There is nothing in this section which requires that the abduction should be with a particular intent. It is only necessary to allege and prove that the child was abducted, or by any means induced to leave its custodian. State v. Chisenhall, 106 N.C. 676, 11 S.E. 518 (1890).

Force Not Required. — In a prosecution under this section it is not necessary for the State to show that the child was carried away by force. State v. Ashburn, 230 N.C. 722, 55 S.E.2d 333 (1949).

Father's Consent a Good Defense. — If the carrying away was with the father's consent, that fact is a defense the burden of which is upon the defendant. State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906).

Where the only inference reasonably deducible from the evidence in a prosecution under this section was that the defendant was acting with the consent of the child's father, the trial court erred in denying the defendant's motion for judgment as of nonsuit. State v. Walker, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

Father Not Guilty in Absence of Order in Favor of Mother. — In the absence of a custody order in favor of the mother, the father of the child taken cannot be guilty of the crime of child abduction. State v. Walker, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

The indictment need not state the means by which the abduction was accomplished, nor that it wad done without the consent and against the will of her father, State v. Burnett, 142 N.C. 577, 55 S.E. 72 (1906), nor that the defendant was not a nearer relation to the child than the person from whose custody the child was abducted. State v. George, 93 N.C. 567 (1885).

Evidence that defendant induced a minor to accompany him on a trip for immoral purposes by promising marriage is sufficient to sustain conviction. State v. Ashburn, 230 N.C. 722, 55 S.E.2d 333 (1949).

Use of Wrong Expression in Charge to Jury. — The rule that what the court says to the jury is to be considered in its entirety and contextually saves from successful attack the use, on a trial for abduction, of the expression "taken out," where the jury must have understood from the entire charge that the court meant thereby "taken away." State v. Truelove, 224 N.C. 147, 29 S.E.2d 460 (1944).

OPINIONS OF ATTORNEY GENERAL

Removal of Child from State by Parent in Absence of Custody Order. — See opinion of Attorney General to Honorable Roy R. Holdford, Jr., Solicitor, Second Solicitorial District, 40 N.C.A.G. 143 (1970).

Applicability to Arrest by Special Police. — See opinion of Attorney General to Mr. G.R. Rankin, Vanguard Security Service, 40 N.C.A.G. 152 (1970).

§ 14-42. Conspiring to abduct children.

If anyone shall conspire to abduct, or by any means to induce any child under the age of fourteen years, who shall reside with any of the persons designated in G.S. 14-41, or shall reside at school, to leave such persons or the school, he shall be punished as a Class G felon: Provided, that no one who may be a nearer blood relation to the child than the persons named in G.S. 14-41 shall be indicted for either of said offenses. (1879, c. 81, s. 2; Code, s. 974; Rev., s. 3359; C. S., s. 4224; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to persuading children to leave any State institution to which they have been legally committed, see § 14-266.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class G felon" for "guilty of a felony, and on conviction shall be punished as prescribed in that section." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

CASE NOTES

The proviso in this section must be read in harmony with § 14-41. State v. Walker, 35 N.C. App. 182, 241 S.E.2d 89 (1978).

§ 14-43. Abduction of married women.

If any male person shall abduct or elope with the wife of another, he shall be punished as a Class H felon: Provided, that the woman, since her marriage, has been an innocent and virtuous woman: Provided further, that no conviction shall be had upon the unsupported testimony of any such married woman. (1903, c. 362; Rev., s. 3360; C. S., s. 4225; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and upon conviction shall be imprisoned not less than one year nor more than ten years." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Elopement Defined. — Elopement of wife is her voluntary act in deserting her husband to go away with and cohabit with another man. State v. O'Higgins, 178 N.C. 708, 100 S.E. 438 (1919).

The fact that the wife had voluntarily left her husband falls within the definition of this section when this results from the unlawful scheming of the man to achieve that end. State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923).

Adultery after the elopement is an essential element of the offense under this section. State v. Ashe, 196 N.C. 397, 145 S.E. 784 (1928).

Effect of Prior Adultery. — In order to constitute the offense of abducting or eloping with a married woman, under this section, the seduction by the male may be accomplished by insistent persuasion under which the woman yields her consent to be carried away from the house of her husband by the defendant charged therewith and living with him in adultery; and the defense that the woman in the course of his scheme had yielded herself before the abduction is untenable when it was shown that the wife had not thus yielded herself to any other man than the defendant. State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923); State v. Temple, 240 N.C. 738, 83 S.E.2d 792 (1954).

Burden of Proof of First Proviso. — The State has the burden of proving the facts required under the first proviso of the section. State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906).

The law requires proof of the fact that at the time of the commission of the offense the wife was an innocent and virtuous woman, before a conviction can be had under this section. State v. Temple, 240 N.C. 738, 83 S.E.2d 792 (1954).

Evidence. — Evidence tending to show that the defendant knew of the whereabouts of the wife of another after she had left her husband, a room thereof is competent upon the question ill fame, and that they had shut themselves in a room thereof is competent upon the question of the abduction and of their immoral relations and a circumstance to be submitted to the jury. State v. Ashe, 196 N.C. 387, 145 S.E. 784 (1928).

Same — Adultery. — In a prosecution under this section the necessary element of adultery may be shown by circumstantial evidence which satisfies the jury of the defendant's guilty beyond a reasonable doubt. State v. Ashe, 196 N.C. 387, 145 S.E. 784 (1928).

Same — Influence of Defendant. — Upon the question of influence of the defendant over the wife of another whom he is being tried for abducting and eloping with, it is competent to show the strength of the influence he had acquired, and the admission of testimony that the defendant had deserted his wife and dependent children, and also that the abducted woman had used her own money for expenses, is not subject to just exception. State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923).

Same — Virtuousness of Wife. — In an indictment under this section, where the character of the woman is by express terms of the statute directly in question, evidence as to her general character for virtue is admissible. State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906).

Evidence that a married woman had retained her innocence and virtue through some 20 years of married life and through more than 15 months of professions of love for her by defendant, and that she did not have intercourse with defendant until some six days prior to the actual elopement, and after he had asked her to marry him, is sufficient upon the question of her innocence and virtue, since the requirement of the statute is fulfilled if her innocence and virtue existed at the beginning of the acts of the defendant which in sequence led to the elopement. State v. Temple. 240 N.C. 738, 83 S.E.2d 792 (1954).

Testimony of Husband as to Chastity. — On a criminal trial for abducting and eloping with a married woman, it is competent for her husband to testify as to the chastity of his wife up to the time the defendant had invaded his home; such testimony may be sufficient to sustain a conviction. State v. O'Higgins, 178 N.C. 708, 100 S.E. 438 (1919); State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923).

Testimony of Wife Supported by Others. — The provision of this section that no conviction of abduction or eloping with the wife of another may be had on the unsupported testimony of the wife as to her virtue, is complied with when the testimony of the wife is supported by evidence of others as to her previous good character. State v. Hopper, 186 N.C. 405, 119 S.E. 769 (1923).

Instructions. — Where the evidence is that the defendant and the married woman met in a bad house, it is not prejudicial or reversible error for the judge in the statement of facts in his instructions to call it a "bad" house or "house of ill fame," where this was not brought to his attention at the time. State v. Ashe, 196 N.C. 387, 145 S.E. 784 (1928).

In a prosecution under this section, an instruction that the married woman must have been innocent and virtuous at the time of the elopement "or at some time prior to the elopement," must be held for prejudicial error. State v. Temple, 240 N.C. 738, 83 S.E.2d 792 (1954).

§ 14-43.1. Unlawful arrest by officers from other states.

A law-enforcement officer of a state other than North Carolina who, knowing that he is in the State of North Carolina and purporting to act by authority of his office, arrests a person in the State of North Carolina, other than as is permitted by G.S. 15A-403, is guilty of a misdemeanor punishable by a fine of not more than five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1973, c. 1286, s. 10.)

Article 11.

Abortion and Kindred Offenses.

§ 14-44. Using drugs or instruments to destroy unborn child.

If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, he shall be punished as a Class H felon. (1881, c. 351, s. 1; Code, s. 975; Rev., s. 3618; C. S., s. 4226; 1967, c. 367, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to instances when abortion not unlawful, see § 14-45.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall be imprisoned in the State's prison for not less than one year nor more than ten years, and be fined at the discretion of the court." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For article on "federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes," see 46 N.C.L. Rev. 730 (1968).

CASE NOTES

Constitutional Power of State. — See Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 34 L. Ed. 2d 682 (1973), for reconsideration in light of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, rehearing denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, rehearing denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973).

This section and § 14-45 create separate and distinct offenses, the first statute being designed to protect the life of a child in ventre sa mere, and the second being primarily for the protection of the woman. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947); State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Section relates to destruction of child. State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

The words "either pregnant or quick with child" contained in this section mean "pregnant with child that is quick," since otherwise the words "or quick with child" would be merely confusing surplusage, and since the sine qua non of the offense is the intent to destroy the child in ventre sa mere, which must be quick before it has independent life. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947); State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949). But see, State v. Slagle, 83 N.C. 630 (1880).

Thus, evidence that defendant, with intent to produce a miscarriage, gave a certain drug to a woman within 30 days after she had conceived, is insufficient to be submitted to the jury in a prosecution under this section since in such instance the child could not be quick. State v. Jordon, 227 N.C. 579, 42 S.E.2d 674 (1947).

Elements of Offense — Intent. — The essential ingredient of the offense is the intent and not the noxious nature of the drug used. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901); State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

It is no defense even if defendant could show that the drug would not in fact cause a miscarriage. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901). For the offense is committed by administering any substance with intent to procure an abortion. State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

Same — Abortion or Procuring Abortion. — It is just as much a crime to produce an abortion under the advice of and with means furnished by another, as it is to have an abortion performed by another. The gravamen of the offense is the abortion, or the procuring of the abortion, and not the manner by which it is accomplished. Parker v. Edwards, 222 N.C. 75, 21 S.E.2d 876 (1942).

Same — Procurement or Use of Drug Not Essential. — For a conviction under this section it is no essential to show that defendant procured the drug or that the woman used it. If defendant prescribed or advised its use with the illegal intent, that alone is sufficient. State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921).

Under this section it is not necessary to charge or prove that the accused procured the drug. State v. Crews, 128 N.C. 581, 38 S.E. 293 (1901).

Woman Not an Accomplice. — The woman is not, in a legal sense, an accomplice, whether or not she consents to the abortion. State v. Shaft, 166 N.C. 407, 81 S.E. 932 (1914).

Admissibility of Evidence — Belief of Woman as to Her Pregnancy Relevant. — In a prosecution for abortion, belief of victim on the day of alleged operation that she was pregnant is a relevant circumstance, properly proved by her own testimony. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Same — Statement of Woman as to Payment of Doctor's Fee Admissible. — The testimony as to the statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of this section and § 14-45, that the defendant had paid the physician one half of the $200.00 fee he had charged for such services, uttered in the defendant's presence, is held competent with the other evidence in this case; and whether the defendant, under the circumstances was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence, whether they were understood by him, whether he denied them or remained silent. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

Same — Admission of evidence that woman took an anesthetic was not prejudicial. State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937).

Same — Evidence of Disease Facilitating Abortion Properly Excluded. — Evidence offered by the defendant tending to show that the deceased was suffering from a disease which facilitated the abortion was not relevant to the issue involving the defendant's guilt as charged in the indictment. There was no error in the exclusion of such evidence. State v. Evans, 211 N.C. 458, 190 S.E. 724 (1937).

Same — Statement Made Four Months Prior to Abortion Inadmissible. — Upon the trial of a physician for procuring an abortion,

testimony of the conversation between the physician and the woman as to an abortion about four months prior to the time in controversy is irrelevant and incompetent and its admission in evidence is prejudicial to the defendant and constitutes reversible error. State v. Brown, 202 N.C. 221, 162 S.E. 216 (1932).

Same — Prejudicial Evidence. — In a prosecution for abortion, testimony of the woman that she went to defendant by reason of newspaper articles stating that defendant had performed abortions was held incompetent as hearsay and extremely prejudicial to defendant, entitling her to a new trial. State v. Gavin, 232 N.C. 323, 59 S.E.2d 823 (1950).

Sufficiency of Evidence. — Indictment and evidence that the defendant advised the prosecutrix, who was then "pregnant or quick with child," to take a certain drug, medicine or substance with intent to destroy the child is sufficient for a conviction under this section. State v. Powell, 181 N.C. 515, 106 S.E. 133 (1921).

Testimony of the relation between the defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is held sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921).

Joinder of Offenses. — Where the defendant is tried under this section and § 14-45, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. State v. Martin, 182 N.C. 846, 109 S.E. 74 (1921); State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

Upon the trial on an indictment charging the performance of an operation on a woman (1) quick with child, with intent to destroy the child, and (2) with intent to procure a miscarriage, there was a verdict of guilty, and upon the jury being polled, each juror stated that the verdict related to the first count, which verdict was entered, and upon retirement and further consideration of the second count, as instructed, the verdict on that count was not guilty, the defendant is not prejudiced thereby. State v. Dilliard, 223 N.C. 446, 27 S.E.2d 85 (1943).

Variance. — On the trial of an indictment charging the performance of an operation upon a woman "quick with child," with intent thereby to destroy the child, where the proof tends to show the performance of an operation upon a pregnant woman, with no evidence that she was "quick with child," there is a fatal variance and defendant's motion for nonsuit should be allowed. State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

Where warrant charged that defendant feloniously advised a woman pregnant with child to take certain medicines with intent to destroy such child, and the evidence tended to show that this was prior to the time the child was quick, nonsuit for fatal variance should have been allowed. State v. Green, 230 N.C. 381, 53 S.E.2d 285 (1949).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

Cited in State v. Geurukus, 195 N.C. 642, 143 S.E. 208 (1928); Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975).

§ 14-45. Using drugs or instruments to produce miscarriage or injure pregnant woman.

If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be punished as a Class I felon. (1881, c. 351, s. 2; Code, s. 976; Rev., s. 3619; C. S., s. 4227; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to instances when abortion not unlawful, see § 14-45.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony and shall be imprisoned in the jail or State's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

In General. — This section relates to miscarriage of, or to injury to, or destruction of the woman. State v. Forte, 222 N.C. 537, 23 S.E.2d 842 (1943).

Constitutional Power of State. — See Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 34 L. Ed. 2d 682 (1973), for reconsideration in light of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, rehearing denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, rehearing denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973).

The purpose of this section is the protection of "any pregnant woman." State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

This section is designed primarily for the protection of the woman. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

This section and § 14-45 create separate offenses. See note to § 14-44.

Properties of Drug Irrelevant If Intent Shown. — This section proscribes the administering of any drug with the intent to produce a miscarriage. It is the intent which is made requisite within the statute, and not the properties of the administered drug, which makes the violation of this statute a felony. State v. Lenderman, 20 N.C. App. 687, 202 S.E.2d 787, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

An actual miscarriage is not a necessary element to prove violation of this section. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960); State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

But proof of pregnancy is essential. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960); State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

This section does not require that the woman be quick with child and for that reason provides for a lesser punishment than § 14-44. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281 (1960).

A woman may be pregnant within the meaning of this section though the foetus has not quickened. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

But see § 14-45.1 permitting abortion during first 20 weeks of pregnancy.

When Death Results from Abortion, It Is Culpable Homicide. — When death results from an abortion or attempted abortion of a pregnant woman, when not necessary to save the life of the woman or that of the unborn child or to protect the health of the woman, it is a culpable homicide, even though done at the woman's request. State v. Mitchner, 256 N.C. 620, 124 S.E.2d 831 (1962).

Evidence of Previous Abortions. — Where defendant's defense to a charge of criminal abortion is that the operation was necessary to save the life of the mother, evidence that defendant had committed previous abortions is competent to show animus; but where defendant denies he performed the operation charged, evidence of previous abortions committed by him is incompetent. State v. Choate, 228 N.C. 491, 46 S.E.2d 476 (1948).

Expert Medical Testimony. — In a prosecution for abortion, testimony of a medical expert that a certain described treatment of a pregnant woman might cause an abortion is competent. State v. Brooks, 267 N.C. 427, 148 S.E.2d 263 (1966).

It was not error for the trial court to exclude testimony to the effect that pills, taken as directed, would not cause an abortion and would have no effect upon the prosecuting witness, where there was no evidence in the record that defendant was aware the drug was ineffective as a means to induce a miscarriage, and that defendant thereby lacked the intent required in this section. State v. Lenderman, 20 N.C. App. 687, 202 S.E.2d 787, cert. denied, 285 N.C. 375, 205 S.E.2d 100 (1974).

Evidence Sufficient. — In a prosecution for aiding and abetting in an abortion, it was held that the evidence was sufficient to take the case to the jury. State v. Manning, 225 N.C. 41, 33 S.E.2d 239 (1945); State v. Choate, 228 N.C. 491, 46 S.E.2d 476 (1948).

Applied in State v. Lee, 248 N.C. 327, 103 S.E.2d 295 (1958); State v. Phillip, 261 N.C. 263, 134 S.E.2d 386 (1964).

Cited in State v. Gavin, 232 N.C. 323, 59 S.E.2d 823 (1950); State v. Furley, 245 N.C. 219, 95 S.E.2d 448 (1956); Hallmark Clinic v. North Carolina Dep't of Human Resources, 519 F.2d 1315 (4th Cir. 1975).

§ 14-45.1. When abortion not unlawful.

(a) Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful, during the first 20 weeks of a woman's pregnancy, to advise, procure, or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital or

clinic certified by the Department of Human Resources to be a suitable facility for the performance of abortions.

(b) Notwithstanding any of the provisions of G.S. 14-44 and 14-45, it shall not be unlawful, after the twentieth week of a woman's pregnancy, to advise, procure or cause a miscarriage or abortion when the procedure is performed by a physician licensed to practice medicine in North Carolina in a hospital licensed by the Department of Human Resources, if there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman.

(c) The Department of Human Resources shall prescribe and collect on an annual basis, from hospitals or clinics where abortions are performed, such representative samplings of statistical summary reports concerning the medical and demographic characteristics of the abortions provided for in this section as it shall deem to be in the public interest. Hospitals or clinics where abortions are performed shall be responsible for providing these statistical summary reports to the Department of Human Resources. The reports shall be for statistical purposes only and the confidentiality of the patient relationship shall be protected.

(d) The requirements of G.S. 130-43 are not applicable to abortions performed pursuant to this section.

(e) Nothing in this section shall require a physician licensed to practice medicine in North Carolina or any nurse who shall state an objection to abortion on moral, ethical, or religious grounds, to perform or participate in medical procedures which result in an abortion. The refusal of such physician to perform or participate in these medical procedures shall not be a basis for damages for such refusal, or for any disciplinary or any other recriminatory action against such physician.

(f) Nothing in this section shall require a hospital or other health care institution to perform an abortion or to provide abortion services. (1967, c. 367, s. 2; 1971, c. 383, ss. 1, 1½; 1973, c. 139; c. 476, s. 128; c. 711.)

Editor's Note. — Session Laws 1967, c. 367, s. 2, designated the above section as § 14-46. Since there was already a § 14-46 in the General Statutes, the section added by the 1967 act has been designated § 14-45.1 herein.

Pursuant to Session Laws 1973, c. 476, ss. 128 and 152, "Department of Human Resources" has been substituted for "North Carolina Medical Care Commission" in subsections (a) and (b) and for "State Board of Health" in subsection (c) of the section as rewritten by Session Laws 1973, c. 711.

Legal Periodicals. — For comment on this section, see 46 N.C.L. Rev. 585 (1968).

For comment on a constitutional right to abortion, see 49 N.C.L. Rev. 487 (1971).

For note on equal protection and residence requirements, see 49 N.C.L. Rev. 753 (1971).

CASE NOTES

Burden of Proof. — The legislature did not intend to reverse the presumption of innocence, and the burden of proof in a prosecution is on the State to show that an abortion did not come within the exemptions of this section. Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), judgment vacated, 410 U.S. 950, 93 S. Ct. 1411, 34 L. Ed. 2d 682 (1973), for reconsideration in light of Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, rehearing denied, 410 U.S. 959, 93 S. Ct. 1409, 35 L. Ed. 2d 694 (1973) and Doe v. Bolton, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, rehearing denied, 410 U.S. 959, 93 S. Ct. 1410, 35 L. Ed. 2d 694 (1973).

Stated in Tatham v. Hoke, 469 F. Supp. 914 (W.D.N.C. 1979).

OPINIONS OF ATTORNEY GENERAL

Abortion Cannot Be Performed After Twenty Weeks for Sole Reason that Fetus Is Abnormal. — Even if a woman at 22 weeks of gestation is found to have a genetically abnormal fetus which will be severely mentally retarded and/or will not survive beyond the first year of life; an abortion cannot be performed in North Carolina for these reasons alone upon request of the woman. — See opinion of Attorney General to Mr. Lewis H. Nelson, M.D., Assistant Professor, Bowman Gray School of Medicine, 48 N.C.A.G. 2 (1979).

§ 14-46. Concealing birth of child.

If any person shall, by secretly burying or otherwise disposing of the dead body of a newborn child, endeavor to conceal the birth of such child, such person shall be punished as a Class H felon. Any person aiding, counseling or abetting any other person in concealing the birth of a child in violation of this statute shall be guilty of a misdemeanor. (21 Jac. I, c. 27; 43 Geo. III, c. 58, s. 3; 9 Geo. IV, c. 31, s. 14; 1818, c. 985, P. R.; R. C., c. 34, s. 28; 1883, c. 390; Code, s. 1004; Rev., s. 3623; C. S., s. 4228; 1977, c. 577; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and punished by fine or imprisonment, or both, in the discretion of the court" at the end of the first sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

History. — Under the section as it stood after the amendment of 1818, the offense was the concealing of the death of a being on whom murder could have been committed. If, therefore, the child was stillborn, concealment would be no offense. The burden of showing that fact would, however, be on the defendant. State v. Joiner, 11 N.C. 350 (1826).

A former conviction for concealing the birth of a child is no defense to an indictment for the murder of such child. State v. Morgan, 95 N.C. 641 (1886).

Evidence Insufficient for Directed Verdict. — Under the provisions of this section making it a felony for any person to conceal the birth of a newborn child by secretly burying or otherwise disposing of its dead body, it is reversible error for the trial judge to direct a verdict of guilty upon evidence tending to show that the defendant found the dead body of the infant in a state of decomposition and therefore buried it, and had informed the authorities thereof and directed them where he had buried it, it being required of the State to rebut the common-law presumption of innocence by establishing the defendant's guilt beyond a reasonable doubt. State v. Arrowood, 187 N.C. 715, 122 S.E. 759 (1924).

ARTICLE 12.

Libel and Slander.

§ 14-47. Communicating libelous matter to newspapers.

If any person shall state, deliver or transmit by any means whatever, to the manager, editor, publisher or reporter of any newspaper or periodical for publication therein any false and libelous statement concerning any person or corporation, and thereby secure the publication of the same, he shall be guilty

of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1901, c. 557, ss. 2, 3; Rev., s. 3635; C. S., s. 4229; 1969, c. 1224, s. 1.)

Cross References. — As to the truth of allegations in indictment for libel as a defense, see § 15-168. As to libel by a newspaper, see §§ 99-1 and 99-2. As to derogatory reports about banks, see §§ 53-128 and 53-129. As to derogatory statements about building and loan associations, see § 54-44.

Legal Periodicals. — For comment on responsibility of newspapermen, see 4 N.C.L. Rev. 27.

CASE NOTES

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942); Gillikin v. Bell, 254 N.C. 244, 118 S.E.2d 609 (1961).

§ 14-48: Repealed by Session Laws 1975, c. 402.

Article 13.

Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material.

§ 14-49. Malicious use of explosive or incendiary; attempt; punishment.

(a) Any person who willfully and maliciously injures or attempts to injure another by the use of any explosive or incendiary device or material is guilty of a felony.

(b) Any person who willfully and maliciously damages or attempts to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a felony.

(c) Any person who violates any provision of this section shall be punished as a Class E felon. (1923, c. 80, s. 1; C. S., s. 4231 (a); 1951, c. 1126, s. 1; 1969, c. 869, s. 6; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class E felon" for "is punishable by an imprisonment in the State's prison for not less than five nor more than thirty years" in subsection (c). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

The offense created by this section is malicious injury or damage to property, real or personal, by the use of high explosives. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973), aff'd, 22 N.C. App. 53, 205 S.E.2d 358 (1974).

The word "malicious" as used in this section connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973), aff'd, 22 N.C. App. 53, 205 S.E.2d 358 (1974).

"Malicious" means more than intending wrong, it connotes actual ill will or resentment toward the owner or possessor of the property and is an element of preconceived revenge. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973), aff'd, 22 N.C. App. 53, 205 S.E.2d 358 (1974).

Count Charging Violation of This Section as Embracing a Charge under § 14-127. — See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

"Feloniously" Not Substitute for "Maliciously" in Indictment Under this Section. — Use of the word "feloniously" in an indictment based on subsection (b) charging defendants with damaging real and personal property of another by use of an explosive was not a sufficient substitute for the word "maliciously" as used in the statute, since the word "feloniously" implies that the act charged to have been done proceeded from an evil heart and wicked purpose but does not allege the necessary element of actual ill will, hatred or animosity of the accused toward the person whose property was injured. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973), aff'd 22 N.C. App. 53, 205 S.E.2d 358 (1974).

Without the element of malicious damage to property being alleged in the indictment, regardless of the method with which the damage was caused, the defendants were not apprised of the crime charged and the bill of indictment was defective. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973), aff'd, 22 N.C. App. 53, 205 S.E.2d 358 (1974).

Indictment Should Contain Identifying Description of Property. — Since no distinction whatever is made between real and personal property in this section an indictment under this section should contain an identifying description of the property which the defendant damaged or attempted to damage by the use of the explosive. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

Where the Jury Can Consider Lesser Offense. — On an indictment under § 14-49.1, if proof of occupancy fails, the jury can consider the lesser included offense of malicious injury to unoccupied property under this section. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his co-conspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

Verdict in Consolidated Trial of Separate Indictments. — See same catchline in note under § 14-49.1.

Applied in State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975).

Cited in State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126 (1976).

§ 14-49.1. Malicious damage of occupied property by use of explosive or incendiary; attempt; punishment.

Any person who willfully and maliciously damages or attempts to damage any real or personal property of any kind or nature, being at the time occupied by another, by the use of any explosive or incendiary device or material is guilty of a felony punishable as a Class C felony. (1967, c. 342; 1969, c. 869, s. 6; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class C felony" for "by imprisonment in the

State's prison for not less than ten years nor more than imprisonment for life." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

The offense created by this section is malicious injury or damage to property, real or personal, by the use of high explosives. State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974).

The word "malicious," as used in this section, connotes a feeling of animosity, hatred or ill will toward to owner, the possessor or the occupant. State v. Little, 286 N.C. 185, 209 S.E.2d 749 (1974).

Description in the indictment of the property damaged as a "1974 Ford Torino owned by the North Carolina State Bureau of Investigation, being at the time occupied by another, Albert Stout, Jr.," was sufficient to inform defendant with certainty as to the crime that he had allegedly committed. State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975), cert. denied, 423 U.S. 1091, 96 S. Ct. 886, 47 L. Ed. 2d 102 (1976).

Indictment Should Include Description of Any Other Property Injured. — An indictment drawn under this section should include not only the description of the occupied property and the name of the occupant but any other property injured or attempted to be injured by the explosion so that if proof of occupancy fails, the jury could consider whether the defendant is guilty under § 14-49 of the lesser included offense of malicious injury to unoccupied property. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Where the Jury Can Consider Lesser Offense. — On an indictment under this section, if proof of occupancy fails, the jury can consider the lesser included offense of malicious injury to unoccupied property under § 14-49. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his co-conspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant's motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

Verdict in Consolidated Trial of Separate Indictments. — In consolidated trial of separate indictments charging the same defendant with malicious damage to an occupied dwelling and malicious damage to an automobile, where the evidence discloses but one explosion and the jury returns a verdict finding defendant guilty of malicious damage to the occupied dwelling, a further jury verdict finding defendant guilty of malicious damage to the automobile should be treated as surplusage, since the verdict of dynamiting the occupied dwelling contains the maximum charge under § 14-49 as amended by this section. State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969).

Applied in State v. Conrad, 4 N.C. App. 50, 165 S.E.2d 771 (1969).

Cited in State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126 (1976).

§ 14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment.

(a) Any person who conspires with another willfully and maliciously to injure another by the use of any explosive or incendiary device or material is guilty of a felony.

(b) Any person who conspires with another willfully and maliciously to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material is guilty of a felony.

(c) Any person who violates any provision of this section shall be punished as a Class G felon. (1923, c. 80, s. 2; C. S., s. 4231 (b); 1951, c. 1126, s. 1; 1969, c. 869, s. 6; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class G felon" for "is punishable by imprisonment in the State's prison for not more than fifteen years" in subsection (c). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

CASE NOTES

A conspiracy is an "agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

Criminal responsibility for a conspiracy requires more than a merely passive attitude toward and existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with the other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime. State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

A criminal conspiracy is continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. State v. Hicks, 233 N.C. 511, 64 S.E.2d 871, cert. denied, Hicks v. North Carolina, 342 U.S. 831, 72 S. Ct. 56, 96 L. Ed. 629 (1951).

Burning of bushes and fences involves the use of an incendiary device thus making the conspiracy a felony. State v. Bindyke, 25 N.C. App. 273, 212 S.E.2d 666, rev'd on other grounds, 288 N.C. 608, 220 S.E.2d 521 (1975).

This section does not require that the owner of the property be named in the indictment but only that it be property belonging to one other than defendant. State v. Hanford, 16 N.C. App. 353, 191 S.E.2d 910, cert. denied, 282 N.C. 428, 192 S.E.2d 841 (1972).

Direct proof of the charge of conspiracy it not essential, for such is rarely obtainable. It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy. State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 229 S.E.2d 691 (1976).

For one to be convicted of the crime of conspiracy, the State need not prove that the parties agreed in express terms to unite for the common illegal purpose. A mutual, implied understanding is sufficient to constitute the offense. State v. Grier, 30 N.C. App. 281, 227 S.E.2d 126, cert. denied, 291 N.C. 177, 299 S.E.2d 691 (1976).

Nonsuit Where Conspiracy Formed Out of State. — See note § 15-173.

Sufficiency of Evidence. — In a prosecution for willful and malicious injury to person and property by means of dynamite, and conspiracy to injure a person by means of dynamite, where defendant knew the victim was an undercover narcotics agent, an informer saw defendant and his co-conspirators in possession of dynamite while they were beside the victim's car with its hood raised, defendant stated in coming away from the car that "it would happen in the morning," and the victim was injured the next morning by an explosion when he attempted to start his car, the evidence for the State was sufficient to withstand defendant motion for nonsuit. State v. Sellers, 289 N.C. 268, 221 S.E.2d 264 (1976).

§ 14-50.1. Explosive or incendiary device or material defined.

As used in this Article, "explosive or incendiary device or material" means nitroglycerine, dynamite, gunpowder, other high explosive, incendiary bomb or grenade, other destructive incendiary device, or any other destructive incendiary or explosive device, compound, or formulation; any instrument or substance capable of being used for destructive explosive or incendiary purposes against persons or property, when the circumstances indicate some probability that such instrument or substance will be so used; or any explosive or incendiary part or ingredient in any instrument or substance included above, when the circumstances indicate some probability that such part or ingredient will be so used. (1969, c. 869, s. 6.)

CASE NOTES

Applied in State v. Bindyke, 25 N.C. App. 273, 212 S.E.2d 666 (1975).

SUBCHAPTER IV. OFFENSES AGAINST THE HABITATION AND OTHER BUILDINGS.

ARTICLE 14.

Burglary and Other Housebreakings.

§ 14-51. First and second degree burglary.

There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree. If such crime be committed in a dwelling house or sleeping apartment not actually occupied by anyone at the time of the commission of the crime, or if it be committed in any house within the curtilage of a dwelling house or in any building not a dwelling house, but in which is a room used as a sleeping apartment and not actually occupied as such at the time of the commission of the crime, it shall be burglary in the second degree. For the purposes of defining the crime of burglary, larceny shall be deemed a felony without regard to the value of the property in question. (1889, c. 434, s. 1; Rev., s. 3331; C. S., s. 4232; 1969, c. 543, s. 1.)

Cross References. — As to accessories, see §§ 14-5 through 14-7. As to breaking into or entering jails with intent to kill or injure prisoners therein, see § 14-221.

Legal Periodicals. — For note on burglary in North Carolina, see 35 N.C.L. Rev. 98 (1956).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Elements of Offense.
A. In General.
B. First Degree.
C. Second Degree.
III. Indictment.
IV. Instructions.
V. Verdict.

I. GENERAL CONSIDERATION.

The purpose of this section is to protect the habitations of men, where they repose and sleep, from meditated harm. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

The purpose of the law in the offense of first-degree burglary was and is to protect the habitation of men, where they repose and sleep, from meditated harm. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Lesser Offense Set Forth in § 14-54. — The statutory offense set forth in § 14-54 is a less degree of the offense of burglary in the first degree as defined in this section. State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968).

A felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of § 14-54, is a less degree of the felony of burglary in the first degree. State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

A violation of § 14-54 is a less degree of the felongy of burglary in the first degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

The statutory offense of felonious breaking or entering is a lesser included offense of burglary in the first and second degrees. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Applied in State v. Robertson, 210 N.C. 266, 186 S.E. 247 (1936); State v. Walls, 211 N.C. 487, 191 S.E. 232 (1937); State v. Virgil, 263 N.C. 73, 138 S.E.2d 777 (1964); State v. Elam, 263 N.C. 273, 139 S.E.2d 601 (1965); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Hamilton, 298 N.C. 238, 258 S.E.2d 350 (1979); State v. Evans, 298 N.C. 263, 258 S.E.2d 354 (1979); State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Quoted in Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785 (1970).

Stated in State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973).

Cited in State v. Lawrence, 199 N.C. 481, 154 S.E. 741 (1930); State v. Hamlet, 206 N.C. 568, 174 S.E. 451 (1934); State v. Brown, 206 N.C. 747, 175 S.E. 116 (1934); State v. Stevenson, 212 N.C. 648, 194 S.E. 81 (1937); State v. Mathis, 230 N.C. 508, 53 S.E.2d 666 (1949); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976); State v. Perry, 291 N.C. 586, 231 S.E.2d 262 (1977).

II. ELEMENTS OF OFFENSE.

A. In General.

The crime of burglary at common law was composed of five distinct elements, which were: (1) the breaking; (2) the entering; (3) that the breaking and entry be into a mansion house; (4) that the breaking and entering were in the nighttime, and (5) that the breaking and entering were with the intent to commit a felony. State v. Whit, 49 N.C. 349 (1857).

Burglary, as defined at common law, was a capital offense, i.e., the breaking into and entering of the "mansion or dwelling house of another in the nighttime, with an intent to commit a felony therein," whether the intent was executed after the burglarious act or not.

This has been changed by this section dividing the crime into two degrees, first and second, with certain designated differences between them, with different punishment prescribed for each. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923); State v. Morris, 215 N.C. 552, 2 S.E.2d 554 (1939). Burglary is a common-law offense, the elements of which are the breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein and whether the building is occupied at the time affects only the degree. State v. Mumford, 227 N.C. 132, 41 S.E.2d 201 (1947).

Burglary is a common-law offense. To warrant a conviction thereof it must be made to appear that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. That the building was or was not occupied at the time affects the degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Burglary, whether in the first degree or in the second degree, is the breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

To warrant a conviction for burglary the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to

commit a felony therein. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976); State v. Garrison, 294 N.C. 270, 240 S.E.2d 377 (1978); State v. Jones, 294 N.C. 642, 243 S.E.2d 118 (1978).

Burglary is a common-law offense. It consists of the felonious breaking and entering of the dwelling house or sleeping apartment of another in the nighttime with the intent to commit a felony therein, whether such intent be executed or not. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

Breaking and Entering. — A "breaking" is an essential element of the offense of first-degree burglary. There is a sufficient "breaking" to sustain a charge of first-degree burglary when a person unlocks a door with a key, or opens a closed, but not fastened window. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U. S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

A "breaking" is an essential element of the crime of first-degree burglary. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

If any force at all is employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open or closed, there is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

The moving and raising of the window would be a breaking within the meaning of the law. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

The mere pushing or pulling open of an unlocked door constitutes a breaking. State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

A breaking in the law of burglary constitutes any act of force, however slight, employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

To justify submission of felonious breaking or entering as a permissible verdict in a prosecution for burglary there must be evidence tending to show that defendant could have gained entry to victim's motel room by means other than a burglarious breaking, i.e., a forcible entry. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

A breaking may be actual or constructive. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads: (1) when entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened, (2) when in consequence of violence commenced, or threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters, (3) when entrance is obtained by procuring the servants or some inmate to remove the fastening, (4) when some process of law is fraudulently resorted to for the purpose of obtaining an entrance, (5) when some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters; as, if one knocks at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being open, enters. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

A constructive breaking occurs where entrance is obtained in consequence of violence commenced or threatened by defendant. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Proof that a breaking occurred, or from which it may reasonably be inferred that the defendant broke into the dwelling, is usually accomplished by testimony showing that prior to the entry all doors and windows were closed. State v. Alexander, 18 N.C. App. 460, 197 S.E.2d 272, cert. denied, 283 N.C. 666, 200 S.E.2d 655 (1973).

In order to show a breaking it is not required that the State offer evidence of damage to a door or window. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U.S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976).

In a prosecution for first-degree burglary and second-degree rape, defendant's entry was accomplished by a "breaking" notwithstanding the fact that the prosecuting witness "cracked" her door to see who was there. State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

Where the evidence showed that defendant gained entry into victim's motel room by pushing victim into the room as he opened the door, this clearly constituted a constructive breaking. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

There was sufficient evidence of a "breaking" to support the trial court's charge on burglary where the state's evidence tended to show that defendant and a male accomplice gained access to deceased's dwelling by pushing a female accomplice out of the way as she left the dwelling "busting" the door open, and rushing into the dwelling. State v. Easterling, 300 N.C. 594, 268 S.E.2d 800 (1980).

Inferring of Breaking and Entering from Possession of Stolen Articles. — Upon proof of larceny following a breaking and entering, the defendant's possession of the stolen articles under such circumstances will also support an inference that he committed the breaking and entering. State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976).

The sleeping apartment referred to in the section is one in which a person regularly

sleeps. State v. Foster, 129 N.C. 704, 40 S.E. 209 (1901).

Curtilage. — The meaning of the term curtilage is a piece of ground, either inclosed or not, that is commonly used with the dwelling house. State v. Twitty, 2 N.C. 102 (1794).

Burglary in a Store with Sleeping Quarters. — The offense of burglary may be committed by breaking into a store if there are sleeping quarters in the store, for the sleeping there makes it a dwelling. State v. Foster, 129 N.C. 704, 40 S.E. 209 (1901).

The trial court's statement to the jury that the motel room in question was a sleeping apartment was an impermissible expression of opinion, or an assumption that a material fact had been proved within the meaning of § 15A-1232. However, since there could be no serious contention that a motel room, regularly and usually occupied by travelers for the purpose of sleeping, was not in fact a "sleeping apartment" within the meaning of this section and its predecessors, nor did defendants contest the "sleeping apartment" issue at trial, other than by their general pleas of not guilty, there was no reasonable possibility that this error contributed to defendant's conviction or that a different result would have obtained had the language complained of been omitted, therefore, the error was harmless. State v. Nelson, 298 N.C. 573, 260 S.E.2d 629 (1979).

Burglary could not be committed in a tent or booth erected in a market or fair, although the owner lodged in it. State v. Jake, 60 N.C. 471 (1964).

The occupant of the building at the time of the burglary was the owner, and it was unnecessary to allege ownership of the title to the building. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

There is no requirement that actual ownership of the occupied premises be alleged and proved. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

There is no requirement that there be an individual asleep in the house which is broken into in order for burglary to be committed. Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975), cert. denied, 424 U.S. 950, 96 S. Ct. 1421, 47 L. Ed. 2d 355 (1976).

Nighttime. — The law considers it to be nighttime when it is so dark that a man's face cannot be identified except by artificial light or moonlight. With respect to burglary, there is no statutory definition of nighttime in this State. State v. Frank, 284 N.C. 137, 200 S.E.2d 169 (1973); State v. Garrison, 294 N.C. 270, 240 S.E.2d 377 (1978).

Although the common law required an indictment for burglary to allege the hour the crime was committed, today it is sufficient to aver that the crime was committed in the nighttime. State v. Wood, 286 N.C. 248, 210 S.E.2d 52 (1974).

Since 1889, burglary has been divided into two degrees by § 14-51. If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. To constitute burglary in either degree, however, the common law required the felonious breaking and entering to occur in the nighttime, and this common law requirement is still the law in this State. State v. Jones, 294 N.C. 642, 243 S.E.2d 118 (1978).

Intent. — The fifth element of burglary — the intent to commit a felony — must exist at the time of the breaking and entering. Intent, being a state of mind, is difficult to prove and ordinarily is a question for the jury to decide. State v. Alexander, 18 N.C. App. 460, 197 S.E.2d 272, cert. denied, 283 N.C. 666, 200 S.E.2d 655 (1973).

Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

The fact that a felony was actually committed after the house was entered is not necessarily proof of the intent requisite for the crime of burglary, but is only evidence from which such intent at the time of the breaking and entering may be found. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

In the absence of evidence of other intent or explanation for breaking and entering, the usual object or purpose of burglarizing a dwelling house at night is theft. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

In a prosecution for first-degree burglary, where the State attempts to show intent to commit larceny, the fact that defendant did not disturb any of the valuables in the house does not aid him. State v. Hedrick, 289 N.C. 232, 221 S.E.2d 350 (1976).

The intelligent mind will take cognizance of the fact that people do not usually enter the dwellings of others, in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

Felonious intent is an essential element of burglary which the State must allege and prove, and the felonious intent proven must be the felonious intent alleged. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

A specific felonious intent is an essential element of burglary which must be alleged and proved and the state is held to proof of the intent alleged in the indictment, and it is error for the trial judge to permit a jury to convict upon some abstract theory not supported by the bill of indictment. State v. Joyner, 301 N.C. 18, 269 S.E.2d 125 (1980).

Jury Must Determine Whether Criminal Intent Existed. — Where the evidence is sufficient for submission to the jury upon the allegations contained in the indictment, it is for the jury to determine, under all the circumstances, whether the defendant had the ulterior criminal intent at the time of breaking and entering to commit the felony charged in the indictment. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

The indictment having identified the intent necessary, the State is held to the proof of that intent. Of course, intent or absence of it may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

First and Second Degree Burglary Distinguished. — If the burglary occurred — i.e., the breaking and entry occurred — while the dwelling house was actually occupied, that is, while some person other than the intruder was in the house, the crime is burglary in the first degree. If the house was then unoccupied, however momentarily, and whether known to the intruder or not, the offense is burglary in the second degree. Otherwise, the elements of the two offenses are identical. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

The bill of indictment returned by the grand jury charged all of the elements of burglary in the first degree. Consequently, it necessarily charged all of the elements of burglary in the second degree plus the additional allegation that the dwelling house in question was actually occupied at the time of the alleged breaking and entry by the defendant. This further element of actual occupancy at the time of the breaking and entering is the only distinction between the two degrees of burglary. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

If the burglarized dwelling is occupied, it is burglary in the first degree; if unoccupied, it is burglary in the second degree. State v. Frank, 284 N.C. 137, 200 S.E.2d 169 (1973); State v. Wood, 286 N.C. 248, 210 S.E.2d 52 (1974); State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976).

By this section the offense of burglary is divided into two degrees, first and second. The distinction between the two degrees depends upon the actual occupancy of the dwelling house or sleeping apartment at the time of the commission of the crime. State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

The sole distinction between the two degrees of burglary is the element of actual occupancy of the dwelling house or sleeping apartment at the time of the breaking and entering. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

B. First Degree.

Burglary in the first degree consists of the intent, which must be executed, of breaking and entering the presently occupied dwelling house or sleeping apartment of another, in the nighttime, with the further concurrent intent, which may be executed or not, then and there to commit therein some crime which is in law a felony. This particular, or ulterior, intent to commit therein some designated felony must be proved, in addition to the more general one, in order to make out the offense. State v. Thorpe, 274 N.C. 457, 164 S.E.2d 171 (1968); State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970); State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

The elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) with the intent to commit a felony (5) into a dwelling house or a room used as a sleeping apartment in any house or sleeping apartment (6) which is actually occupied at the time of the offense. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Burglary in the first degree is the breaking and entering during the nighttime of an occupied dwelling or sleeping apartment with intent to commit a felony therein. State v. Henderson, 285 N.C. 1, 203 S.E.2d 10 (1974), death sentence vacated, 428 U. S. 902, 96 S. Ct. 3202, 49 L. Ed. 2d 1205 (1976); State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

The crime of burglary in the first degree is complete when an occupied dwelling is broken and entered in the nighttime with the intent to commit larceny therein whether or not anything was actually stolen from the house. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

The constituent elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

First-degree burglary is defined as the unlawful breaking and entering of an occupied dwelling or sleeping apartment in the

nighttime with the intent to commit a felony therein. State v. Sweezy, 291 N.C. 366, 230 S.E.2d 524 (1976).

Value of Goods Stolen Immaterial. — A person who burglariously broke and entered a dwelling at nighttime while the same was occupied was guilty of burglary in the first degree, and the fact that the value of the goods stolen from the dwelling was less than $20.00 was no defense to the capital charge, since the provision of § 14-72, dividing larceny into two degrees, by its terms had no application to burglary. State v. Richardson, 216 N.C. 304, 4 S.E.2d 852 (1939).

C. Second Degree.

Burglary in the second degree consists of all the elements of burglary in the first degree save the element of actual occupancy. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

An essential element of second-degree burglary, as derived from the common law, is the intent of the perpetrator to commit a felony after accomplishing the breaking and entering of a dwelling house belonging to another in the nighttime. State v. Foust, 40 N.C. App. 71, 251 S.E.2d 893 (1979).

Occupancy of Dwelling Is No Defense to Charge of Second-Degree Burglary. — If the bill of indictment, by omitting any allegation as to occupancy of the building, charged second-degree burglary only and if the evidence is sufficient to show all of the elements thereof, proof of actual occupancy of the dwelling at the time of the breaking and entering is not a defense to the charge. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Where the solicitor's (now district attorney) announcement precluded a verdict of guilty of burglary in the first degree, it was, in effect, a stipulation by the State that the house was not actually occupied at the time of the breaking and entering. The defendant, not having objected thereto at the time of the announcement, could not await the outcome of the trial and then attack the validity of the verdict that he was guilty of second-degree burglary on the ground that the house was occupied and so he was guilty of the more serious crime. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

III. INDICTMENT.

Indictment Must Charge Intended Felony. — In order for an indictment to sustain a verdict of guilty of burglary in the first degree, it must not only charge the burglarious entry with the intent at the time, but must also charge the felony intended to be committed with sufficient definiteness, though it is not necessary that the actual commission of the intended felony be charged or proven. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923).

The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

In an indictment for burglary it is not enough to charge generally an intent to commit "a felony" in the dwelling house of another. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

The particular felony which it is alleged the accused intended to commit must be specified. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

But Not Fully and Specifically. — The indictment for burglary need not set out the felony which the defendant, at the time of the breaking and entering, intended to commit within the dwelling in as complete detail as would be required in an indictment for the actual commission of that felony. It must, however, state with certainty the felony which the State alleges he intended, at the time of his breaking and entering, to commit within the dwelling. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

In an indictment for burglary the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of that felony. State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976).

The felony intended, need not be set out as fully and specifically as would be required in an indictment for the actual commission of said felony where the State is relying only upon the charge of burglary. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976); State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to steal the goods and chattels of another then being in said dwelling house, or to commit therein the crime of larceny, rape or arson. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

It is ordinarily sufficient to state the intended offense generally, as by alleging an intent to commit therein the crime of larceny, rape or arson. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).

Actual Commission of Felony Not Required. — Actual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary. State v. Bell, 285 N.C. 746, 208 S.E.2d 506 (1974).

The actual commission of the intended felony is not essential to the crime of burglary. State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976);

State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

The crime of burglary is completed by the breaking and entering of the occupied dwelling of another, in the nighttime, with the requisite ulterior intent to commit the designated felony therein, even though, after entering the house, the accused abandons his intent through fear or because he is resisted. State v. Wilson, 293 N.C. 47, 235 S.E.2d 219 (1977).

It is not required that indictment for first-degree burglary describe property which defendant intended to steal, or that which he did steal. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976).

Burglary Indictment Insufficient. — An indictment alleging that defendant broke and entered, with intent to commit a felony within, to wit: "by sexually assaulting a female," did not charge the defendant with the crime of burglary and would not support the imposition of a sentence to life imprisonment for first-degree burglary. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

Indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. State v. Coffey, 289 N.C. 431, 222 S.E.2d 217 (1976); State v. Beaver, 291 N.C. 137, 229 S.E.2d 179 (1976).

IV. INSTRUCTIONS.

Where all the evidence is to the effect that the building was actually occupied at the time of the breaking and entry, the court is not authorized to instruct the jury that it may return a verdict of burglary in the second degree. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Charging Elements of First and Second Degree. — Where a burglarious breaking into a dwelling house had been charged in the bill of indictment, and the evidence tended only to establish the capital felony, an instruction to the jury that they might return a verdict of guilty in either degree was erroneous. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923).
12 S.E.2d 278 (1940).

Where there is evidence of a burglarious entry into a dwelling house sufficient to convict of the capital offense, and also of the lesser offense, it is reversible error for the trial judge to refuse or neglect to charge the different elements of law relating to each of the separate offenses, though a verdict of guilty of the lesser offense might have been rendered, and this error is not cured under a general verdict of guilty of the greater offense. State v. Allen, 186 N.C. 302, 119 S.E. 504 (1923).

Where all the evidence shows that dwelling was actually occupied, instruction that verdict of burglary in second degree is not permissible is without error. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

Where the evidence showed that the house was unoccupied for approximately half an hour, there was no error in instructing the jury that if it did not find from the evidence, beyond a reasonable doubt, that the house was occupied at the time of the breaking and entering, it should find the defendant not guilty of burglary in the first degree, but it should return a verdict of burglary in the second degree if it did so find each of the elements thereof. State v. Tippett, 270 N.C. 588, 155 S.E.2d 269 (1967).

Sufficient Evidence to Submit Question of First-Degree Burglary to Jury. — Evidence that the house was broken into by forcing the door open, that the time was late at night, and that the prosecuting witness and his wife were asleep in the room entered, together with evidence that tracks in the freshly fallen snow were followed and led to the defendant's room in another house in a distant part of the city, where defendant was apprehended, was held sufficient to be submitted to the jury on the question of defendant's guilty of burglary in the first degree. State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936).

Evidence was sufficient to overrule defendant's motion to nonsuit in a prosecution for burglary. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

Evidence was held sufficient to withstand motion for nonsuit. State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977).

Sufficient Evidence to Submit Question of Second-Degree Burglary. — Evidence that the defendants encountered the owner of a dwelling house immediately outside of the house at nighttime, and marched him into the house at the point of firearms and stole money which was hidden in the house, was sufficient to be submitted to the jury on the charge of second-degree burglary, the method of entry being a constructive "breaking." State v. Rodgers, 216 N.C. 572, 5 S.E.2d 831 (1939).

When the solicitor (now district attorney) announces that he will not seek a conviction upon the maximum degree of the crime charged in the bill of indictment, and the defendant interposes no objection to being tried upon the lesser degree of the offense, the sufficiency of the evidence to support a conviction of the lesser degree must be measured by the same standards which would be applied had the bill of indictment charged only the lesser degree of the offense. State v. Allen, 279 N.C. 115, 181 S.E.2d 453 (1971).

Submission of Question of Guilt of Nonburglarious Breaking. — The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony

charged in the bill of indictment. The evidence also tended to show that a window of the room in which felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there was no evidence of burglary in the second degree, the evidence tended to show burglary in the first degree, or a nonburglarious breaking and entering with to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant could be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constituted reversible error. State v. Chambers, 218 N.C. 442, 11 S.E.2d 280 (1941).

Failure to Define Larceny. — Where an indictment for second-degree burglary alleged that the defendant's intent was to commit larceny, but the trial judge failed to define the term "larceny" in its instructions, the omission was prejudicial and erroneous and required a new trial. State v. Foust, 40 N.C. App. 71, 251 S.E.2d 893 (1979).

V. VERDICT.

Discretionary Power of the Jury as to Degree. — The jury does not have the discretionary power to return a verdict of burglary in the second degree if all the evidence shows burglary in the first degree. But under an indictment for burglary in the first degree a verdict of second-degree burglary may be returned if the evidence shows such an offense. State v. Fleming, 107 N.C. 905, 12 S.E. 131 (1890).

Where, in the trial of an indictment for burglary, the evidence showed that the house in which the crime was committed was actually occupied at the time, a conviction of burglary in the second degree was not authorized. State v. Alston, 113 N.C. 666, 18 S.E. 692 (1893); State v. Johnston, 119 N.C. 883, 26 S.E. 163 (1896).

Where one charged with burglary in the first degree admitted the entering and taking, the only question remaining was whether it was done at nighttime, and the jury should not have been charged that they could convict of a lesser offense as provided by this section, for the offense was either burglary in the first degree or larceny. State v. McKnight, 111 N.C. 690, 16 S.E. 319 (1892).

The jury may convict of an attempt to commit burglary in the second degree where the prosecution is for burglary in the first degree. State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949).

Effect of Requesting Verdict of Second Degree Burglary on Indictment Charging Burglary in First Degree. — The defendant was charged with burglary in the first degree in the bill of indictment, and when the solicitor (now district attorney) stated that he would not ask for a verdict of first degree burglary, but would only ask for a verdict of second degree burglary on the indictment, it was tantamount to taking a nolle prosequi with leave on the capital charge. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Verdict of Guilty in First Degree upon Trial for Burglary in Second Degree Set Aside. — Where defendant was tried for burglary in the second degree on indictment charging burglary in the first degree, and the verdict, as rendered, showed defendant was convicted of burglary in the first degree, or was guilty "as charged in the bill of indictment," the fact that clerk certified "that defendant was guilty of second degree burglary as charged in the bill of indictment" which was merely the clerk's interpretation of verdict, rather than a precise certification of it, was not sufficient to deny motion to set aside verdict. State v. Jordan, 226 N.C. 155, 37 S.E.2d 111 (1946).

Double Jeopardy. — The offense of burglary is completed by the breaking and entering of the occupied dwelling of another, in the nighttime, with the intent to commit the designated felony therein. The crime has been committed even though, after entering the house, the accused abandons his intent to commit the designated felony. Consequently, the felonious intent required as an element of burglary cannot be equated with the commission of the underlying felony, and if a burglar after breaking and entering proceeds to commit the underlying felony inside the dwelling, he can be convicted of both crimes. State v. Brady, 299 N.C. 547, 264 S.E.2d 66 (1980).

Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy, since the four offenses were legally separate and distinct crimes, no one of which was a lesser included offense of the other; each clearly required the proof of at least one essential element not embodied in any of the other three offenses at issue; and the four felonies were factually distinct and independent crimes. State v. Revelle, 301 N.C. 153, S.E.2d (1980).

§ 14-52. Punishment for burglary.

Burglary in the first degree shall be punishable as a Class C felony, and burglary in the second degree shall be punishable as a Class D felony. Notwithstanding any other provision of law, with the exception of persons sentenced as committed youthful offenders, a person convicted of a burglary in the first or second degree shall serve a term of not less than seven years in prison, excluding gain time granted under G.S. 148-13. A person convicted of a burglary in the first or second degree shall receive a sentence of at least 14 years in the State's prison and shall be entitled to credit for good behavior under G.S. 15A-1340.7. The sentencing judge may not suspend the sentence and may not place the person sentenced on probation. Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder. (1870-1, c. 222; Code, s. 994; 1889, c. 434, s. 2; Rev., s. 3330; C. S., s. 4233; 1941, c. 215, s. 1; 1949, c. 299, s. 2; 1973, c. 1201, s. 3; 1977, c. 871, s. 2; 1979, c. 672; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

As to eligibility of prisoners serving life sentence for parole, see § 15A-1371. As to facilities and program for youthful offenders, see § 148-49.10 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote this section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

For comment on capital punishment and evolving standards of decency, see 16 Wake Forest L. Rev. 737 (1980).

CASE NOTES

Convictions Remain Valid. — The Supreme Court of the United States has held that the imposition of the death penalty, under certain state statutes and in the application thereof, is unconstitutional. That decision does not affect the conviction but only the death sentence. State v. Davis, 282 N.C. 107, 191 S.E.2d 664 (1972).

Applied in In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948); State v. McAfee, 247 N.C. 98, 100 S.E.2d 249 (1957); State v. Conyers, 267 N.C. 618, 148 S.E.2d 569 (1966); Dean v. North Carolina, 269 F. Supp. 986 (M.D.N.C. 1967); Parker v. North Carolina, 397 U.S. 790, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785 (1970); State v. Green, 280 N.C 431, 185 S.E.2d 872 (1972); Edwards v. Garrison, 529 F.2d 1374 (4th Cir. 1975); State v. Caldwell, 293 N.C. 336, 237 S.E.2d 742 (1977).

Quoted in State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936); State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

Stated in State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965).

Cited in State v. Lawrence, 199 N.C. 481, 154 S.E. 741 (1930); State v. Jordan, 236 N.C. 155, 37 S.E.2d 111 (1946); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. Wilson, 289 N.C. 531, 223 S.E.2d 311 (1976); State v. Garrison, 294 N.C. 270, 240 S.E.2d 377 (1978); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Jackson, 302 N.C. 101, 273 S.E.2d 666 (1981).

§ 14-53. Breaking out of dwelling house burglary.

If any person shall enter the dwelling house of another with intent to commit any felony or larceny therein, or being in such dwelling house, shall commit any felony or larceny therein, and shall, in either case, break out of such dwelling house in the nighttime, such person shall be punished as a Class D felon. (12 Anne, c. 7, s. 3; R. C., c. 34, s. 8; Code, s. 995; Rev., s. 3332; C. S., s. 4234; 1969, c. 543, s. 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class D felon" for "guilty of burglary" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Indictment Must Charge Breaking Out. — One charged by indictment of breaking into a house cannot be convicted of breaking out, and a charge of the court to that effect is error. State v. McPherson, 70 N.C. 239 (1874).

The absence of evidence of breaking does not constitute a fatal defect of proof. State v. Vester, 22 N.C. App. 16, 205 S.E.2d 556, cert. denied, 285 N.C. 668, 207 S.E.2d 760 (1974), 419 U.S. 1116, 95 S. Ct. 795, 42 L. Ed. 2d 814 (1975).

Cited in State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976).

§ 14-54. Breaking or entering buildings generally.

(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon.

(b) Any person who wrongfully breaks or enters any building is guilty of a misdemeanor and is punishable under G.S. 14-3(a).

(c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property. (1874-5, c. 166; 1879, c. 323; Code, s. 996; Rev., s. 3333; C. S., s. 4235; 1955, c. 1015; 1969, c. 543, s. 3; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class H felon" for "is guilty of a felony and is punishable under G.S. 14-2" at the end of subsection (a). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 538 (1955).

For note on burglary in North Carolina, see 35 N.C.L. Rev. 98 (1956).

For comment on alleging and proving elements of offense under this section and § 14-72, see 3 Wake Forest Intra. L. Rev. 1 (1967).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
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I. GENERAL CONSIDERATION.

Constitutionality. — This section and § 14-72 do not violate the equal protection or due process provisions of either the State or federal Constitutions. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

This section and § 14-72 are reasonably related to valid legislative goals. The legislature has determined that breaking or entering with intent to commit larceny is a more serious crime than breaking or entering without the intent to commit larceny or any felony, and that larceny committed pursuant to breaking or entering is more serious than simple larcenry. The legislature was acting within its authority in designating these crimes as felonies and in fixing punishment commensurate with their serious nature. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

This section and § 14-72 meet the test of equal protection because all persons who fall under the terms of the statutes are subject to the same sentence. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Double Jeopardy. — Where a defendant has been tried for breaking and entering, and then the State tries him for a felony in which breaking and entering is an indispensable element, he has suffered double jeopardy. This is because the charge against him was increased after he had been tried for an offense consisting of an essential element of the greater offense. Wood v. Ross, 434 F.2d 297 (4th Cir. 1970), vacated on other grounds sub nom. North Carolina v. Rice, 404 U.S. 244, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971).

Same — Larceny. — Prosecution for larceny will not bar a subsequent prosecution for breaking and entering with intent to commit larceny, the larceny being necessarily distinct from the breaking and entering. State v. Hooker, 145 N.C. 581, 59 S.E. 866 (1907).

Statutory Offense. — The offense defined in this section, commonly referred to as house breaking or nonburglarious breaking, is a statutory, not a common-law, offense. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

Prior to the 1955 amendment, a nude defendant who entered the sleeping quarters of hospital nurses was not guilty of an offense under this section, where he did not flee when discovered but merely asked for a girl who worked at the hospital, and left upon demand without any attempt at larceny. State v. Cook, 242 N.C. 700, 89 S.E.2d 383 (1955).

Effect and Application of 1969 Amendment. — The title of the 1969 amendatory act, Session Laws 1969, c. 543, s. 7, expresses the legislative intent to clarify, not to repeal, "the laws relating to burglar and related offenses." It is, therefore, clear that the 1969 act amended, rather than repealed, this section. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

A defendant may be prosecuted, and if lawfully convicted may be punished, after the effective date of the 1969 amendment for a violation of this section as it existed prior to the effective date of that amendment, May 23, 1969, where the offense was committed prior to the effective date of May 23, 1969. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

A defendant is entitled to have the jury instructed as to what facts they were required to find in order to find him guilty under the statute as it existed on the date the offense was alleged to have been committed, without reference to the less stringent requirements of the amended statute. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

This section concerns only the crimes of breaking and entering buildings and does not relate to the felony of larceny. The crime of larceny after breaking or entering is punishable as provided in § 14-72. State v. Haigler,

14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Applied in State v. Minton, 228 N.C. 518, 46 S.E.2d 296 (1948); State v. Templeton, 237 N.C. 440, 75 S.E.2d 243 (1953); In re Bentley, 240 N.C. 112, 81 S.E.2d 206 (1954); State v. Jones, 247 N.C. 260, 100 S.E.2d 845 (1957); State v. Crawford, 261 N.C. 658, 135 S.E.2d 652 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Ward, 263 N.C. 93, 138 S.E.2d 779 (1964); State v. Yates, 263 N.C. 100, 138 S.E.2d 787 (1964); Potter v. State, 263 N.C. 114, 139 S.E.2d 4 (1964); State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Stinson, 263 N.C. 283, 139 S.E.2d 558 (1965); State v. Mullinax, 263 N.C. 512, 139 S.E.2d 639 (1965); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Morgan, 265 N.C. 597, 144 S.E.2d 633 (1965); State v. Ford, 266 N.C. 743, 147 S.E.2d 198 (1966); State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966); State v. Jones, 267 N.C. 434, 148 S.E.2d 236 (1966); State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Dawson, 268 N.C. 603, 151 S.E.2d 203 (1966); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Barnes, 270 N.C. 146, 153 S.E.2d 868 (1967); State v. Wilson, 270 N.C. 299, 54 S.E.2d 102 (1967); State v. Woody, 271 N.C. 544, 157 S.E.2d 108 (1967); State v. Lovelace, 271 N.C. 613, 157 S.E.2d 209 (1967); State v. Miller, 271 N.C. 646, 157 S.E.2d 335 (1967); State v. Foster, 271 N.C. 727, 157 S.E.2d 542 (1967); State v. Bethea, 272 N.C. 521, 158 S.E.2d 591 (1968); State v. Parrish, 273 N.C. 477, 160 S.E.2d 153 (1968); State v. Shedd, 274 N.C. 95, 161 S.E.2d 477 (1968); State v. Thorpe, 274 N.C. 457, 164 S.E.2d 171 (1968); State v. Evers, 1 N.C. App. 81, 159 S.E.2d 372 (1968); State v. Burgess, 1 N.C. App. 142, 160 S.E.2d 105 (1968); State v. Martin, 2 N.C. App. 148, 162 S.E.2d 667 (1968); State v. Morris, 2 N.C. App. 611, 163 S.E.2d 539 (1968); State v. Kelly, 3 N.C. App. 72, 164 S.E.2d 22 (1968); State v. Biggs, 3 N.C. App. 589, 165 S.E.2d 560 (1969); State v. Wilson, 6 N.C. App. 618, 170 S.E.2d 557 (1969); State v. McDonald, 6 N.C. App. 627, 170 S.E.2d 551 (1969); State v. Perry, 8 N.C. App. 83, 173 S.E.2d 521 (1970); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Gordon, 12 N.C. App. 38, 182 S.E.2d 14 (1971); State v. Cadora, 13 N.C. App. 176, 185 S.E.2d 297 (1971); State v. Oliver, 13 N.C. App. 184, 184 S.E.2d 900 (1971); State v. Ruiz, 13 N.C. App. 187, 185 S.E.2d 300 (1971); State v. Perry, 13 N.C. App. 304, 185 S.E.2d 467 (1971); State v. Gore, 14 N.C. App. 645, 188 S.E.2d 660 (1972); State v. Gibson, 15 N.C. App. 445, 190 S.E.2d 315, appeal withdrawn, 282 N.C. 154, 191 S.E.2d 365 (1972); State v. Goode, 16 N.C. App. 188, 191 S.E.2d 241 (1972); State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972); State v. Huffman, 16 N.C. App. 653, 192 S.E.2d 621 (1972); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973); State v. Irby, 19 N.C. App. 262, 198 S.E.2d 447 (1973); In re Meyers, 22 N.C. App. 11, 205 S.E.2d 569 (1974); In re Meyers, 25 N.C. App. 555, 214 S.E.2d 268 (1975); State v. McNeil, 28 N.C. App. 125, 220 S.E.2d 401 (1975); State v. Greene, 33 N.C. App. 228, 234 S.E.2d 428 (1977).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

Cited in State v. Ellsworth, 130 N.C. 690, 41 S.E. 548 (1902); State v. Setzer, 198 N.C. 663, 153 S.E. 118 (1930); State v. Ratcliff, 199 N.C. 9, 153 S.E. 605 (1930); In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948); State v. Alston, 233 N.C. 341, 64 S.E.2d 3 (1951); State v. Birckhead, 256 N.C. 494, 124 S.E.2d 838 (1962); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968); State v. Stafford, 274 N.C. 519, 164 S.E.2d 371 (1968); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969); Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971); Withers v. North Carolina, 328 F. Supp. 1152 (W.D.N.C. 1971); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Smith, 11 N.C. App. 552, 181 S.E.2d 778 (1971); State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971); State v. Cooper, 17 N.C. App. 184, 193 S.E.2d 352 (1972); State v. Smathers, 287 N.C. 226, 214 S.E.2d 112 (1975); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. Gosnell, 38 N.C. App. 679, 248 S.E.2d 756 (1978); State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980). State v. Boltinhouse, 49 N.C. App. 660, 272 S.E.2d 148 (1980).

II. ELEMENTS OF THE OFFENSE.

A. In General.

What Constitutes Offense Generally. — Under the provisions of this section, if any person breaks and enters or enters any storehouse, shop or other building where any merchandise, chattel, money, valuable security or other personal property shall be, with the intent to commit the felony of larceny, he shall be guilty of a felony. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

In respect to a dwelling, it is the entering otherwise than by a burglarious breaking, with intent to commit a felony, that constitutes the offense condemned by this section. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), overruled on

other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

This section condemns three separate felonies as follows: (1) If any person, with intent to commit a felony or other infamous crime therein, shall break or enter the dwelling house of another otherwise than by a burglarious breaking, he shall be guilty of a felony; (2) if any person, with intent to commit a felony or other infamous crime therein, shall break or enter any storehouse, shop, warehouse, banking house, countinghouse or other building where any merchandise, chattel, money, valuable security or other personal property shall be, he shall be guilty of a felony; (3) if any person, with intent to commit a felony or other infamous crime therein, shall break or enter any uninhabited house, he shall be guilty of a felony. State v. McDowell, 1 N.C. App. 361, 161 S.E.2d 769 (1968).

What Constitutes "Building" — Dwelling House. — A dwelling house is the place wherein a man reposes. State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

Every permanent building in which the owner or renter and his family, or any member thereof, usually and habitually dwell and sleep is deemed a dwelling. State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

A room in a rooming house is included in the meaning of the term "dwelling house." State v. Clinton, 3 N.C. App. 571, 165 S.E.2d 343 (1969).

Same — Clerk's Office. — The office of the clerk of a superior court in a county courthouse is a "structure designed to house or secure within it any activity or property" within the meaning of subsection (c) of this section and therefore is by statutory definition a "building" under subsection (b) of this section. Even though the office may be open to the public, it is still protected by the statute during the time that it is not open for public business. State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980).

Completion of Intended Felony or Larceny Not Required. — Under this section, if a person breaks or enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent or whether, if successful, the goods he succeeds in stealing have a value in excess of $200.00. In short, his criminal conduct is not determinable on the basis of the success of his felonious venture. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Smith, 266 N.C. 747, 147 S.E.2d 165 (1966); State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966); State v. Cloud, 271 N.C. 591, 157 S.E.2d 12 (1967); State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968).

If a person breaks or enters with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent. His criminal conduct is not determinable on the basis of the success of his felonious venture. State v. Wooten, 1 N.C. App. 240, 161 S.E.2d 59 (1968); State v. Sawyer, 283 N.C. 289, 196 S.E.2d 250 (1973).

If there is a breaking and entering with the felonious intent to steal, the accomplishment of the felonious intent is not a prerequisite of guilt. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972).

Same — Effect of Arrest of Judgment in Conviction under § 14-72(b). — The trial court's arrest of judgment on defendant's conviction for felonious larceny under § 14-72(b) had no effect on his conviction for felonious breaking or entering since it is not necessary for conviction of breaking and entering under subsection (a) of this section that a felony or larceny actually be committed in the building broken into; it is merely the intent at the time of the breaking or entering to commit the felony or larceny within the building that is required. State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980).

Value of Stolen Property Immaterial. — Larceny by breaking and entering a building is a felony without regard to the value of the stolen property. State v. Stubbs, 266 N.C. 274, 145 S.E.2d 896 (1966), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Where larceny is commited pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Ownership of Property Is Immaterial. — It is incumbent upon the State to establish that, at the time the defendant broke and entered, he intended to steal something. However, it is not incumbent upon the State to establish the ownership of the property which he intended to steal, the particular ownership being immaterial. State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968).

It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. The same rule applies to breaking and entering with larcenous intent. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

A person is guilty of feloniously breaking and entering a dwelling house if he unlawfully

breaks and enters such dwelling house with the intent to steal personal property located therein without reference to the ownership thereof. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

But see State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976) which held that, in a prosecution for breaking or entering, and felonious larceny, the allegations of ownership described in a bill of indictment are essential and proof of ownership should not vary from ownership as alleged. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

And Owner of Property Sought to Be Stolen Need Not be Identified. — If there is a breaking and entering with the felonious intent to steal, the identification of the owner of the personal property sought to be stolen is not a prerequisite to guilt. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

B. Intent.

Intent Must Be Shown to Establish Felonious Breaking and Entering. — In order to convict under this section it is necessary to show intent and a failure to show intent leaves no other course except acquittal. State v. Spear, 164 N.C. 452, 79 S.E. 869 (1913), disapproving dictum in State v. Hooker, 145 N.C. 581, 59 S.E. 866 (1907). And see State v. Crisp, 188 N.C. 799, 125 S.E. 543 (1924).

Felonious intent is an essential element of the crime defined in this section. It must be alleged and proved, and the felonious intent proven must be the felonious intent alleged, which is the "intent to steal." State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943); State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968); State v. Jackson, 4 N.C. App. 459, 167 S.E.2d 20 (1969).

In order to satisfy the felony requirement of this section is must be made to appear that there was a breaking or entering into a designated building or room "with intent to commit a felony or other infamous crime therein." State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957).

The crime defined in this section is complete, all other elements being present, if there was an entry with felonious intent. State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964).

To convict a person of the felony defined in this section, the State must satisfy the jury from the evidence beyond a reasonable doubt that a building described in this section was broken into or entered "with intent to commit a felony or other infamous crime therein." State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965).

An essential element of the crime stated in subsection (a) of this section is that the intent exist at the time of the breaking or entering. State v. Hill, 38 N.C. App. 75, 247 S.E.2d 295 (1978).

But intent is not a prescribed element of wrongful breaking and entering under subsection (b) of this section. See State v. Currie, 19 N.C. App. 17, 198 S.E.2d 28 (1973).

Proof. — Intent is a mental attitude which must ordinarily be proved by circumstances from which it can be inferred. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971); State v. Harlow, 16 N.C. App. 312, 191 S.E.2d 900 (1972).

The intent with which defendant broke and entered, or entered, may be found by the jury from what he did within the building. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

In determining the presence or absence of the element of intent the jury may consider the acts and conduct of defendant and the general circumstances existing at the time of the alleged commission of the offense. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Intoxication as Defense. — Intoxication which renders an offender utterly unable to form the required specific intent may be shown as a defense. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Voluntary intoxication is not a defense. State v. Tillman, 22 N.C. App. 688, 207 S.E.2d 316 (1974).

IV. TRIAL.

A. Indictment.

Bill of Indictment Must Sufficiently Describe Crime Alleged. — The bill of indictment under this section must describe the crime alleged in such detail as would enable the defendant to plead his conviction or acquittal thereof as a bar to another prosecution for the same offense. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

Description of Building. — In an indictment under this section punishing the breaking and entering of buildings, a building must be described as to show that it is within the language of the statute and so as to identify it with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Sellers, 273 N.C. 641, 161 S.E.2d 15 (1968).

Particular identification in the indictment of the building alleged to have been broken into and entered is desirable. State v. Melton, 7 N.C. App. 721, 173 S.E.2d 610 (1970).

In light of the growth in population and in the number of structures (domestic, business and governmental), the prosecuting officers of this State would be well advised to identify the subject premises in a bill of indictment under this section by street address, highway address, rural road address or some clear description and designation to set the subject premises apart

from like and other structures described in Article 14 of this Chapter. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

Under this section, the breaking or entering of any building with intent to commit a felony or larceny therein constitutes a felony. Thus the necessity for describing the building in the bill of indictment for the purpose of showing that it is within the statute no longer exists. It remains necessary, however, to identify the building with reasonable particularity so as to enable the defendant to prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Carroll, 10 N.C. App. 143, 178 S.E.2d 10 (1970).

An indictment under this section is sufficient if the building allegedly broken and entered is described sufficiently to show that it is within the language of the section and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Vawter, 33 N.C. App. 131, 234 S.E.2d 438, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

The recommended practice is to identify the location of the subject premises by street address, rural road address or some other clear description. However, an indictment under this section is sufficient if the building allegedly broken and entered is described sufficiently to show that it is within the language of the statute and to identify it with reasonable particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. State v. Baker, 34 N.C. App. 434, 238 S.E.2d 648 (1977).

Same — Bill of Particulars. — If a defendant is in doubt as to the identity of the building he is charged with having feloniously broken into and entered, he can call for a bill of particulars. State v. Sellers, 273 N.C. 641, 161 S.E.2d 15 (1968).

"Unlawfully Breaking" Charges Intent. — An indictment under this section for housebreaking is sufficient when charging "that defendant did break and enter (otherwise than by burglarious breaking) the storeroom and house, etc., with intent to commit a felony, to wit, with intent the goods, etc., feloniously to steal, etc.," and is not defective for the failure to allege that the breaking and entering was feloniously done, there being no distinction between the words "unlawfully breaking" and "entering with the intent to commit a felony." State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).

Indictment Charging Intent to Commit More than One Offense. — An indictment for entering a house with an intent to commit a felony or other infamous crime is not defective because it charges an intent to commit more than one offense. State v. Christmas, 101 N.C. 749, 8 S.E. 361 (1888).

Indictment Held Sufficient. — See Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

The indictment charged store-breaking, larceny and receiving in the language of the statute under which it was drawn, § 14-72 and this section, and contained the elements of the offense intended to be charged, and sufficiently informed the petitioner of the crime with which he was charged so that he could adequately prepare his defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. Nothing more was required. Harris v. North Carolina, 320 F. Supp. 770 (M.D.N.C. 1970), aff'd, 435 F.2d 1305 (4th Cir. 1971).

Indictment under This Section or § 14-51. — Where on appeal defendant's motion to set aside the verdict should have been allowed for want of evidence of defendant's guilt of second degree burglary and want of charge of second degree burglary in the indictment, upon the new trial ordered, defendant may be tried upon the original bill of burglary in the first degree, or upon an indictment under this section. State v. Locklear, 226 N.C. 410, 38 S.E.2d 162 (1946).

Though not sufficient as an indictment for burglary, an indictment, under which the defendant was tried for and convicted of burglary in the first degree, alleging that the defendant, at the specified time, broke and entered the dwelling house therein described, was sufficient to support a conviction under subsection (b) for wrongfully breaking and entering a building. State v. Cooper, 288 N.C. 496, 219 S.E.2d 45 (1975).

Variance. — In a prosecution for breaking and entering a building with intent to steal, the fact that the indictment alleges an intent to steal the property of a named corporation while the evidence discloses the property actually stolen belonged to another is not fatal. State v. Crawford, 3 N.C. App. 337, 164 S.E.2d 625 (1968).

If evidence offered at trial fails to show ownership as alleged in indictment of premises entered and property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

There was no fatal variance where the indictment alleged a breaking and entering with intent to steal of a "building occupied by Julian Jones used as a garage" and the evidence showed that the building was a storage shed and no longer used by Mr. Jones, since it was not incumbent on the State to establish the owner of the property defendant intended to steal but only the intent to steal upon breaking or entering. State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980).

C. Unlawful Breaking or Entering.

"Unlawful Breaking or Entering" Essential to Both Offenses. — The unlawful breaking or entering of a building described in this section is an essential element of both the felony and misdemeanor offenses. The distinction rests solely on whether the unlawful breaking or entering is done "with intent to commit a felony or other infamous crime therein." State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965).

This section defines a felony and defines a misdemeanor. The unlawful breaking or entering of a building described in this statute is an essential element of both offenses. The distinction rests solely on whether the unlawful breaking or entering is done "with intent to commit a felony or other infamous crime therein." State v. Dickens, 272 N.C. 515, 158 S.E.2d 614 (1968); State v. Williams, 2 N.C. App. 194, 162 S.E.2d 688 (1968); State v. Green, 2 N.C. App. 221, 162 S.E.2d 513 (1968).

But Both Breaking And Entering Need Not Be Shown. — Evidence of a breaking when available is relevant, but the absence of such evidence is not a fatal defect of proof to support a conviction of breaking and entering under this section where there is proof of entry. Nor is proof of entry where there is proof of breaking necessary to support a conviction on a charge of breaking and entering under this section. Blakeney v. State, 2 N.C. App. 312, 163 S.E.2d 69 (1968).

Either a breaking or an entering with the requisite intent is sufficient to constitute a violation of this section. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

Since subsection (a) of this section is in the disjunctive, the contention that there is no evidence that defendant broke and entered a house was not well taken. State v. Houston, 19 N.C. App. 542, 199 S.E.2d 668, cert. denied, 284 N.C. 426, 200 S.E.2d 662 (1973).

To convict of violating this section, it is sufficient if the State's evidence shows either a breaking or an entering; it need not show both. State v. Barnett, 41 N.C. App. 171, 254 S.E.2d 199 (1979).

Same — Breaking Not Required Where Entry Shown. — It is evident it was the intention of the legislature to make it a penal offense to wilfully break into a storehouse where merchandise, etc., is kept, or into an uninhabited house, or to willfully enter into a dwelling house in the night otherwise than by breaking, with the intent to commit a felony. State v. Hughes, 86 N.C. 662 (1882).

Housebreaking or nonburglarious breaking is a statutory and not a common-law offense, and under this section it is unlawful to enter a dwelling with intent to commit a felony therein, either with or without a breaking, and therefore while evidence of a breaking, when available, is always relevant proof of a breaking is not essential to sustain conviction. State v. Mumford, 227 N.C. 132, 41 S.E.2d 201 (1947); State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950).

A breaking is not now and has never been a prerequisite of guilt and proof thereof is not required. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Under this section it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. Hence, evidence of a breaking, when available, is always relevant, but absence of such evidence does not constitute a fatal defect of proof. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), overruled on other grounds, State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Under this section it is unlawful to break into a dwelling with intent to commit a felony therein. It is likewise unlawful to enter, with like intent, without a breaking. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

A breaking is not a necessary element of the offense defined in this section and the offense defined in this section is complete, all other elements being present, if there was an entry with felonious intent. State v. Lassiter, 15 N.C. App. 265, 189 S.E.2d 798, cert. denied, 281 N.C. 761, 191 S.E.2d 358 (1972).

Same — Entry Not Required When Breaking Shown. — The fact that the shaking of a door and its opening was not followed by a physical entrance into the building does not prevent a finding by the jury that defendants broke and entered the building. They had actually opened the door although they had not entered and the crime was complete upon the finding by the jury of the overt act and felonious intent which was amply supported by the evidence. State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966).

Breaking of store window with requisite intent to commit a felony therein, completes offense, even though the defendant is interrupted or otherwise abandons his purpose without actually entering the building. State v. Jones, 272 N.C. 108, 157 S.E.2d 610 (1967); State v. Burgess, 1 N.C. App. 104, 160 S.E.2d 110 (1968); State v. Wooten, 1 N.C. App. 240, 161 S.E.2d 59 (1968).

Violation of subsection (a) of this section was complete when defendant broke open the door with the obvious intention to enter and take something from the store. State v. Avery, 48 N.C. App. 675, 269 S.E.2d 708 (1980).

Entry With Consent of Owner Not Unlawful. — In order to convict a person of housebreaking under this section there must have been an unlawful entry by the prisoner, and when the owner has procured the act to be done by the prisoner company with and at the instance of the one selected by the owner for the purpose, the entry is lawful, and no crime is shown to have been committed, whatever the intent of the prisoner may have been at the time. State v. Goffney, 157 N.C. 624, 73 S.E. 162 (1911).

An entry is found to be a lawful one where the owner of the premises gives the defendant permission to enter, and where the entry is with the consent and at the instance of the owner. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

The entry proscribed by this section contemplates an unauthorized or unpermitted entry, and thus an entry with the consent of the owner is not an unlawful entry. State v. Boone, 39 N.C. App. 218, 249 S.E.2d 817 (1978), cert. granted, 296 N.C. 587, 251 S.E.2d 473 (1979).

An entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis for conviction of felonious entry under subsection (a). State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979).

Same — Entering Place of Business During Business Hours. — A person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public because there has not been an unauthorized or unpermitted entry. State v. Boone, 39 N.C. App. 218, 249 S.E.2d 817 (1978), cert. granted, 296 N.C. 537, 251 S.E.2d 473 (1979); State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979).

Where defendant entered a store at a time when it was open to the public, his entry was thus with the consent, implied if not express, of the owner and it cannot serve as the basis for a conviction for felonious entry. State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979).

Same — Same — Concealment Voided Consent to Entry. — Although a person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public because there has not been an unauthorized or unpermitted entry, where defendant entered the building during normal business hours, but thereafter without the consent of the owner, he went into an area not open to the public and there secreted himself, and remained concealed until well beyond the closing of business hours for the store for the purpose of participating in a theft, these acts voided any consent to the entry. Going into an area not open to the public and remaining hidden there past closing hours made the entry through the front door open for business unlawful. State v. Speller, 44 N.C. App. 59, 259 S.E.2d 784 (1979).

Unlocking Door with Key. — There is a sufficient breaking where a person enters a building with a felonious intent by unlocking a door with a key. State v. Knight, 361 N.C. 17, 134 S.E.2d 101 (1964).

The State is not required to offer evidence of damage to a door or window. A breaking or entering condemned by the statute may be shown to be a mere pushing or pulling open of an unlocked door or the raising or lowering of an unlocked window, or the opening of a locked door with a key. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

III. LESSER INCLUDED OFFENSE.

Breaking and Entering Is Lesser Included Offense of Burglary. — The statutory offense set forth in this section is a less degree of the offense of burglary in the first degree set forth in § 14-51. State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968); State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973), aff'd, 285 N.C. 746, 208 S.E.2d 506 (1974).

A felonious entering into a house otherwise than burglariously with intent to commit larceny, a violation of this section, is a less degree of the felony of burglary in the first degree. State v. Fikes, 270 N.C. 780, 155 S.E.2d 277 (1967).

A violation of this section is a less degree of the felony of burglary in the first degree. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

The statutory offense of felonious breaking or entering is a lesser included offense of burglary in the first and second degree. State v. Jolly, 297 N.C. 121, 254 S.E.2d 1 (1979).

Felonious Breaking and Entering as Lesser Included Offense of Felony-Murder. — Where proof that defendant feloniously broke into and entered a dwelling is an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of feloniously breaking into and entering that particular dwelling, the conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, is based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering, and the felonious breaking and entering is a lesser included offense of the felony-murder. Hence, a separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Receiving stolen goods is not a lesser included offense of breaking and entering but a separate and distinct offense. State v.

Miller, 18 N.C. App. 489, 197 S.E.2d 46, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (1973).

Misdemeanor Breaking and Entering Is Lesser Included Offense of Felonious Breaking and Entering. — The misdemeanor defined in this section must be considered "a less degree of the same crime," an included offense, within the meaning of § 15-170. State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Dickens, 272 N.C. 515, 158 S.E.2d 614 (1968); State v. Williams, 2 N.C. App. 194, 162 S.E.2d 688 (1968).

Wrongful breaking or entering without intent to commit a felony or other infamous crime is a lesser degree of felonious breaking or entering within this section. State v. Worthey, 270 N.C. 444, 154 S.E.2d 515 (1967).

The misdemeanor of nonfelonious breaking and entering, if there is evidence to support it, is a lesser included offense of the felony of breaking and entering with intent to commit a felony as described in this section. State v. Johnson, 1 N.C. App. 15, 159 S.E.2d 249 (1968); State v. Fowler, 1 N.C. App. 546, 162 S.E.2d 37 (1968).

Wrongful breaking and entering without intent to commit a felony or other infamous crime is a lesser included offense of the felony of breaking or entering with intent to commit a felony under this section. State v. Fowler, 1 N.C. App. 549, 162 S.E.2d 39 (1968); State v. Lewis, 17 N.C. App. 117, 193 S.E.2d 455 (1972), cert. denied, 283 N.C. 258, 259, 195 S.E.2d 691 (1973).

Any person who breaks or enters any building described in this section with intent to commit any felony or larceny therein, is guilty of a felony. A wrongful breaking or entering into such building, without the intent to commit any felony therein, is a misdemeanor, a lesser included offense within the meaning of § 15-170. State v. Dozier, 19 N.C. App. 740, 200 S.E.2d 348 (1973), cert. denied, 284 N.C. 618, 201 S.E.2d 690 (1974).

B. Burden of Proof.

Proof of recent possession of stolen property by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt. State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976).

Insanity as Defense. — Insanity is an affirmative defense and the burden of carrying it is upon the defendant. State v. Tillman, 22 N.C. App. 688, 207 S.E.2d 316 (1974).

C. Evidence.

Evidence Concerning Accomplice Immaterial. — Where defendant was charged under this section with nonburglariously breaking and entering and the evidence showed that he sat in his car while a friend unlawfully entered the house of another, the defendant was a principal in the crime being committed and the fact that his friend did not enter by burglarious breaking is immaterial. State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950).

Acquittal of Third Persons Not Relevant. — Since breaking and entering, larceny and uttering a forged check are offenses that require only one perpetrator, the acquittal of third persons arrested with the accused for the crime is not relevant evidence at defendant's trial. State v. McCullough, 50 N.C. App. 184, 272 S.E.2d 613 (1980).

Evidence of Entry without Breaking. — Where the evidence in the case and the inferences to be reasonably drawn therefrom were not such as would have required the jury to find that defendant entered by a burglarious breaking, the jury might reasonably have inferred that defendant made his entry without a burglarious breaking. State v. Bell, 284 N.C. 416, 200 S.E.2d 601 (1973).

Inference From Possession of Recently Stolen Property. — Evidence that defendant was in possession of stolen property shortly after the property was stolen raises a presumption of defendant's guilt of larceny of such property. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36 (1969); State v. Snuggs, 18 N.C. App. 226, 196 S.E.2d 525 (1973).

The presumption of recent possession, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976).

While possession of recently stolen property will support both a presumption of guilt of larceny and an inference of guilt of breaking and entering, they are mere inferences which the jury may consider along with other evidence in the case, which other evidence may be sufficient to tip the scales with respect to one count but not the other. State v. Barnes, 30 N.C. App. 671, 228 S.E.2d 83 (1976).

Tracing Stolen Articles to Defendant. — It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970).

Evidence Concerning Owner's Permission. — Where the evidence tended to show that a homeowner was locked out of his house and was trying to gain entry by using a credit card when defendant approached him and opened the door with an eight inch knife, the homeowner and defendant entered the house,

drank alcoholic beverages and removed some items belonging to the homeowner, and both then left the house whereupon the homeowner called the police, testimony by the homeowner that he did not forbid defendant to come into the house because he was afraid defendant had a gun or knife was evidence from which the jury could conclude defendant did not have the owner's permission to enter the house. State v. Bartlett, 45 N.C. App. 704, 263 S.E.2d 800 (1980).

For the State to survive a motion to dismiss under § 15A-1227(a)(1), it must present evidence that defendant entered a building within the meaning of subsection (b) of this section and that he did so wrongfully, that is, that he entered without any consent or permission of the owner or occupant. State v. Winston, 45 N.C. App. 99, 262 S.E.2d 331 (1980).

To justify submission of felonious breaking or entering as a permissible verdict in a prosecution for burglary there must be evidence tending to show that defendant could have gained entry to victim's motel room by means other than a burglarious breaking, i.e., a forcible entry. State v. Jolly, 297, N.C. 121, 254 S.E.2d 1 (1979).

Evidence Held Sufficient. — Evidence that a cotton mill had been broken into and that goods taken therefrom had been found in defendant's possession within an hour or two thereafter, with further evidence of his unlawful possession, is sufficient for conviction, under the provisions of this section and defendant's demurrer to the State's evidence, or motion for dismissal thereon, is properly overruled. State v. Williams, 187 N.C. 492, 122 S.E. 13 (1924).

Evidence held sufficient to sustain conviction under this section. State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929).

The evidence was held amply sufficient to support verdict of guilty of feloniously breaking and entering and larceny by means of such felonious breaking and entering. State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966).

Evidence held sufficient to overrule nonsuit in the prosecution for unlawfully breaking and entering a building with intent to steal merchandise therefrom. State v. Cloud, 271 N.C. 591, 157 S.E.2d 12 (1967).

Evidence that around midnight the defendant and a companion broke the glass door of a hardware store and took away guns and ammunition was held sufficient to show a present intent on the part of defendant to take property belonging to another and convert it to his own use. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

In prosecution for breaking and entering testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

In prosecution for breaking and entering, where the State's evidence established that: (1) defendant's right thumbprint was found on the lock at the scene of the crime, a fact defendant solemnly admitted in open court; (2) no other fingerprints — of defendant or any one else — were found at the scene; and (3) when informed of the fingerprint defendant stated to the police that he had never been in the business establishment alleged to have been broken into, a statement now conceded to be false, defendant's motion to nonsuit on the breaking and entering count was properly denied. State v. Miller, 289 N.C. 1, 220 S.E.2d 572 (1975).

The court properly denied a motion for nonsuit where the State, having introduced substantial evidence of each element of the offense of breaking or entering the building as charged in the indictment and that defendant was one of the persons who committed the offense, the question of guilt or innocence was properly submitted to the jury. State v. Burch, 24 N.C. App. 514, 211 S.E.2d 511 (1975).

There was sufficient circumstantial evidence from which the court could have found that respondent committed the breaking or entering: (1) Numerous items similar though not identified, as those stolen were found in the car driven by respondent; (2) respondent's companion in the car had a fresh cut on his hand and at the store that was broken into, blood was found on the window and near the cash register; (3) and the officer's observation of the car being driven by respondent under suspicious circumstances "backing out from behind" the store and thereafter stopping the car. In re Frye, 32 N.C. App. 384, 232 S.E.2d 301 (1977).

Where the evidence shows (1) that a breaking and entering occurred; (2) that prior thereto the accused had possession of an instrument used to effect it; (3) that such possession occurred within a short time prior to the breaking and entering; (4) and that the instrument was found at the scene of the crime immediately after the crime was committed, a jury would be justified in finding that the instrument had been brought there by the person who had been shown to have previously possessed it and that such person used it to effect the breaking and entering. If the evidence is also sufficient to show that the crime of larceny was committed pursuant to the breaking and entering, then the jury may infer that the accused is guilty of larceny as well as breaking and entering. State v. McNair, 36 N.C. App. 196, 243 S.E.2d 805 (1978).

Evidence Held Sufficient. — There was insufficient evidence from which the jury could find that defendant committed the breaking and entering where no fingerprints were taken linking the defendant to the break-in, no effort was made to determine whether the footprints leading from the home matched the defendant's footprints, and where clearly defendant never had actual possession of the stolen merchandise. State v. McKinney, 25 N.C. App. 283, 212 S.E.2d 707 (1975).

In a prosecution of defendant for breaking or entering, evidence relating to the actions of a bloodhound should have been excluded because the State failed to show that the dog was put on the trail of the guilty party under such circumstances as to afford substantial assurance that the person trailed was in fact the person suspected, and the case should have been dismissed for insufficiency of evidence where the evidence tended to show that one and half to two hours after a breaking occurred, one and a half to two miles away, defendant was found on a little sandbar by a creek; there was no evidence tending to establish that defendant was ever at the residence broken into; the only witness to the crime was unable to identify the man he had seen leaving the residence; there was no evidence defendant was at the place at which the dog was released to track the thieves; there was no evidence placing stolen guns or other stolen items in defendant's possession; there was evidence of footprints in the vicinity of the residence, but no evidence indicating they were defendant's footprints; and there was no evidence that defendant attempted to flee to avoid capture. State v. Lanier, 50 N.C. App. 383, 273 S.E.2d 746 (1981).

Same — Evidence of Intoxication. — Evidence that defendant was in an intoxicated condition at the time he was apprehended fell short of a showing that defendant was in such an intoxicated condition that he was utterly unable to form the intent required. State v. Bronson, 10 N.C. App. 638, 179 S.E.2d 823 (1971).

D. Instructions to Jury.

Duty of Court to Submit to Jury Question of Guilt Hereunder Where Indictment Charges First-Degree Burglary. — Where the evidence is sufficient to justify it upon a bill of indictment charging a defendant with burglary in the first degree, it is the duty and mandatory upon the court to submit to the jury the question of whether or not the defendant is guilty of breaking and entering the dwelling house in question at the time and place mentioned in the bill of indictment otherwise than burglariously, and it is error for the court to fail or refuse to do so. State v. Johnson, 218 N.C. 604, 12 S.E.2d 278 (1940).

Same — Illustration. — The State's evidence tended to show that defendant broke and entered the dwelling house in question at night while same was occupied as a sleeping apartment, stole some money and ran away when the female occupant discovered him and screamed. Defendant contended, upon supporting evidence, that at the time he was too drunk to know where he was or what he was doing. The court instructed the jury that defendant might be convicted of burglary in the first degree, or of burglary in the second degree, if they found that the room was unoccupied, but if they found defendant was too drunk to form felonious intent they should return a verdict of not guilty. Held: The instruction required the jury to find the defendant guilty of burglary in the first degree or not guilty, since there was no evidence that the room was unoccupied, and defendant was entitled to a new trial for error of the court in failing to instruct that defendant might be found guilty of breaking and entering otherwise than burglariously, or of an attempt to commit the offense. State v. Feyd, 213 N.C. 617, 197 S.E. 171 (1938).

The evidence tended to show unlawful entry into a dwelling at nighttime while same was actually occupied, and the actual commission therein of the felony charged in the bill of indictment. The evidence also tended to show that the window of the room in which the felony was committed was open, and that the perpetrator of the crime was first seen in this room, and that after the commission of the crime he escaped by the open window. There was also circumstantial evidence that entry was made by opening a window of another room of the house. There was also sufficient evidence tending to identify defendant as the perpetrator of the crime. Held: Although there is no evidence of burglary in the second degree, the evidence tends to show burglary in the first degree, or a nonburglarious breaking and entering with intent to commit a felony, depending upon whether the perpetrator of the crime entered by the open window or burglariously "broke" into the dwelling, and therefore the trial court should have charged that the defendant might be found guilty of burglary in the first degree, guilty of a nonburglarious breaking and entering of the dwelling house with intent to commit a felony or other infamous crime therein, or not guilty, and its failure to submit the question of defendant's guilt of nonburglarious entry constitutes reversible error. State v. Chambers, 218 N.C. 442, 11 S.E.2d 280 (1940).

Failure to Charge on Misdemeanor Prejudicial Error. — Where the evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony, it was prejudicial error for the court to fail to charge that the jury could find a verdict

of nonfelonious breaking and entering, a misdemeanor, and for the court to fail to explain the full contents of this section to the jury. State v. Worthey, 270 N.C. 444, 154 S.E.2d 515 (1967).

The term "larceny" is a vital element of the crime of breaking and entering with the intent to commit larceny and the trial judge's failure to define such term in his instructions constituted error requiring a new trial. State v. Elliott, 21 N.C. App. 555, 205 S.E.2d 106 (1974).

Proper Instruction. — See State v. Jones, 272 N.C. 108, 157 S.E.2d 610 (1967).

Same — Instruction in Words of Section. — Where the court charged in the words of this section, the instruction was free from prejudicial error. State v. Wade, 14 N.C. App. 414, 188 S.E.2d 714, cert. denied, 281 N.C. 627, 190 S.E.2d 470 (1972).

Same — Instruction Allowing Conviction on Alternative Propositions. — In prosecutions under this section, where the indictment charges the defendant with breaking and entering, proof by the State of either a breaking or an entering is sufficient, and instructions allowing juries to convict on the alternative propositions are proper. State v. Boyd, 287 N.C. 131, 214 S.E.2d 14 (1975); State v. Reagan, 35 N.C. App. 140, 240 S.E.2d 805 (1978).

E. Verdict.

Verdict Disapproved. — In a prosecution for felonious breaking and entering, a verdict that defendant is guilty of felonious "B. & E." is disapproved. State v. Gaston, 4 N.C. App. 575, 167 S.E.2d 510 (1969).

F. Appeal.

Scope of Review. — Each defendant having entering a peal of guilty to a valid information charging the felony of nonburglarious breaking, their appeal brings up for review only the question whether the facts charged constitute an offense punishable under the laws and Constitution. Defendants' plea established a violation of this section. State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

V. SENTENCING.

Editor's Note. — The cases cited in the following annotation were decided under the section as it stood prior to the effective date of the 1979 amendment.

Maximum Sentence. — The punishment for a violation of this section may be a maximum of 10 years. State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966).

The maximum punishment for the felony of breaking and entering is 10 years' imprisonment. State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969); State v. Perryman, 4 N.C. App. 684, 167 S.E.2d 517 (1969).

Larceny of any property of another of any value after breaking and entering, and larceny of property of more than $200.00 (now $400.00) in value, are felonious, each of which may be punishable by imprisonment for as much as 10 years. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36 (1969).

A sentence of 10 years is not in excess of that permitted by the statute upon a conviction of the felony of breaking and entering in violation of subsection (a) of this section. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Sentence Not Cruel or Unusual Punishment. — A sentence of 25 years' imprisonment, imposed after a plea of guilty to four indictments charging felonious breaking and entering and larceny in violation of this section and § 14-72, did not exceed the statutory maximum and was not cruel and unusal punishment in the constitutional sense. State v. Greer, 270 N.C. 143, 153 S.E.2d 849 (1967).

The impisition of a sentence of imprisonment of seven to nine years upon plea of nolo contendere to the offenses of breaking and entering and larceny is not cruel or unusual punishment in a constitutional sense. State v. Robinson, 271 N.C. 448, 156 S.E.2d 854 (1967).

Sentence of imprisonment for not less than six nor more than 10 years for felonious breaking and entering was punishment within the limits authorized by statute and is not cruel and unusual punishment within the constitutional prohibition. State v. Strickland, 10 N.C. App. 540, 179 S.E.2d 162 (1971).

Sentence Exceeding Maximum. — Where the maximum term of a sentence is set beyond statutory authorization under this section, the sentence imposed is not void in toto. Petitioner is not entitled to be released from custody since he has not served that part of the sentence which is within lawful limits. State v. Clendon, 249 N.C. 44, 105 S.E.2d 93 (1958).

Sentence Where Misdemeanor and Felony Charges Consolidated. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

§ 14-55. Preparation to commit burglary or other housebreakings.

If any person shall be found armed with any dangerous or offensive weapon, with the intent to break or enter a dwelling, or other building whatsoever, and to commit any felony or larceny therein; or shall be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking; or shall be found in any such building, with intent to commit any felony or larceny therein such person shall be punished as a Class H felon. (Code, s. 997; Rev., s. 3334; 1907, c. 822; C. S., s. 4236; 1969, c. 543, s. 4; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
A. Possession of Housebreaking Implements.
1. In General.
2. Particular Implements.
III. Practice and Procedure.

I. GENERAL CONSIDERATION.

Separate Offenses. — The offense of being armed with any dangerous weapon with intent to break and enter a dwelling or other building and commit a felony therein, and the offense of possessing, without lawful excuse, implements of housebreaking, are separate and distinct offenses, under this section, the first requiring a presently existing intent to break and enter, and the second mere possession, without lawful excuse, of implements of housebreaking, which infers no personal intent but rather the purpose for which the implements are kept. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

This section defines three separate offenses. State v. Morgan, 268 N.C. 215, 150 S.E.2d 377 (1966); State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971); State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

This section defines three separate offenses, and the part of this section relating to possession of implements of housebreaking is a separate offense. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

This section defines a separate felony for mere possession without lawful excuse of tools or implements of housebreaking, and it is the inherent nature and purpose of the tool, or the clear effect of a combination of otherwise innocent tools, which is condemned. State v. Godwin, 3 N.C. App. 55, 164 S.E.2d 86 (1968), disapproved, State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

The second defined offense under this section is the possession of an implement of housebreaking without lawful excuse. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

Applied in State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Shedd, 274 N.C. 95, 161 S.E.2d 477 (1968); State v. Ruiz, 13 N.C. App. 187, 185 S.E.2d 300 (1971); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

Quoted in State v. Searcy, 37 N.C. App. 68, 245 S.E.2d 412 (1978).

Cited in State v. Surles, 230 N.C. 272, 52 S.E.2d 880 (1949); State v. McPeak, 243 N.C. 243, 90 S.E.2d 501 (1955); State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

II. ELEMENTS OF THE OFFENSE.

A. Possession of Housebreaking Implements.

1. In General.

Elements of Crime and Burden of Proof Thereof. The gravamen of the offense is the possession of burglar's tools without lawful excuse, and the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute; and (2) that such possession was without lawful excuse. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943).

In a prosecution under this section for having possession without lawful excuse of a crowbar, hack saw and automatic pistol, the burden is on the State to prove beyond a reasonable doubt that the possession of the implements was "without lawful excuse" within the spirit of the statute, and the possession of a pistol for personal protection, even though unauthorized, cannot be unlawful possession within the meaning of the statute. State v. Davis, 245 N.C. 146, 95 S.E.2d 564 (1956).

In a prosecution under the provisions of this section, the burden is on the State to show two things: (1) That the person charged was found having in his possession an implement or implements of housebreaking enumerated in, in, or which come within the meaning of the statute, and (2) that such possession was without lawful excuse. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966); State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967); State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967); State v. Davis, 272 N.C. 469, 158 S.E.2d 630 (1968); State v. Styles, 3 N.C. App. 204, 164 S.E.2d 412 (1968); State v. McCloud, 7 N.C. App. 132, 171 S.E.2d 470, aff'd, 276 N.C. 518, 173 S.E.2d 753 (1970).

In a prosecution for unlawful possession of implements of housebreaking the burden is on the State to show (1) that the person charged was found having in his possession an implement of housebreaking and (2) that such possession was without lawful excuse. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

The essential elements of the crime of possession of implements of housebreaking are (1) the possession of an implement of housebreaking (2) without lawful excuse, and the State has the burden of proving both of these elements. State v. Stockton, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

Upon indictment for a crime under this section, the State has the burden of proving the following two things: (1) that the defendant was found to have in his possession an implement or implements of housebreaking enumerated in, or which come within the meaning of the statute and (2) that such possession was without lawful excuse. State v. Beard, 22 N.C. App. 596, 207 S.E.2d 390 (1974).

The gravamen of the offense of possession of housebreaking implements, as defined by this section lies in the possession, without lawful excuse, of an implement or implements either enumerated in the statute or which fairly come within the meaning of the term other implements of housebreaking. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

Same — The phrase "without lawful excuse" must be construed in the spirit of this section, and, even though the possession of the pistols and blackjack be unlawful and even though defendants possessed the pistols and blackjack for the purpose of personal protection in the unlawful transportation of intoxicating liquor, such possession is not within the meaning of this section. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943).

Proof of "Intent" or "Unlawful Use" Not Required. — The offense of possessing implements of housebreaking without lawful excuse, does not require the proof of any "intent" or "unlawful use." State v. Vick, 312 N.C. 235, 195 S.E. 779 (1938).

Where defendant is charged with possession of certain specific items condemned by this section, it is not necessary for the court to determine whether tools or implements that have legitimate purposes were being possessed for an illegitimate purpose. State v. Styles, 3 N.C. App. 204, 164 S.E.2d 412 (1968).

The offense of possessing implements of housebreaking does not require the proof of "intent" in this State. State v. Ledford, 24 N.C. App. 542, 211 S.E.2d 532 (1975).

A prosecution under this section does not require proof of any specific intent to break into a particular building at a particular time and place. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

But State Must Show General Intent To Use Unlawfully. — Although a prosecution under this section does not require proof of any specific intent to break into a particular building at a particular time and place, the burden rests on the state to show beyond a reasonable doubt that the defendant possessed the article in question with a general intent to use it at some time for the purpose of facilitating a breaking. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

Character of Object of Burglary Immaterial. — The possession of an implement with intent to burglarize and not the character of the object (be it a house or vending machine) of the burglary brings the act within the condemnation of the statute. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1979).

State Need Not Prove That All Articles in Defendant's Possession Are Implements of Housebreaking. — The State is not required to prove that all the articles the defendant had in his possession are implements of housebreaking. State v. Stockton, 13 N.C. App. 287, 185 S.E.2d 459 (1971).

Constructive Possession of Implements of Housebreaking. — The State need not always prove an actual possession of implements of housebreaking, but may show constructive possession by circumstantial evidence. State v. Ledford, 24 N.C. App. 542, 211 S.E.2d 532 (1975).

2. Particular Implements.

"Implements of Housebreaking" Generally. — If tools enumerated in an indictment are embraced within the general term "other implement of housebreaking," their possession without lawful excuse is prohibited by this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

Items which are "implements of housebreaking" are not specifically named in this section, so if their possession without lawful excuse is proscribed at all it is under the general language of the statute. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

An article may be deemed an implement of housebreaking, the possession of which is made criminal by the statute, when (1) it is a picklock, key, bit, or any other instrument capable of being used for the purpose of housebreaking, and (2) at the time and place alleged, the person charged with its possession did in fact possess it for that purpose, i.e., without lawful excuse. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

Use to Which Instrument Is Put Is Not Controlling. — The fact that certain implements were possessed and used by the defendant in breaking open a window in a building is not determinative of the question of whether or not they were implements of housebreaking possessed in violation of this section. The use to which a tool or instrument is put is not necessarily controlling in determining whether it is within the intent of the phrase "or other implement of housebreaking" as contained in this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

A crowbar is clearly a breaking tool. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

Likewise, a Combination of Crowbar and Big Screwdriver. — Under the circumstances the possession of a crowbar and a big screwdriver were without lawful excuse, and said crowbar and big screwdriver were other implements of housebreaking within the intent and meaning of this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

And a Combination of Gloves, Tapes, Chisels, Crowbars, Hammers, and Punches. — While gloves, tapes, chisels, crowbars, hammers, and punches all have their honest and legitimate uses, when no explanation is offered for this combination of articles by a man several hundred miles from his home, in the middle of the night, it is ample to sustain a possession of wrongful and unlawful possession of tools used in store breaking. State v. Nichols, 268 N.C. 152, 150 S.E.2d 21 (1966).

As Is a Picklock. — This section contemplates a picklock as being a burglary tool when it is in the possession of someone without lawful excuse. State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967).

A "lockpick" and a "picklock" are the same thing. State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967).

Chisels and Screwdrivers May Be Implements of Housebreaking. — Although the instruments have other uses which are legitimate and were not made for the specific purpose of breaking into buildings, it is common knowledge that chisels and screwdrivers can be, and may be, used as implements of housebreaking. State v. Cadora, 13 N.C. App. 176, 185 S.E.2d 297 (1971).

Tire Tool Not Necessarily an Implement For Housebreaking. — A tire tool is a part of the repair kit which the manufacturer delivers with each motor vehicle designed to run on pneumatic tires; not only is there lawful excuse for its possession, but there is little or no excuse for a motorist to be on the road without one. State v. Garrett, 263 N.C. 773, 140 S.E.2d 315 (1965), aff'd sub nom. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

There is some doubt whether a tire tool, under the ejusdem generis rule, is of the same classification as a picklock, key, or bit, and hence, condemned by this section. State v. Garrett, 263 N.C. 773, 140 S.E.2d 315 (1965), aff'd sub nom. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980); State v. Godwin, 3 N.C. App. 55, 164 S.E.2d 86 (1968), disapproved, State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

But May Be Under Certain Circumstances. — A tire tool was an implement of housebreaking within the meaning of this section where there was plenary circumstantial evidence which implied that defendant was in actual or constructive possession of the tire tool, that the tire tool was reasonably capable of use for the purpose of breaking into a building, and that defendant did in fact possess it for that purpose at the time and place of his arrest. State v. Bagley, 300 N.C. 736, 268 S.E.2d 77 (1980).

Small Screwdrivers, Tire Tool, Gloves, Flashlights, and Socks Not Implements of Housebreaking. — Two small screwdrivers, a tire tool, gloves, flashlights, and socks in defendant's possession at time store was broken into and entered by defendant were not other implements of housebreaking within the intent and meaning of this section. State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

A pistol is not an "implement of housebreaking" within the intent and meaning of this section. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

This section does not make it illegal to possess implements used for opening car doors. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (1971).

Ladder and Torch Not Housebreaking Implements. — Neither a three-foot long ladder nor an acetylene torch with tanks mounted on a wheeled stand possessed by defendant was reasonably adapted for use in housebreaking, and they do not qualify as implements of housebreaking within the meaning of this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

Judicial Knowledge of Housebreaking Implements. — Although a Stillson wrench, a brace, drills of varying sizes, detonating caps, flashlight batteries, gloves, dynamite, bullets, a drill chuck key, and other like articles, are articles having legitimate uses, the court will take judicial knowledge that they are, in combination, implements of housebreaking. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

III. PRACTICE AND PROCEDURE.

Sufficiency of Indictment. — An indictment under this section is not fatally defective because of its failure to enumerate any of the articles specified in the statute as implements of housebreaking when it does specify implements coming within the generic term of "implements of housebreaking." State v. Morgan, 268 N.C. 214, 150 S.E.2d 377 (1966).

Where a count in an indictment contains words set forth in the second offense defined in this section, namely, "having in his possession without lawful excuse," those words are mere surplusage where the count sufficiently embraces the first offense defined in this section. State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

Reference in an indictment to the defendant's possession of items not illegal under this section was mere surplusage and did not render the charge ambiguous since the indictment also charged the possession of specific items listed in the statute, and the proof showed that defendant possessed these specific items as well as other items which came within the generic term of implements of housebreaking. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (1971).

Inference Where Accused Is Borrower of Vehicle Containing Contraband. — Where contraband material, such as burglary tools, is under the control of an accused, even though the accused is the borrower of a vehicle, this fact is sufficient to give rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

And Inference May Be Rebutted. — If the owner of a vehicle loans the vehicle to an accused without telling him what is contained within the vehicle, the accused may offer evidence to that effect and thereby rebut the inference of knowledge and possession of the contents. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

Possession of Bolt-Cutter Raises Inference of Unlawful Purpose. — The conduct of defendants and the circumstances under which they were in possession of a bolt-cutter may raise the inference that its possession is for an unlawful purpose. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

It is reasonable to perceive that a burglar with a bolt-cutter, on the prowl to steal that which belongs to others, would clip a padlock and enter and steal from a service station building as readily as he would clip a metal band securing a vending machine and steal its contents. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

Jury Must Decide Conflicting Evidence. — The evidence as to whether the possession of an implement was lawful, being in conflict, is for the jury to decide and a nonsuit would be improper. State v. Shore, 10 N.C. App. 75, 178 S.E.2d 22 (1970), cert. denied, 278 N.C. 105, 179 S.E.2d 453 (1971).

Testimony of Police May Be Competent Evidence of Possession of Burglary Tools. — Testimony of police officers in regard to the lack of defendant's need for certain tools in his employment may be competent evidence of possession of burglary tools without lawful excuse within this section. State v. Glaze, 24 N.C. App. 60, 210 S.E.2d 124 (1974).

Ownership of Automobile and Location of Tools Therein Need Not Be Shown. — Where the evidence tended to show that defendant was in control of an automobile, that he owned tools and had placed them therein, then who owned the automobile, and where the tools were located therein, were not essential elements which had to be shown in order to convict defendant of possession of burglary tools. State v. Kersh, 12 N.C. App. 80, 182 S.E.2d 608, appeal dismissed, 279 N.C. 513, 183 S.E.2d 689 (1971).

Evidence Held Sufficient. — Evidence tending to show that officers searched a car owned by defendant and to which defendant had the key, and found therein implements which, in combination, as a matter of common knowledge, are implements of housebreaking, is sufficient to overrule defendant's motion to nonsuit in a prosecution under this section. State v. Baldwin, 226 N.C. 295, 37 S.E.2d 898 (1946).

Evidence Held Insufficient. — The evidence failed to show that any of the articles found in the automobile was an implement made and designed for the express purpose of housebreaking, within the terms of this section. State v. Boyd, 223 N.C. 79, 25 S.E.2d 456 (1943).

Upon an indictment charging possession, without lawful excuse, of a crowbar, hack saw and automatic pistol, in a prosecution under this section, the evidence was held insufficient to be submitted to the jury. State v. Davis, 245 N.C. 146, 95 S.E.2d 564 (1956).

Evidence tending to show that defendant was a passenger in a car in which implements of housebreaking were found, without any evidence that defendant had any control whatsoever over either the automobile or the implements of housebreaking found therein, and without evidence showing when, where, or under what circumstances defendant entered the automobile, or disclosing his relationship or association with the driver thereof, is insufficient to be submitted to the jury in prosecution for possession of implements of housebreaking without lawful excuse. State v. Godwin, 269 N.C. 263, 152 S.E.2d 152 (1967).

Instruction on Elements of Offense Erroneous. — Where defendant was charged with the first offense defined in this section, the trial court erred by instructing the jury on the first and second offense defined in this section when it substituted "implementation of housebreaking," an element of the second offense, for "dangerous or offensive weapon," an element of the first offense defined. State v. Hines, 15 N.C. App. 337, 190 S.E.2d 293 (1972).

Instruction as to Tire Tool. — In a prosecution for felonious possession of implements of storebreaking pursuant to this section, it was not error for the trial court to permit the jury to conclude that a tire tool was an implement of storebreaking, where there is abundant evidence to show that the tire tool was used in the breaking, no explanation appears of record which would justify the presence of the tire tool inside the store after the breaking, no suggestion appears of record that any automobile tire was in need of or receiving repair on the premises in question at the time defendant and his companion were apprehended, and the jury was properly instructed on the principles of actual and constructive possession. State v. Bagley, 43 N.C. App. 171, 258 S.E.2d 427 (1979), aff'd, 300 N.C. 736, 268 S.E.2d 77 (1980).

§ 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft.

If any person, with intent to commit any felony or larceny therein, breaks or enters any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind, containing any goods, wares, freight, or other thing of value, or, after having committed any felony or larceny therein, breaks out of any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind containing any goods, wares, freight, or other thing of value, that person is guilty of a Class I felony. It is prima facie evidence that a person entered in violation of this section if he is found unlawfully in such a railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft. (1907, c. 468; C. S., s. 4237; 1969, c. 543, s. 5; 1979, c. 437; c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 10.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The first 1979 amendment, effective Jan. 1, 1980, rewrote this section.

The second 1979 amendment, effective July 1, 1981, substituted "be punished as a Class I felon" for "upon conviction be punished by confinement in the penitentiary in the discretion of the court for a term of years not exceeding five years" at the end of the first sentence of the section as it stood before the first 1979 amendment. The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by

Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, repealed the second 1979 amendment and substituted "Class I felony" for "felony punishable by imprisonment for not more than five years" at the end of the first sentence. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

CASE NOTES

The gravamen of the offense is the breaking and entering with intent to commit larceny. State v. Harrington, 15 N.C. App. 602, 190 S.E.2d 280 (1972).

And Actual Larceny Need Not Be Completed. — The language of this section does not require the actual larceny of anything in order to convict of felonious breaking or entering. It is the breaking or entering with intent to commit larceny that is proscribed. State v. Kirkpatrick, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

The success of the larceny venture does not determine the grade of the breaking or entering as defendants argue. It is only necessary to establish the intent to commit larceny in order to establish a felonious breaking or entering of the motor vehicle. State v. Kirkpatrick, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

Larceny May Be Felony or Misdemeanor. — This section makes it a felony to break or enter a motor vehicle containing any goods, wares, freight or other thing of value with intent to commit larceny, whether the larceny be felonious or misdemeanor larceny. State v. Kirkpatrick, 34 N.C. App. 452, 238 S.E.2d 615 (1977).

Subject of Larceny. — Papers, a shoe bag and cigarettes are without question personal property, and as such they may be the subject of larceny within the meaning of this section. State v. Quick, 20 N.C. App. 589, 202 S.E.2d 299 (1974).

Possession of Recently Stolen Goods. — In a prosecution under this section, the doctrine of possession of recently stolen goods does not apply unless there is proof that the property had been stolen. State v. McKay, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

In a prosecution under this section, the doctrine of inference of guilt derived from the possession of recently stolen goods applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence, and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. State v. McKay, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

Possession of recently stolen goods does not have to be such that the goods are actually in the hands or on the person of the accused. It is sufficient if the property was under his exclusive personal control. State v. McKay, 32 N.C. App. 61, 231 S.E.2d 22 (1977).

Allegation of Ownership of Vehicle and Property Therein. — Where the bill of indictment specifically lays the ownership of the property contained in the motor vehicle in another named person, thereby negating the possibility of defendant's breaking and entering the vehicle to steal his own property, and the motor vehicle involved is described in detail and its possession is alleged to be in another, the technical ownership of the vehicle broken into is immaterial. State v. Harrington, 15 N.C. App. 602, 190 S.E.2d 280 (1972).

The State's evidence was sufficient for submission of the question to the jury as to whether an entry had been committed by the defendant where the defendant was standing on the street at the open door of a van with the upper part of his body inside the van. State v. Sneed, 38 N.C. App. 230, 247 S.E.2d 658 (1978).

Evidence of Control by Defendant Lacking. — In a prosecution for breaking and entering a motor vehicle and larceny, evidence that defendant was present in the vehicle containing stolen items and with individuals who had attempted to negotiate stolen traveler's checks, without any evidence that any of the stolen items were under the actual control of defendant, is insufficient to carry the question of defendant's guilt to the jury. State v. Millsaps, 29 N.C. App. 176, 223 S.E.2d 559 (1976).

Cited in State v. Brown, 198 N.C. 41, 150 S.E. 635 (1929); State v. Hendricks, 207 N.C. 873, 178 S.E. 557 (1935); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

§ 14-56.1. Breaking into or forcibly opening coin- or currency-operated machines.

Any person who forcibly breaks into, or by the unauthorized use of a key or other instrument opens, any coin- or currency-operated machine with intent to steal any property or moneys therein shall be guilty of a misdemeanor punishable by fine or imprisonment or both in the discretion of the court, but if such person has previously been convicted of violating this section, such person shall be punished as a Class H felon. The term "coin- or currency-operated machine" shall mean any coin- or currency-operated vending machine, pay telephone, telephone coin or currency receptacle, or other coin- or currency-activated machine or device.

There shall be posted on the machines referred to in G.S. 14-56.1 a decal stating that it is a crime to break into vending machines, and that a second offense is a felony. The absence of such a decal is not a defense to a prosecution for the crime described in this section. (1963, c. 814, s. 1; 1977, c. 723, ss. 1, 3; 1979, c. 760, s. 5; c. 767, s. 1.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The first 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony" at the end of the first sentence of the first paragraph. The first 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The second 1979 amendment added the second sentence of the second paragraph.

CASE NOTES

Cited in Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

§ 14-56.2. Damaging or destroying coin- or currency-operated machines.

Any person who shall willfully and maliciously damage or destroy any coin- or currency-operated machine shall be guilty of a misdemeanor punishable by fine or imprisonment or both in the discretion of the court. The term "coin- or currency-operated machine" shall be defined as set out in G.S. 14-56.1. (1963, c. 814, s. 2; 1977, c. 723, s. 2.)

§ 14-56.3. Breaking into paper currency machines.

Any person, who with intent to steal any moneys therein forcibly breaks into any vending or dispensing machine or device which is operated or activated by the use, deposit or insertion of United States paper currency, shall be guilty of a misdemeanor, but if such person has previously been convicted of violating this section, such person shall be punished as a Class H felon.

There shall be posted on the machines referred to in G.S. 14-56.3 a decal stating that it is a crime to break into paper currency machines. The absence of such a decal is not a defense to a prosecution for the crime described in this section. (1977, c. 853, ss. 1, 2; 1979, c. 760, s. 5; c. 767, s. 2.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The first 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony" at the end of the first paragraph. The first 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The second 1979 amendment added the second sentence of the second paragraph.

CASE NOTES

Cited in State v. Tilley, 44 N.C. App. 313, 260 S.E.2d 794 (1979).

§ 14-57. Burglary with explosives.

Any person who, with intent to commit any felony or larceny therein, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gunpowder, or any other explosive, or acetylene torch, shall be deemed guilty of burglary with explosives. Any person convicted under this section shall be punished as a Class E felon. (1921, c. 5; C. S., s. 4237 (a); 1969, c. 543, s. 6; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class E felon" for "as burglary in the second degree, as provided in G.S. 14-52" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

"Burglary with explosives" was unknown to the common law. Obviously, it is separate and distinct from the crime of burglary named in § 14-51. United States v. Brandenburg, 144 F.2d 656 (3rd Cir. 1944).

This section is not void for vagueness. Dean v. North Carolina, 269 F. Supp. 986 (M.D.N.C. 1967).

Applied in In re McKnight, 229 N.C. 303, 49 S.E.2d 753 (1948); State v. Roux, 263 N.C. 149, 139 S.E.2d 189 (1964); State v. Roux, 266 N.C. 555, 146 S.E.2d 654 (1966).

Cited in State v. Vick, 213 N.C. 235, 195 S.E. 779 (1938); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976).

ARTICLE 15.

Arson and Other Burnings.

§ 14-58. Punishment for arson.

There shall be two degrees of arson as defined at the common law. If the dwelling burned was occupied at the time of the burning, the offense is arson in the first degree and is punishable as a Class C felony. If the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree and is punishable as a Class D felony. (R. C., c. 34, s. 2; 1870-1, c. 222; Code, s. 985; Rev., s. 3335; C. S., s. 4238; 1941, c. 215, s. 2; 1949, c. 299, s. 3; 1973, c. 1201, s. 4; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to accomplices, see § 14-5. As to eligibility of prisoners serving life sentence for parole, see § 15A-1371. As to arrests and prosecutions by Attorney General, see § 69-2.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote this section, which formerly provided for punishment by imprisonment for life for any person convicted of arson. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For article entitled "Capital Punishment and Life Imprisonment in North Carolina, 1946 to 1968: Implications for Abolition of the Death Penalty," see 6 Wake Forest Intra. L. Rev. 417 (1970).

CASE NOTES

Purpose. — The main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned. Where there are several apartments in a single building, this purpose can be served only by subjecting to punishment for arson any person who sets fire to any part of the building. State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978); State v. Wyatt, 48 N.C. App. 709, 269 S.E.2d 717 (1980).

Common-Law Offense. — Arson is not defined by statute but is a common-law offense. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Specific intent is not an essential element of the crime of common-law arson. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

The common-law definition of arson is still in force in this State. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956); State v. Gulley, 46 N.C. App. 822, 266 S.E.2d 8 (1980).

Sufficiency of Indictment. — An indictment was sufficient to charge defendant with common-law arson of an apartment where it alleged that apartment 9F was burned and apartment 9E was occupied by a named person, since Building 9 of the apartments, comprised of apartments A through F, constituted one dwelling house such that the requirement of a burning could be satisfied by the charring in 9F while the requirement of occupancy could be satisfied by the tenant's presence in 9E. State v. Wyatt, 48 N.C. App. 709, 269 S.E.2d 717 (1980).

Evidence held admissible in prosecution for arson as tending to show ill will towards occupants of house burned and as being part of res gestae. State v. Smith, 225 N.C. 78, 33 S.E.2d 472 (1945).

Evidence Sufficient to Go to Jury. — Where the defendant set fire to his own apartment, but there were three other occupied apartments in the building, the evidence was sufficient to go to the jury on the charge of common-law arson. State v. Jones, 296 N.C. 75, 248 S.E.2d 858 (1978).

Voluntary intoxication is not a defense to a charge of arson. State v. White, 291 N.C. 118, 229 S.E.2d 152 (1976).

Instructions. — In a prosecution of defendant for burning an apartment, it was immaterial which person occupied which apartment in view of the court's ruling that Building 9 of the apartments, with all its individual apartments, constituted a single dwelling house, and defendant therefore was not prejudiced by the trial court's instructions which placed people in the wrong apartment. State v. Wyatt, 48 N.C. App. 709, 269 S.E.2d 717 (1980).

Cited in State v. Freeman, 197 N.C. 376, 148 S.E. 450 (1929); State v. Wilfong, 222 N.C. 746, 24 S.E.2d 629 (1943); State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974); State v. Williams, 286 N.C. 422, 212 S.E.2d 113 (1975); State v. McLaughlin, 286 N.C. 597, 213 S.E.2d 238 (1975); State v. Woodson, 287 N.C. 578, 215 S.E.2d 607 (1975); State v. Phillips, 297 N.C. 600, 256 S.E.2d 212 (1979); State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979).

§ 14-58.1. Definition of "house" and "building."

As used in this Article, the terms "house" and "building" shall be defined to include mobile and manufactured-type housing and recreational trailers. (1973, c. 1374.)

§ 14-58.2. Burning of mobile home, manufactured-type house or recreational trailer home.

If any person shall willfully and maliciously burn any mobile home or manufactured-type house or recreational trailer home which is the dwelling house of another and which is occupied at the time of the burning, the same shall constitute the crime of arson in the first degree. (1973, c. 1374; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, added "in the first degree" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-59. Burning of certain public buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other governmental or quasi-governmental entity, he shall be punished as a Class E felon. (1830, c. 41, s. 1; R. C., c. 34, s. 7; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 3; Rev., s. 3344; C. S., s. 4239; 1965, c. 14; 1971, c. 816, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class E felon" for "guilty of a felony and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Intent Necessary. — If the prisoner put fire to the jail, not with an intention of destroying it, he is not guilty under the act. But if he put fire to the jail and burnt it with an intent to burn it down and destroy it, he is guilty, notwithstanding the fire went out, or was put out by others before the intention of the prisoner was completed by burning down the jail; and this is the law, although his main intention was to escape. State v. Mitchell, 27 N.C. 350 (1845).

Applied in State v. DeGraffenreidt, 17 N.C. App. 550, 195 S.E.2d 84 (1973).

Cited in State v. Gulley, 46 N.C. App. 822, 266 S.E.2d 8 (1980).

§ 14-60. Burning of schoolhouses or buildings of educational institutions.

If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any schoolhouse or building owned, leased or used by any public or private school, college or educational institution, he shall be punished as a Class E felon. (1901, c. 4, s. 28; Rev., s. 3345; 1919, c. 70; C. S., s. 4240; 1965, c. 870; 1971, c. 816, s. 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class E felon" for "guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Cited in State v. Kelly, 5 N.C. App. 209, 167 S.E.2d 881 (1969).

§ 14-61. Burning of certain bridges and buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any public bridge, or private toll bridge, or the bridge of any incorporated company, or any fire-engine house or rescue-squad building, or any house belonging to an incorporated company or unincorporated association and used in the business of such company or association, he shall be punished as a Class E felon. (1825, c. 1278, P. R.; R. C., c. 34, s. 30; Code, s. 985, subsec. 4; Rev., s. 3337; C. S., s. 4241; 1971, c. 816, s. 3; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class E felon" for "guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws

1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

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City Market House. — A person charged with damaging a market house by fire must be tried under this section and not under a municipal ordinance as the general law must prevail over the ordinance, when they conflict. The municipal court would have jurisdiction only by express legislation conveying it. Town of Washington v. Hammond, 76 N.C. 33 (1877).

§ 14-62. Burning of churches and certain other buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be punished as a Class E felon. (1874-5, c. 228; Code, s. 985, subsec. 6; 1885, c. 66; 1903, c. 665, s. 2; Rev., s. 3338; C. S., s. 4242; 1927, c. 11, s. 1; 1953, c. 815; 1959, c. 1298, s. 1; 1971, c. 816, s. 4; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to burning of ginhouses and tobacco houses, see § 14-64. As to setting fire to grass and brushlands and woodlands, see § 14-136. As to burning crops in fields, see § 14-141.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class E felon" for "guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For comment on the 1953 amendment, see 31 N.C.L. Rev. 403 (1953).

CASE NOTES

I. General Consideration.
II. Indictment.
III. Evidence.
IV. Questions for Jury.

I. GENERAL CONSIDERATION.

Constitutionality. — This section is not unconstitutional as violative of the Fourteenth Amendment to the Constitution of the United States. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

The imposition of a sentence of 12 years in prison for violation of this section is not cruel and unusual punishment under the Eighth and Fourteenth Amendments to the Constitution of the United States. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

This section clearly and specifically defines the prohibited conduct and sets out the possible punishment. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

This section cannot be extended to cover structures not intended by the legislature. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Crime Fixed Herein Is Separate from That in § 14-66. — A verdict of not guilty on a count brought under this section does not necessarily carry a verdict of not guilty on a second count brought under § 14-66, the counts being separate and distinct and each requiring proof of facts which the other does not. State v. Pierce, 208 N.C. 47, 179 S.E. 8 (1935).

Inquiry Desirable. — Inquiry into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced is a procedure particularly desirable in respect to this section, which covers the wanton and willful burning of a wide variety of structures. State v. Stewart, 4 N.C. App. 249, 166 S.E.2d 458 (1969).

Applied in In re Reddy, 16 N.C. App. 520, 192 S.E.2d 621 (1972); State v. Caron, 288 N.C. 467, 219 S.E.2d 68 (1975); State v. Moorefield, 33 N.C. App. 37, 234 S.E.2d 25 (1977).

Cited in State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971); State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); Moorefield v. Garrison, 464 F. Supp. 892 (W.D.N.C. 1979).

II. INDICTMENT.

Indictment in Language of Section Insufficient. — Where a bill of indictment merely charges the offense in the language of this section, it fails to meet the minimum requirements as to identity of the offense attempted to be charged and is fatally defective. State v. Banks, 247 N.C. 745, 102 S.E.2d 245 (1958).

"Wantonly and Willfully" Must Be Charged. — An indictment charged that the defendant "did unlawfully, willfully and feloniously set fire to and burn a certain ginhouse, belonging to B. and in the possession of one G." Verdict of guilty and defendant moved in arrest of judgment for that this section had been amended (Laws 1885, c. 66) by striking out the words "unlawfully and maliciously" and "willfully," and that the words used in the indictment are not synonymous with those required by the amended statute. The objection would be well taken if this indictment was sustainable only under this section. State v. Massey, 97 N.C. 465, 2 S.E. 445 (1887); State v. Morgan, 98 N.C. 641, 3 S.E. 927 (1887). But it is a valid indictment under § 14-64, as was held in State v. Thorne, 81 N.C. 555 (1879), cited and followed by State v. Green, 92 N.C. 779 (1885). It seems to be the rule that "unlawfully and willfully" do not answer the requirements under this section but under § 14-64 it is sufficient in the indictment. State v. Pierce, 123 N.C. 745, 31 S.E. 847 (1898).

Title to Property Immaterial. — In the indictment it is not necessary to set out that the burned property "was the property of" or "was in the possession of" anyone. The constituent element is "willful and wanton." State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897).

An allegation of ownership or of possession suffices to meet the requirements of identity under this section. State v. Banks, 247 N.C. 745, 102 S.E.2d 245 (1958).

Charge of Particular Intent. — It was formerly the rule that an indictment under this section for burning a barn must aver that the act was done "with intent thereby to injure or defraud" some person. And an indictment for such offense at common law had to charge that the barn contained hay or grain, or was a parcel of the dwelling house. State v. Porter, 90 N.C. 719 (1884).

Same — Not Necessary. — An indictment for burning a mill, under this section, need not allege that the prisoner set fire to the mill with the intent to injure some particular person. State v. Rogers, 94 N.C. 860 (1886).

Defendant Is Charged with Complicity in Burning. — When an individual is prosecuted for procuring felonious burning under this section he is being charged with complicity in the burning and not with mere solicitation. State v. Sargent, 22 N.C. App. 148, 205 S.E.2d 768 (1974).

III. EVIDENCE.

Burden of Proof on Plea of Not Guilty. — Where a plea of not guilty is entered in a prosecution for common-law arson or for the statutory felony of burning a building contrary to this section it is incumbent on the State to prove both the fire and cause of the fire and the connection of the accused with the crime. State v. Cuthrell, 233 N.C. 274, 63 S.E.2d 549 (1951).

Defendant's plea of not guilty in a prosecution under this section places the burden upon the State to prove: (1) the fire, (2) that it was of incendiary origin, and (3) that defendant was connected with the crime. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

State Must Prove That Building Was in Fact Burned. — To establish guilt in procuring arson, it is necessary for the State to prove not only that defendant instructed someone to burn the building, but also that the building was in fact burned. State v. Sargent,

22 N.C. App. 148, 205 S.E.2d 768 (1974).

Necessity for Proving Nature and Use of Structure. — Under an indictment charging that the defendant willfully and feloniously procured the burning of a certain building used in carrying on a trade, the burden rests on the State to prove that the defendant unlawfully procured the burning of (1) a structure that answered to the description of a "building" within the meaning of this section, and also (2) that the structure was "used in carrying on a trade," within the purview of the section. Findings by the jury concerning these two elements of the statutory offense charged are quite as essential to a conviction as proof of the fact of procuring the burning of the structure. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Proof of Title Not Necessary. — "Ownership is alleged only to identify the property, and is sufficiently proved by showing occupancy." State v. Gailor, 71 N.C. 88 (1874); State v. Jaynes, 78 N.C. 504 (1878); State v. Thompson, 97 N.C. 496, 1 S.E. 921 (1887); State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897); State v. Sprouse, 150 N.C. 860, 64 S.E. 900 (1909).

"This section was copied from the English Statute of 7 and 8 Geo. IV., c. 30; and under that it was sufficient to allege the building simply 'of' A. (Archb. Cr. Pl. [3d Am. Ed.] 262, and lxiv.); and this is the better practice, proof of either possession or property being sufficient identification." State v. Daniel, 121 N.C. 574, 28 S.E. 255 (1897).

Motive or Intent. — "It is not always necessary to show either a motive or an intent, for in some offenses the intent to do the forbidden act is the criminal intent, and the act committed with that intent constitutes the crime. If the person has done the act which in itself is a violation of the law, he will not be heard to say that he did not have the intent. State v. King, 86 N.C. 603 (1882); State v. Voight, 90 N.C. 741 (1884); State v. Smith, 93 N.C. 516 (1885); State v. McBrayer, 98 N.C. 619, 2 S.E. 755 (1887); State v. McLean, 121 N.C. 589, 28 S.E. 140, 42 L.R.A. 721 (1897). But this principle does not apply when the act is itself equivocal and becomes criminal only by reason of the intent." State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

The proof of threats directed against the son and grandson, from their near relationship to the owner of a burned house, was relevant, though perhaps feeble, in showing general ill will to the family and a motive for the act. State v. Rash, 34 N.C. 382 (1851); State v. Gailor, 71 N.C. 88 (1874); State v. Green, 92 N.C. 779 (1885); State v. Thompson, 97 N.C. 496, 1 S.E. 921 (1887).

Bad Feeling. — It was entirely competent for the State to show motive upon the part of the defendant to burn a barn occupied and used by the witness, and to that end it was proper to show that bad feeling existed, and the reasons for it, but that part of a reply of a witness in which he stated that defendant had been convicted of stealing and sent to the chain gang should have been excluded and the jury carefully cautioned not to regard it as it put the character of the defendant in issue. State v. Barrett, 151 N.C. 665, 65 S.E. 894 (1909).

Same — Toward Agent. — Ill will toward an agent of the owner of a building was not sufficient to show motive for setting fire to the building, as such evidence was too remote. State v. Battle, 126 N.C. 1036, 35 S.E. 624 (1900).

Admissibility. — Under an indictment for burning a barn, evidence of bad blood for the owner of the barn, footprints, failure of defendant to go to fire when the remainder of the neighborhood was there, the hour defendant arose, and his acts when notified of the fire was admissible and was sufficient to sustain a verdict of guilty. State v. Allen, 149 N.C. 458, 62 S.E. 597 (1908).

On trial under indictment under this section for burning a barn to collect fire insurance thereon, evidence that the defendant at another place, at some indefinite time in the past, had another barn burn was incompetent and did not come within the exceptions to the general rule, there being no causal relation between the two fires, or logical or natural connection between them, nor were they a part of the same transaction. State v. Deadmon, 195 N.C. 705, 143 S.E. 514 (1928).

Same — Opinion Evidence as to Origin of Fire. — In a prosecution under this section it was reversible error to admit opinion testimony that the fire was of incendiary origin since the facts constituting the basis for such conclusion were so simply and readily understood that it was for the jury to draw the conclusion from testimony as to the facts, and since the conclusion is not a proper subject of opinion testimony. State v. Cuthrell, 233 N.C. 274, 63 S.E.2d 549 (1951).

An expert in arson investigation may properly give his opinion that a fire was of incendiary origin where his opinion is based on the expert's own examination of the premises and based on a proper hypothetical question supported by the evidence. State v. Sheetz, 46 N.C. App. 641, 265 S.E.2d 914 (1980).

Subsequent Attempt to Fire Another Building. — Where the defendant was indicted for setting fire to an outhouse, evidence was competent to show that at the same time an attempt was made to fire a dwelling house near it, the evidence directly connecting the defendant with the latter attempt. State v.

Thompson, 97 N.C. 496, 1 S.E. 921 (1887).

Effect of Evidence That Dwelling Was Inhabited. — Defendant who was charged with the unlawful burning of an uninhabited dwelling pursuant to this section was entitled to have his motion for nonsuit granted, since the evidence tended to show that the mobile home burned was used by three people as their place of residence. Their temporary absence at the time of the fire did not make the dwelling an uninhabited house within the meaning of this section. State v. Gulley, 46 N.C. App. 822, 266 S.E.2d 8 (1980).

Evidence Held Insufficient. — The evidence against the defendant on a charge of malicious burning of a dwelling house was held insufficient to survive a motion to dismiss. State v. Blizzard, 280 N.C. 11, 184 S.E.2d 851 (1971).

IV. QUESTIONS FOR JURY.

Must Be Sufficient Evidence. — The general rule is, if there be any evidence tending to prove the fact in issue the weight of it must be left to the jury, but if there be no evidence conducing to that conclusion the judge should say so, and, in a criminal case, direct an acquittal. In State v. Vinson, 63 N.C. 335 (1869), it was said: "But it is confessedly difficult to draw the line between evidence which is very slight, and that which, as having no bearing on the fact to be proved, is in relation to that fact no evidence at all." The evidence must be more than sufficient to raise a suspicion or a conjecture. State v. Rhodes, 111 N.C. 647, 15 S.E. 1038 (1892).

Nature and Use of Structure. — It is for the jury to find and declare by their verdict, among other things, (1) whether the structure alleged to have been burned had arrived at such a stage of completion as to be usable for some useful purpose so as to make it a building within the meaning of the statute, and, if so, (2) whether it had been put to use in the occupation or business of the lessee prior to the fire. The action of the trial court in assuming the existence of these disputed facts was prejudicial error. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Duty of Trial Court to Define and Explain Words. — The duty rests upon the trial court to define and explain to the jury the meaning of (1) "building," and (2) "used in carrying on any trade," as used in this section State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

The word "trade" as used in this section means more than traffic in goods, and the like. It is used in its broader sense, and as such is synonymous with "occupation" or "calling." Thus the word "trade" as here used embraces any ordinary occupation or business, whether manual or mercantile. State v. Cuthrell, 235 N.C. 173, 69 S.E.2d 233 (1952).

Intent. — It is prima facie presumed that a person intended the natural consequence of his act when he set fire to a building. But this is subject to rebuttal by evidence to the contrary and then "intent" becomes a question for the jury. State v. Phifer, 90 N.C. 721 (884).

Alibi. — The burden of proving an alibi does not rest on the prisoner, but the burden of proving the guilt of the prisoner rests on the State. It is for the jury to decide, and it is only necessary for the prisoner to offer enough evidence to produce in the mind of the jury a reasonable doubt. State v. Jaynes, 78 N.C. 504 (1878).

Evidence Sufficient to Submit to Jury. — On the trial of defendant of burning a barn, the tracing by the bloodhounds some two hours later of a track leading from the rear of the barn to defendant's residence, together with the identification of the track as that of defendant by one of his shoes, with evidence of motive, was sufficient evidence of guilt to take the case to the jury. State v. Thompson, 192 N.C. 704, 135 S.E. 775 (1926).

On trial for willfully and wantonly burning a barn in violation of this section, evidence of the felonious origin of the fire and of the identity of the defendant as the culprit was sufficient to be submitted to the jury that defendant had committed the crime, the corpus delicti being reasonably inferable from the circumstances, there being evidence that a fresh boot track found at the scene of the crime was made by defendant's boot, and that defendant failed to answer charges of his brother, made in presence of officers, under circumstances calling for a reply. State v. Wilson, 205 N.C. 376, 171 S.E. 338 (1933).

For circumstantial evidence sufficient for jury, see State v. Moore, 262 N.C. 431, 137 S.E.2d 812 (1964).

Evidence Insufficient to Submit to Jury. — Where the only evidence against a person accused of burning a barn was threats made by him, without any evidence connecting him with the execution of said threats, or with the offense charged, the trial judge should have withdrawn the case from the jury. State v. Freeman, 131 N.C. 725, 42 S.E. 575 (1902).

Where, in a prosecution under this section, the evidence fails to establish the felonious origin of the fire or the identity of the defendant as the one who committed the offense charged, or circumstances from which these facts might reasonably be inferred, it is insufficient to be submitted to the jury. State v. Church, 202 N.C. 692, 163 S.E. 874 (1932).

§ 14-62.1. Burning of building or structure in process of construction.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any building or structure in the process of construction for use or intended to be used as a dwelling house or in carrying on any trade or manufacture, or otherwise, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be punished as a Class E felon. (1957, c. 792; 1971, c. 816, s. 5; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class E felon" for "guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than two nor more than 30 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-63. Burning of boats and barges.

If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, any boat, barge, ferry or float, without the consent of the owner thereof, he shall be punished as a Class H felon. In the event the consent of the owner is given for an unlawful or fraudulent purpose, however, the penalty provisions of this section shall remain in full force and effect. (1909, c. 854; C. S., s. 4243; 1971, c. 816, s. 6; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and shall, on conviction, be punished by imprisonment in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court" at the end of the first sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-64. Burning of ginhouses and tobacco houses.

If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any ginhouse or tobacco house, or any part thereof, he shall be punished as a Class H felon. (1863, c. 17; 1868-9, c. 167, s. 5; Code, s. 985, subsec. 2; 1903, c. 665, s. 1; Rev., s. 3341; C. S., s. 4244; 1971, c. 816, s. 7; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to setting fire to churches and certain other buildings, see § 14-62. As to setting fire to grass and brushlands and woodlands, see §§ 14-136 and 14-137. As to burning crops in the field, see § 14-141.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class H felon" for "shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Indictment in General. — That any informality will not be grounds for quashing proceeding if the charge is set out in a clear manner and enough matter appears to enable the court to proceed to judgment, see § 15-153. That judgments will not be vitiated for failure to aver certain unnecessary matter, see § 15-155. State v. Rogers, 168 N.C. 112, 83 S.E. 161 (1914).

Necessity of Alleging "Willful Burning". — In the case of State v. Thorne, 81 N.C. 555 (1879), there was an indictment for unlawfully, maliciously and feloniously burning a ginhouse. The court was asked to charge the jury that the defendant could not be convicted under the act of 1869, because the burning was not charged to have been willfully done. The court held that the word maliciously was more comprehensive and included willfully. State v. Green, 92 N.C. 779 (1885).

Necessity of Showing Motive. — It is never indispensable to a conviction that a motive for the commission of the crime should appear. But when the State has to rely upon circumstantial evidence to establish the guilt of the defendant, it is not only competent, but often very important, in strengthening the evidence for the prosecution, to show a motive for committing the crime. State v. Green, 92 N.C. 779 (1885).

§ 14-65. Fraudulently setting fire to dwelling houses.

If any person, being the occupant of any building used as a dwelling house, whether such person be the owner thereof or not, or, being the owner of any building designed or intended as a dwelling house, shall wantonly and willfully or for a fraudulent purpose set fire to or burn or cause to be burned, or aid, counsel or procure the burning of such building, he shall be punished as a Class H felon. (Code, s. 985; 1903, c. 665, s. 3; Rev., s. 3340; 1909, c. 862; C. S., s. 4245; 1927, c. 11, s. 2; 1971, c. 816, s. 8; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall, on conviction, be punished by imprisonment in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

The main import of this section is protection of the property itself, whereas the gravamen of the offense of common-law arson is the danger that results to persons who are or might be in the dwelling. State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975), vacated on other grounds, 291 N.C. 118, 229 S.E.2d 152 (1976).

Essential Element of Crime. — Burning or procuring to be burned the dwelling house occupied by defendant to constitute a criminal offense must have been done willfully and wantonly, or for a fraudulent purpose. To convict the defendant something more must be found than the fact that the house was burned, and that it was done at the instance and request of the defendant. By the terms of this section an essential element of the crime charged was that it be done willfully and wantonly or for a fraudulent purpose. State v. Cash, 234 N.C. 292, 67 S.E.2d 50 (1951).

Burning a dwelling for the purpose of frightening the occupant and keeping him from testifying for the State would clearly be a willful and malicious burning, but it would not by a burning "for a fraudulent purpose." State v. White, 288 N.C. 44, 215 S.E.2d 557 (1975), vacated on other grounds, 291 N.C. 118, 229 S.E.2d 152 (1976).

Indictment Need Not Specify Particular Fraudulent Purpose. — Where in a prosecution under this section the indictment charges that the defendant burned his dwelling house for the fraudulent purpose of obtaining insurance money thereon, and the court charges the jury that if they should find beyond a reasonable doubt that the defendant did the act charged for a fraudulent purpose, it was not necessary for the bill of indictment to specify any particular fraudulent purpose, and the unnecessary allegation in the bill is not, necessarily, fatal. State v. Morrison, 202 N.C. 60, 161 S.E. 725 (1932).

Sufficiency of Evidence. — Evidence that fire in defendant's house started in a closet in which was hanging a quilt soaked in kerosene, that kindling wood was on the floor of the closet, that the closet had no ceiling, but opened at the top into the attic, that defendant was being pressed to pay installments on the mortgage on the house, and was threatened with foreclosure, with other incriminating circumstantial evidence, establishes a motive and an opportunity for the defendant to commit the crime, and that the fire was of incendiary origin, and is sufficient to be submitted to the jury in a prosecution under this section. State v. Moses, 207 N.C. 139, 176 S.E. 267 (1934).

Cited in State v. Kluttz, 206 N.C. 726, 175 S.E. 81 (1934); State v. Saults, 294 N.C. 722, 242 S.E.2d 801 (1978).

§ 14-66. Burning of personal property.

If any person shall wantonly and willfully set fire to or burn, or cause to be burned, or aid, counsel or procure the burning of, any goods, wares, merchandise or other chattels or personal property of any kind, whether or not the same shall at the time be insured by any person or corporation against loss or damage by fire, with intent to injure or prejudice the insurer, the creditor or the person owning the property, or any other person, whether the property is that of such person or another, he shall be punished as a Class H felon. (1921, c. 119; C. S., s. 4245 (a); 1971, c. 816, s. 9; 1979, c. 760 s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Crime Separate From That Under § 14-62. See note under § 14-62.

Intent to Injure or Prejudice Owner. — A violation of this section requires, in addition to the willful and wanton burning of personal property, that the defendant have the specific intent to injure or prejudice the owner of the property. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, State v. Wesson, 45 N.C. 510, 263 S.E.2d 298 (1980).

The legislature chose to add the element of intent to injure or prejudice and, until this section is amended, the State must prove beyond a reasonable doubt such intent. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, State v. Wesson, 45 N.C. 510, 263 S.E.2d 298 (1980).

The holding in State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), that an intent to injure or prejudice the owner of the burned property must be shown by evidence other than the act of buring itself, is overruled. State v. Wesson, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

In a prosecution for the unlawful burning of personal property, a stolen automobile, in violation of this section, the jury could properly find an intent to injure or prejudice the owner or some other person by the burning from the nature of the act — the willful burning of an automobile stolen from a stranger, evidence that defendant poured paint thinner over the interior of the car and set it on fire, and defendant's alleged statement that the automobile should be burned because it was nothing but trash. State v. Wesson, 45 N.C. App. 510, 263 S.E.2d 298 (1980).

"Willful" means the wrongful doing of an act without justification or excuse, or purposely and deliberately in violation of the law. State v. Murchinson, 39 N.C. App. 163, 249 S.E.2d 871 (1978), overruled on other grounds, State v. Wesson, 45 N.C. 510, 263 S.E.2d 298 (1980).

Evidence Held Insufficient. — Evidence that defendant's car was driven away from defendant's house shortly before defendant's personal property therein was destroyed by fire, and that the car had been driven to the house several times during the days preceding the fire, and that the occupants of the car were heard in the house, is held insufficient, in the absence of evidence that defendant was one of the occupants of the car, to resist defendant's motions for judgment as of nonsuit in a prosecution under this section, although there was ample evidence that the fire was of incendiary origin and destroyed personal property of defendant which had been insured by him. State v. Simms, 208 N.C. 459, 181 S.E. 269 (1935).

§ 14-67. Attempting to burn dwelling houses and certain other buildings.

If any person shall wantonly and willfully attempt to set fire to or burn or cause to be burned any dwelling house, uninhabited house, the State Capitol, the Legislative Building, the Justice Building or any building owned or occupied by the State or any of its agencies, institutions or subdivisions or by any county, incorporated city or town or other governmental or quasi-governmental entity, any schoolhouse or building owned, leased or used by any public or private school, college or educational institution, or any public bridge, private toll bridge or the bridge of any incorporated company, or any fire-engine house or rescue-squad building, or any house belonging to an incorporated company or unincorporated association and used in the business of such company or association, any church, chapel or meetinghouse, or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure or erection used or intended to be used in carrying on any trade or manufacture, or otherwise, any boat, barge, ferry, or float, any ginhouse or tobacco house, or any part thereof, whether such buildings or structures or any of them shall then be in the possession of the offender or in the possession of any other person, he shall be punished as a Class H felon. (1876-7, c. 13; Code, s. 985, subsec. 7; Rev., s. 3336; C. S., s. 4246; 1957, c. 250, s. 1; 1959, c. 1298, s. 2; 1971, c. 816, s. 10; 1979, c. 760, s. 5.)

Cross References. — See note to § 14-64. For statute providing maximum punishment for felonies, see § 14-1.1. As to offense of burning an uninhabited house as distinguished from an attempt to do so, see § 14-144.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall, on conviction, be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

In General. — A conviction for burning a ginhouse can be had either under this section or § 14-64. All that is required is a clear statement of the charge and because of §§ 15-153, 15-155 if sufficient matter is set out in the charge, the proceedings will not be quashed, because of use of terms that have the same meaning as those used in the statute. If the punishment does not exceed that prescribed by either section it is immaterial under which section the conviction was had. State v. Rogers, 168 N.C. 112, 83 S.E. 161 (1914).

Felony created by this section is a lesser included offense of the crime of arson. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974). See State v. Green, 298 N.C. 793, 259 S.E.2d 904 (1979).

Attempt to commit arson is now a felony rather than a common-law misdemeanor under the provisions of this section. State v. Arnold, 285 N.C. 751, 208 S.E.2d 646 (1974).

Applied in State v. Lawhorn, 250 N.C. 598, 108 S.E.2d 863 (1959); State v. Stansbury, 14 N.C. App. 294, 187 S.E.2d 882 (1972).

Cited in State v. Hampton, 210 N.C. 283, 186 S.E. 251 (1936); State v. Williams, 10 N.C. App. 183, 178 S.E.2d 41 (1970); State v. Lynch, 279 N.C. 1, 181 S.E.2d 561 (1971).

§ 14-67.1. Burning or attempting to burn other buildings.

If any person shall wantonly and willfully set fire to or burn or cause to be burned or aid, counsel or procure the burning of, or attempt to burn, any building or other structure of any type not otherwise covered by the provisions of this Article, he shall be punished as a Class H felon. (1971, c. 816, s. 11; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall, on conviction be imprisoned in the State's prison for not less than four months nor more than 10 years, and may also be fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Cited in State v. McWhorter, 34 N.C. App. 462, 238 S.E.2d 639 (1977).

§ 14-68. Failure of owner of property to comply with orders of public authorities.

If the owner or occupant of any building or premises shall fail to comply with the duly authorized orders of the chief of the fire department, or of the Commissioner of Insurance, or of any municipal or county inspector of buildings or of particular features, facilities, or installations of buildings, he shall be guilty of a misdemeanor, and shall be fined not less than ten ($10.00) nor more than fifty dollars ($50.00) for each day's neglect, failure, or refusal to obey such orders. (1899, c. 58, s. 4; Rev., s. 3343; C. S., s. 4247; 1969, c. 1063, s. 1.)

§ 14-69. Failure of officers to investigate incendiary fires.

If any town or city officer shall fail, neglect or refuse to comply with any of the requirements of the law in regard to the investigation of incendiary fires, he shall be guilty of a misdemeanor and may be fined not less than twenty-five ($25.00) nor more than two hundred dollars ($200.00). (1899, c. 58, s. 5; Rev., s. 3342; C. S., s. 4248.)

§ 14-69.1. Making a false report concerning destructive device.

If any person shall, by any means of communication to any person or group of persons, make a report, knowing or having reason to know the same to be false, that there is located in any building, house or other structure whatsoever or any vehicle, aircraft, vessel or boat any device designed to destroy or damage the building, house or structure or vehicle, aircraft, vessel or boat by explosion, blasting or burning, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned or both in the discretion of the court. (1959, c. 555, s. 1.)

CASE NOTES

Cited in State v. Smith, 267 N.C. 755, 148 S.E.2d 844 (1966).

§ 14-69.2. Perpetrating hoax by use of false bomb or other device.

If any person, with intent to perpetrate a hoax, shall secrete, place or display and device, machine, instrument or artifact, so as to cause any person reasonably to believe the same to be a bomb or other device capable of causing injury to persons or property, he shall be guilty of a misdemeanor, and shall, upon conviction, be fined or imprisoned or both in the discretion of the court. (1959, c. 555, s. 1.)

CASE NOTES

Applied in State v. Peek, 22 N.C. App. 350, 206 S.E.2d 386 (1974).

SUBCHAPTER V. OFFENSES AGAINST PROPERTY.

ARTICLE 16.

Larceny.

§ 14-70. Distinctions between grand and petit larceny abolished; punishment; accessories to larceny.

All distinctions between petit and grand larceny are abolished. Unless otherwise provided by statute, larceny is a felony punishable under G.S. 14-2 and is subject to the same rules of criminal procedure and principles of law as to accessories before and after the fact as other felonies. (R. C., c. 34, s. 26; Code, s. 1075; Rev., s. 3500; C. S., s. 4249; 1969, c. 522, s. 1.)

Cross References. For statute providing the maximum punishment for felonies, see § 14-1.1. As to larceny from dwelling by breaking and entering, see § 14-51 et seq. As to larceny of property and receipt of stolen goods, see § 14-72. As to robbery, see § 14-87. As to obtaining property by false pretense, see § 14-100 et. seq. As to taking away or injuring exhibits at fairs, see § 14-164. As to theft of property from public libraries, museums, etc., see § 14-398. As to restitution of stolen property to its owner, see § 15-8. As to stealing of aircraft, see § 63-25.

Editor's Note. — The 1979 amendment to § 14-2, referred to in this section, provides that § 14-2 is not applicable to felonies occurring after July 1, 1981 and that § 14-1.1 shall apply to such felonies.

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
III. Practice and Procedure.

I. GENERAL CONSIDERATION.

Larceny is a common-law offense. But common-law larceny does not include every wrongful taking and carrying away of the personal property of another. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

At common law both grand and petit larceny were felonies. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

At common law the stealing of property of any value was a felony, and both grand larceny and petit larceny were felonies. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

Accessories Abolished. — There are no accessories to larceny. All that counsel and aid are guilty of the offenses as principals. State v. Gaston, 73 N.C. 93 (1875); State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953).

One Act Two Offenses. — A person committing larceny from the person, upon two persons at the same time may be tried and convicted for both offenses. State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895); State v. Bynum, 117 N.C. 752, 23 S.E. 219 (1895).

Applied in State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Bines, 263 N.C. 48, 138 S.E.2d 797 (1964); State v. Yates, 263 N.C. 100, 138 S.E.2d 787 (1964); Potter v. State, 263 N.C. 114, 139 S.E.2d 4 (1964); State v. Davis, 263 N.C. 127, 139 S.E.2d 23 (1964); State v. Dye, 268 N.C. 362, 150 S.E.2d 507 (1966); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967); State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973); State v. Irby, 19 N.C. App. 262, 198 S.E.2d 447 (1973); State v. Breeze, 26 N.C. App. 48, 214 S.E.2d 802 (1975).

Stated in State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Johnson, 7 N.C.App. 53, 171 S.E.2d 106 (1969).

Cited in State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969); State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969); State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969); Culp v. Bounds, 325 F. Supp. 416 (W.D.N.C. 1971); State v. Boone, 33 N.C. App. 378, 235 S.E.2d 74 (1977); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978); State v. Gosnell, 38 N.C. App. 679, 248 S.E.2d 756 (1978); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Boone, 297 N.C. 652, 256 S.E.2d 683 (1979).

II. ELEMENTS OF THE OFFENSE.

"Larceny". — Larceny, according to the common-law meaning of the term, may be defined as the felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965); State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Larceny is a wrongful taking and carrying away of the personal property of another without his consent, which is done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Larceny under §§ 14-80 and 14-148 Distinguished. — Where there was nothing in the record to establish that the urns or vases stolen by defendant from cemeteries were so connected to the land that they could not be the subject of common-law larceny or that they were affixed to the soil as tombstones or markers but rather they were movable objects of a decorative nature that were easily moved from the grave markers on which they rested, defendant was properly convicted of common-law larceny rather than the offenses under § 14-80 or § 14-148. State v. Schultz, 34 N.C. App. 120, 237 S.E.2d 349 (1977), aff'd, 294 N.C. 281, 240 S.E.2d 451 (1978).

The phrase "felonious intent" originated when both grand and petit larceny were felonies. Now "felonious intent," in the law of larceny, does not necessarily signify an intent to commit a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

Intent Is Necessary. — To constitute the crime of larceny, there must be an original, felonious intent, general or special, at the time of the taking. If such intent be present, no subsequent act or explanation can change the felonious character of the original act. But if the requisite intent be not present, the taking is only a trespass, and it cannot be felony by any subsequent misconduct or bad faith on the part of the taker. State v. Arkle, 116 N.C. 1017, 21 S.E. 408 (1895). State v. Holder, 188 N.C. 561, 563, 125 S.E. 113 (1924).

Felonious intent is an essential element of the crime of larceny. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

But "Intent to appropriate the goods to his own use" has been eliminated and is not now an essential element of the crime of larceny. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

And Intent Need Only Be To Deprive Owner of Property. — To constitute larceny it is not required that the purpose of the taking be to convert the stolen property to the pecuniary advantage or convenience of the taker but it is sufficient if the taking be fraudulent and with the intent wholly to deprive the owner of his property. State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Owner's Possession Must Be Severed. — Even if only for an instant, there must be a complete severance of the object from the owner's possession, to such an extent that the defendant has absolute possession of it. State v. Carswell, 36 N.C. App. 377, 243 S.E.2d 911, aff'd, 296 N.C. 101, 249 S.E.2d 427 (1978).

Casually Lost Property as Subject of Larceny. — Notwithstanding what was said in some of the earlier cases, the modern view in this jurisdiction as well as others is that casually lost property may be the subject of larceny as well as that which is mislaid. No distinction is now made between property "lost" and property "mislaid." State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Same — If at the time of finding, the finder knows or has reasonable means of knowing or ascertaining the owner, he is deemed guilty of larceny if he keeps the property with the intent to deprive the owner thereof. State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Same — Where a closed receptable, container or pocketbook is found and the contents are not known until later, a finder may be guilty of larceny if a felonious intent is formed as soon as the contents are discovered. State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Mitigation of Charge. — An indictment for larceny charges a felony, and it is a matter of defense to mitigate the charge to a misdemeanor by showing that the property taken was a value of less than the amount prescribed by statute, and that it was neither taken from the person nor from a dwelling house. State v. Benfield, 9 N.C. App. 657, 177 S.E.2d 306 (1970), vacated on other grounds, 278 N.C. 199, 179 S.E.2d 388 (1971).

III. PRACTICE AND PROCEDURE.

Indictment — Ownership of Property Must Be Alleged. — The common-law offense of larceny contemplates that the property taken must belong to or be in the possession of another and the statutory offense of embezzlement provides that the misappropriated property must belong to "any other person or corporation, unincorporated association, or organization." In view of the breadth of the offenses, the warrant or bill of indictment charging these offenses must allege the ownership of the property either in a natural person or a legal entity capable of owning property. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

In a prosecution for breaking or entering, and felonious larceny, the allegations of ownership described in a bill of indictment are essential. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

If the evidence offered at trial fails to show the ownership as alleged in the indictment of the premises entered and the property taken, a motion for judgment of nonsuit should be allowed, both to a charge of breaking or entering and to a charge of felonious larceny. State v. Crawford, 29 N.C. App. 117, 223 S.E.2d 534 (1976).

Same — Description of Property. — There is required a reasonable certainty in the designation of stolen property to enable the defendant to know and meet the specific charge if he can, and to protect himself if he cannot, from a second prosecution for the same offense. State v. Clark, 30 N.C. 226 (1848); State v. Horan, 61 N.C. 571 (1868); State v. Bragg, 86 N.C. 687 (1882).

In a prosecution for larceny, the property alledge to have been taken should be described by the name usually applied to it in its condition at that time, and, if possible, the number, kind, quality, and other distinguishing features. State v. Hartley, 39 N.C. App. 70, 249 S.E.2d 453 (1978), cert. denied, 296 N.C. 738, 254 S.E.2d 179 (1979).

Same — It is not necessary for an indictment to allege that a larceny was from the person for it to be shown. State v. Benfield, 9 N.C. App. 657, 177 S.E.2d 306 (1970), vacated on other grounds, 278 N.C. 199, 179 S.E.2d 388 (1971).

Same — Larceny and Malicious Mischief Distinguished. — An indictment for larceny at common law for stealing a cow is not supported by proof that the defendant shot the cow down and then cut off her ears. Such an act is not larceny, but malicious mischief. State v. Butler, 65 N.C. 309 (1871). See § 14-85.

Inference Arising From Possession of Recently Stolen Property. — The defendant's possession of the fruits of the crime recently after its commission justifies the inference of guilt on his trial for larceny. State v. Knight, 261 N.C. 17, 134 S.E.2d 101 (1964).

The doctrine of possession of recently stolen property is a factual presumption whereby a person found in the unexplained possession of recently stolen property is presumed to be the thief. State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976).

A defendant's possession of stolen goods soon after the theft is a circumstance tending to show him guilty of the larceny. State v. Greene, 30 N.C. App. 507, 227 S.E.2d 154 (1976).

Same — Burden of Proof. — Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), is inapposite to the so-called recent possession doctrine because that doctrine does not shift the burden of proof to the defendant. The doctrine only allows the jury to infer that the defendant stole the goods, because the State first proved that the stolen goods were in defendant's possession so soon after the theft that it was unlikely that he obtained them honestly. The doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence. Evidentiary inferences and presumptions such as this are unaffected by Mullaney. State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601, cert. denied, 292 N.C. 732, 235 S.E.2d 782 (1977).

Same — Instruction. — Where no evidence was presented which tended to show that codefendant was ever in possession, actual or constructive, of the recently stolen property, the instruction to apply the doctrine of possession of recently stolen property was prejudicial error as to him. State v. Majette, 30 N.C. App. 120, 226 S.E.2d 223 (1976).

Evidence held sufficient to withstand motion for nonsuit in prosecution for larceny. See State v. Ellis, 32 N.C. App. 226, 231 S.E.2d 285 (1977); State v. Craft, 32 N.C. App. 357, 232 S.E.2d 282, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

Where the evidence shows (1) that a breaking and entering occurred; (2) that prior thereto the accused had possession of an instrument used to effect it; (3) that such possession occurred within a short time prior to the breaking and entering; and (4) that the instrument was found at the scene of the crime immediately after the crime was committed, a jury would be justified in finding that the instrument had been brought there by the person who had been shown to have previously possessed it and that such person used it to effect the breaking and entering. If the evidence is also sufficient to show that the crime of larceny was committed pursuant to the breaking and entering, then the jury may infer that the accused is guilty of larceny as well as breaking and entering. State v. McNair, 36 N.C. App. 196, 243 S.E.2d 805 (1978).

Evidence Insufficient. — A charge of stealing two barrels of turpentine is not supported by proof of the taking of that quantity from the box cut in the tree to receive and hold the descending sap. State v. Moore, 33 N.C. 70 (1850); State v. Bragg, 86 N.C. 687 (1882).

Instructions — Intent. — The trial court, in charging the jury where the factual situation raises a question as to the intent to deprive permanently, should instruct on this element and add that while temporary deprivation will not suffice, if the defendant did not ever intend to return the property and was totally indifferent as to whether the owner ever recovered it, then that would constitute an "intent to permanently deprive." State v. Watts, 25 N.C. App. 194, 212 S.E.2d 557 (1975).

Same — Felonious Intent. — What is meant by felonious intent is a question for the court to explain to the jury, and whether it is present at any particular time is for the jury to say. State v. McCrary, 263 N.C. 490, 139 S.E.2d 739 (1965).

Same — Felonious Larceny of Automobile. — The trial court properly charged the jury that to find defendant guilty of the felonious larceny of an automobile, they must find from the evidence and beyond a reasonable doubt not only that defendant took and carried away the automobile without the owner's consent, knowing that he was not entitled to take it and intending at the time to deprive the owner of its use permanently, but also that the automobile was worth more than $200.00 (now $400.00). State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

Same — Failure to Charge Lesser Included Offense. — Where all of the evidence indicated that the value of the stolen property exceeded $200.00 (now $400.00), the trial court did not err by failing to instruct the jury to consider in addition an issue as to defendant's possible guilt or innocence of the lesser included offense of misdemeanor larceny. State v. Dickerson, 20 N.C. App. 169, 201 S.E.2d 69 (1973).

Since all the evidence indicated that the value of the stolen property exceeded $200.00 (now $400.00), the trial court did not err by failing to instruct as to the lesser included offense of misdemeanor larceny. State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

Verdict of Guilty of "Grand Larceny". — While there is no longer a crime in this State designated as "grand larceny" the verdict of the jury must be considered as tantamount to a verdict finding the defendant guilty as charged in the bill of indictment. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

§ 14-71. Receiving stolen goods.

If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing, shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such receiver may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such receiver may be dealt with, indicted, tried and punished in the county where he actually received such chattel, money, security, or other thing; and such receiver shall be punished as one convicted of larceny. (1797, c. 485, s. 2; R. C., c. 34, s. 56; Code, s. 1074; Rev., s. 3507; C. S., s. 4250; 1949, c. 145, s. 1; 1975, c. 163, s. 1.)

Cross References. — As to seizure and forfeiture of conveyance used in committing a crime under this section, see § 14-86.1.

Legal Periodicals. — As to elements of crime of receiving stolen goods, see 26 N.C.L. Rev. 192.

CASE NOTES

Editor's Note. — Many of the cases cited in the following annotation were decided under this section as it stood prior to the 1975 amendment which added the language concerning "reasonable grounds to believe" that property is stolen with respect to the degree of knowledge required to support a conviction.

I. General Consideration.
II. Elements of the Offense.
III. Practice and Procedure.

I. GENERAL CONSIDERATION.

The crimes of larceny and of receiving stolen goods, knowing them to have been stolen, are separate and distinct offenses. However, receiving stolen property is a sort of secondary crime based upon a prior commission of the primary crime of larceny. It presupposes, but does not include, larceny. Therefore, the elements of larceny are not elements of the crime of receiving. State v. Brady, 237 N.C. 675, 75 S.E.2d 155 (1953); State v. Neill, 244 N.C. 252, 93 S.E.2d 155 (1956).

The crime of receiving stolen goods is a sort of secondary crime based upon a prior commission of the primary crime of larceny. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674, rehearing denied, 409 U.S. 898, 93 S. Ct. 99, 34 L. Ed. 2d 157 (1972).

And Receiving Stolen Property Is Not Accessorial to Larceny. — This section, defining the offense of receiving stolen property, clearly creates an offense not accessorial to larceny. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (1974).

A person cannot be guilty both of stealing property and receiving the same property knowing it to have been stolen by someone else. State v. Prince, 39 N.C. App. 685, 251 S.E.2d 631, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979).

A person cannot be guilty of both larceny and receiving the same goods. Thus, one who steals property and one who receives it afterward from him knowing it to have been stolen, are guilty of separate offenses, and neither is the accomplice of the other. State v. Whitaker, 40 N.C. App. 251, 252 S.E.2d 242 (1979).

Same — Accessories Abolished. — By abolishing the distinction between petit and grand larceny the offense of accessory after the fact was also abolished, and one receiving stolen goods is treated and punished as principal. State v. Tyler, 85 N.C. 569 (1881).

Receiving stolen goods is not a lesser included offense of larceny, and jeopardy has not attached as to a proper larceny indictment. State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974).

The crimes of larceny and receiving stolen goods, knowing them to have been stolen, are separate offenses and not degrees of the same offense. State v. Prince, 39 N.C. App. 685, 251 S.E.2d 631, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979).

Or of Breaking and Entering. — Receiving stolen goods is not a lesser included offense of breaking and entering but a separate and distinct offense. State v. Miller, 18 N.C. App. 489, 197 S.E.2d 46, cert. denied, 283 N.C. 757, 198 S.E.2d 727 (1973).

Receiving or Transferring Stolen Vehicle Constitutes Separate Offense. — The two offenses under § 20-106 and this section are separate offenses. The latter is not a lesser included offense under the former. State v. Carlin, 37 N.C. App. 228, 245 S.E.2d 586 (1978).

Section Applies Only to Receiving, Not Possession or Offering for Sale. — The possession or offering for sale of goods, known to have been stolen, is not a statutory crime under this section, which applies only to receiving the stolen goods. State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974).

Applied in State v. Whitley, 208 N.C. 661, 182 S.E. 338 (1935); State v. Camby, 209 N.C. 50, 182 S.E. 715 (1935); State v. Law, 228 N.C. 443, 45 S.E.2d 374 (1947); State v. Best, 232 N.C. 575, 61 S.E.2d 612 (1950); State v. White, 256 N.C. 244, 123 S.E.2d 483 (1962); State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Vines, 262 N.C. 747, 138 S.E.2d 630 (1964); State v. Holloway, 262 N.C. 753, 138 S.E.2d 629 (1964); State v. Brown, 1 N.C. App. 145, 160 S.E.2d 508 (1968); State v. Burchfield, 30 N.C. App. 128, 226 S.E.2d 384 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Bowden, 37 N.C. App. 191, 245 S.E.2d 552 (1978); State v. Haywood, 297 N.C. 686, 256 S.E.2d (1979).

Cited in State v. Brown, 198 N.C. 41, 150 S.E. 635 (1929); Factor v. Laubenheimer, 290 U.S. 276, 54 S. Ct. 191, 78 L. Ed. 151 (1933); State v. Ray, 209 N.C. 772, 184 S.E. 836 (1936); State v. Conner, 212 N.C. 668, 194 S.E. 291 (1937); State v. Law, 227 N.C. 103, 40 S.E.2d 699 (1946); State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Wilson, 251 N.C. 174, 110 S.E.2d 813 (1959); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Haywood, 39 N.C. App. 639, 251 S.E.2d 620 (1979).

II. ELEMENTS OF THE OFFENSE.

In General. — The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. Sufficient evidence of all the essential elements of the offense must be made to appear in order to sustain a conviction. State v. Yow, 227 N.C. 585, 42 S.E.2d 661 (1947).

The essential elements of the crime of receiving stolen goods which must be proven, are stated as follows: (a) The stealing of the goods by some one other than the accused; (b) that the accused, knowing them to be stolen, received or aided in concealing the goods, and (c) continued such possession or concealment with a dishonest purpose. State v. Brady, 237 N.C. 675, 75 S.E.2d 791 (1953); State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972); State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972); State v. Lash, 21 N.C. App. 365, 204 S.E.2d 563, appeal dismissed, 285 N.C.

593, 206 S.E.2d 865 (1974); State v. Burnette, 22 N.C. App. 29, 205 S.E.2d 357 (1974), decided under this section as it stood before the 1975 amendment; State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979).

The essential elements of the offense of receiving stolen goods are the receiving of goods which had been feloniously stolen by some person other than the accused, with knowledge by the accused at the time of the receiving that the goods had been theretofore feloniously stolen, and the retention of the possession of such goods with a felonious intent or with a dishonest motive. State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968); State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971).

The criminality of the action denounced by this section consists in receiving with guilty knowledge and felonious intent goods which previously had been stolen. State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968).

Where a defendant, charged with a violation of this section, purchases property in a public business from one in custody or possession and with the actual or apparent authority to sell it, the State must prove that the property was taken by the seller in violation of a felony statute, such as § 14-74, and that at the time of the transaction the defendant had knowledge, or reasonable grounds to believe, that the seller had so taken the property and had no authority to transact the sale. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

In a prosecution for receiving stolen goods, having established the theft of goods by someone other than the accused, the State had further to establish that the accused, knowing or having reasons to know the goods were stolen, received or aided in concealing the goods and continued such possession with a dishonest purpose. State v. Moore, 46 N.C. App. 259, 264 S.E.2d 899 (1980).

Guilty Knowledge Essential. — This section makes guilty knowledge one of the essential elements of the offense of receiving stolen goods. This knowledge may be acutal, or it may be implied when the circumstances under which the goods were received are sufficient to lead the party charged to believe they were stolen. State v. Stathos, 208 N.C. 456, 181 S.E. 273 (1935); State v. Grant, 17 N.C. App. 15, 193 S.E.2d 308 (1972).

Knowledge by the accused that the goods were stolen is an essential element of the offense of receiving stolen goods. State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971).

Guilty knowledge is one of the essential elements of the crime of receiving stolen goods. State v. May, 41 N.C. App. 370, 255 S.E.2d 303 (1979).

The test of guilty knowledge is whether defendant knew, or must have known, that the goods were stolen. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972).

Guilty knowledge may be inferred from incriminating circumstances. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972); State v. Allen, 45 N.C. App. 417, 263 S.E.2d 630 (1980).

Felonious intent in receiving stolen goods with knowledge at the time that they had been stolen is necessary to a conviction under this section, and a charge which fails to submit the question of such intent to the jury entitled defendant to a new trial. State v. Morrison, 207 N.C. 804, 178 S.E. 562 (1935).

Property Must Be Stolen. — If there was no theft, the buying of the property is not criminal, even if the buyer believes the property to have been stolen. State v. Collins, 240 N.C. 128, 81 S.E.2d 270 (1954).

If property was not stolen or taken from the owner in violation of this section, as where the original taking was without felonious intent, or was not against the owner's will or consent, the receiver is not guilty of receiving stolen property. State v. Collins, 240 N.C. 128, 81 S.E.2d 270 (1954).

Or Taken In Violation of Other Felony Statute. — Under this section the property knowingly received or concealed could include not only stolen property but trust property converted in violation of § 14-74 or property taken in violation of any other felony statute. But if the property knowingly received was not stolen but was taken in violation of some felony statute, the indictment should so allege. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Same — Receiving Embezzled Property. — This section makes it an offense knowingly to receive embezzled property in violation of a felony embezzlement statute, but such offense is distinct from that of receiving stolen goods, and a charge of receiving stolen goods is not sustained by proof that the goods were merely embezzled. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Constructive receipt is sufficient to constitute "receiving" within the meaning of this section. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351, cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972).

Goods Received through Agent. — If stolen goods are received by an agent of the accused, at his instance, that is sufficient to sustain a conviction if he knew that they were stolen goods. State v. Stroud, 95 N.C. 626 (1886).

It would certainly make the accused a receiver in contemplation of law, if the stolen property was received by his servant or agent, acting under his directions, he knowing at the time of giving the orders that it was stolen. State v. Hart, 14 N.C. App. 120, 187 S.E.2d 351,

cert. denied, 281 N.C. 625, 190 S.E.2d 469 (1972).

Self-Interest Not Necessary for Conviction. — It is not necessary that one receiving stolen goods do it for the purpose of making them his own or to derive profit from them, if he receives them to help the thief, as a friendly act, he is nevertheless guilty. State v. Rushing, 69 N.C. 29 (1873).

Time Not of the Essence. — The crime of receiving stolen goods is not one of the offenses in which time is of the essence. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

Value of Goods Received Must Exceed $400.00. — That the value of stolen goods received with knowledge by defendant exceeded $100.00 (now $400.00) is an essential element of the offense prescribed by this section. State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961). State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

In order for the defendant to be found guilty of a felony under this section, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the goods was more than $200 (now $400). This is an essential element of the crime because § 14-72 specifically provides that "the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars (now $400), is hereby declared a misdemeanor." State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

III. PRACTICE AND PROCEDURE.

Venue. — Under this section, venue is proper in any county in which a defendant was in possession of the stolen goods. State v. Haywood, 297 N.C. 686, 256 S.E.2d 715 (1979).

A plea of guilty of receiving stolen property knowing it to have been stolen is insufficient to support a felony sentence, even though the indictment charges defendant with receiving stolen goods having a value of more than $200. State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

Indictment — Larceny and Receiving Stolen Property May Be Included in Same Indictment. — A charge of larceny of goods of the value of $3,000 and a charge of receiving the stolen property with knowledge that it had been stolen, may be joined as separate counts in a single bill, each being a felony. State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957).

Same — Need Not Name Owner of Property. — It is not necessary that the warrant or indictment in a prosecution for receiving stolen goods state the names of those from whom the goods were stolen. State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972); State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (1974).

Same — Amendment. — The court did not err in allowing the State's motion to amend warrants for receiving stolen goods since the original warrants charged all the essential elements of the offense of receiving stolen goods, and the amendment describing ownership of the property in more detail did not change the offense with which defendants were charged. State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972).

Same — Sufficiency. — The indictment was held sufficient in Doss v. North Carolina, 252 F. Supp 298 (M.D.N.C. 1966); State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Same — Fatal Variance. — Where an indictment sufficiently alleged feloniously receiving stolen goods knowing them to have been stolen (taken by common-law larceny) in violation of this section, but the State's evidence tended to show that defendant received property which was taken by a shop foreman, in violation of the felony statute, § 14-74, there was a fatal variance in the charge and the proof, a failure by the State to show that the goods were stolen. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Presumption From Recent Possession of Stolen Property Does Not Apply. — The inference or presumption arising from the recent possession of stolen property, without more, does not extend to the charge of this section of receiving said property knowing it to have been feloniously stolen or taken. State v. Best, 202 N.C. 9, 161 S.E. 535 (1931); State v. Lowe, 204 N.C. 572, 169 S.E. 180 (1933); State v. Yow, 227 N.C. 585, 42 S.E.2d 661 (1947); State v. Hoskins, 236 N.C. 412, 72 S.E.2d 876 (1952); State v. Neill, 244 N.C. 252, 93 S.E.2d 155 (1956); State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972); State v. St. Clair, 17 N.C. App. 22, 193 S.E.2d 404 (1972).

Recent possession of stolen property, without more, raises no presumption in a prosecution for receiving stolen goods with knowledge that they had been feloniously stolen, and an instruction that recent possession raised no presumption of guilt but raised a presumption of fact to be considered by the jury in passing upon the guilt or innocence of defendant, must be held for reversible error. State v. Larkin, 229 N.C. 126, 47 S.E.2d 697 (1948).

Testimony of Owner on Value Admissible. — In a prosecution for receiving stolen goods, the owner who has knowledge of value gained from experience, information and observation, may give his opinion of the value of personal property; however, the approved procedure requires that he first be qualified to give the evidence. State v. Whitaker, 40 N.C. App. 251, 252 S.E.2d 242 (1979).

Evidence held sufficient to go to jury upon charge of receiving stolen property with knowledge that it had been feloniously stolen. State v. Larkin, 229 N.C. 126, 47 S.E.2d 697 (1948); State v. Chambers, 239 N.C. 114, 79 S.E.2d 262

(1953); State v. Lash, 21 N.C. App. 365, 204 S.E.2d 563, appeal dismissed, 285 N.C. 593, 206 S.E.2d 865 (1974).

Evidence of receiving stolen goods held amply sufficient to overrule motion for nonsuit. State v. Myers, 240 N.C. 462, 82 S.E.2d 213 (1954).

Upon appeal from a conviction under an indictment for feloniously receiving property of a value of $602, knowing it to have been feloniously stolen, it was held that, considering the evidence in the light most favorable to the State, it was amply sufficient to carry the State's case to the jury, and to support the verdict, and defendant's motions for judgment of compulsory nonsuit were property overruled by the trial judge. State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Same — Failure to Prove Ownership of Property. — In a prosecution under this section where there was no evidence on the record tending to show that the property alleged to have been stolen was that of the owner named in the indictment, the defendant's motion for dismissal or nonsuit should be allowed. State v. Pugh, 196 N.C. 725, 147 S.E. 7 (1929).

Evidence Held Insufficient. — See State v. Hoskins, 236 N.C. 412, 72 S.E.2d 876 (1952).

There was no evidence to support the verdict, and the defendant's motion for nonsuit on the charge of feloniously receiving stolen goods should have been allowed, where all the evidence, including the defendant's possession of the goods soon after they were stolen, tended to show that the defendant, and no one else, was the thief. State v. Prince, 39 N.C. App. 685, 251 S.E.2d 631, cert. denied, 296 N.C. 739, 254 S.E.2d 180 (1979).

Same — When Acquittal of Larceny Bars Prosecution for Receiving. — Defendants acquitted of larceny, despite evidence that they had stolen the items, could not over their motion for nonsuit be convicted of receiving stolen goods, where no evidence indicated that others might have stolen the items and then transferred them to defendants. State v. Strickland, 20 N.C. App. 470, 201 S.E.2d 501 (1974).

Instructions. — Where the indictment charges the defendant with "feloniously" receiving stolen goods, knowing them to have been stolen, but the charge fails to instruct the jury that it must find that the receiving was with the felonious intent, this is error and entitles the defendant to a new trial. State v. Brady, 237 N.C. 675, 75 S.E.2d 791 (1953).

Where the trial judge clearly charged the jury in substance that if it found beyond a reasonable doubt from the evidence that defendant was guilty of receiving stolen property (certain guns), knowing it to have been stolen, as he had defined the offense for it, and found beyond a reasonable doubt that the guns were of a value of $600, then it would return a verdict of guilty as charged, but if under those circumstances it found the guns were of a value of $200 or less (now $400 or less), then it would return a verdict of guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200 or less (now $400 or less), a misdemeanor, this conforms to the decision in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962). State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Where the judge charged the jury: "Now, the offense charged here has at least four distinct elements that the State must satisfy you beyond a reasonable doubt about," and the court then instructed the jury as to the essential elements of the crime of receiving stolen goods, quoting from 1 Wharton's Criminal Evidence, 10th Ed., § 325b, p. 643, with the exception that Wharton states there are three elements, and the second element is "... (b) that the accused, knowing them to be stolen, received or aided in concealing the goods," and the trial judge charged: " ... second, that the defendant received the goods that were stolen; third, that at the time of receiving the goods the defendant knew that they had been stolen," an assignment of error to the charge was overruled. State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

Where the State in a prosecution for receiving stolen goods did not rely upon the presumption arising from the possession of recently stolen goods, the trial court was not required to charge that the jury must find that the goods allegedly received by defendant were the same goods that were stolen. State v. Muse, 280 N.C. 31, 185 S.E.2d 214 (1971), cert. denied, 406 U.S. 974, 92 S. Ct. 2409, 32 L. Ed. 2d 674 (1972).

An essential element of the crime of receiving stolen goods in violation of this section is the stealing of the goods by someone other than the accused. Therefore, failure to properly instruct the jury with regard to this element would constitute reversible error requiring a new trial. State v. Slate, 38 N.C. App. 209, 247 S.E.2d 430 (1978).

A charge to the jury in a prosecution for felonious receiving of stolen property defining the necessary intent as the intent to convert property to the defendant's own use or deprive the owner of its use permanently was correct and sufficient. State v. Laughinghouse, 39 N.C. App. 655, 251 S.E.2d 667, cert. denied, 297 N.C. 615, 257 S.E.2d 438 (1979).

In a prosecution for feloniously receiving stolen goods, where the trial court instructed the jury that they should return a verdict of guilty if they found from the evidence beyond a reasonable doubt that the defendant, with a dishonest purpose, received hams which he knew "or had reasonable gounds to believe" someone had stolen, it was not error for the

court to fail to go further and charge the jury that they should judge the reasonableness of defendant's belief from the circumstances as they appeared to him at the time he received the stolen goods. State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979).

Verdict Need Not Specify Value of Goods. — In a prosecution under this section, it is not required that the jury should determine the value of the goods in its verdict. State v. Morrison, 207 N.C. 804, 178 S.E. 562 (1935); State v. Hill, 237 N.C. 764, 75 S.E.2d 915 (1953).

Defective Verdict. — Where the verdict in an indictment under this section is "guilty of receiving stolen goods," it is defective as not being responsive to the charge or falling within the requirements of the statute to constitute the offense made in the indictment, and thereon a judgment may not be entered or a sentence imposed. State v. Shaw, 194 N.C. 690, 140 S.E. 621 (1927); State v. Cannon, 218 N.C. 466, 11 S.E.2d 301 (1940).

Same — General Verdict on Separate Counts. — In a prosecution upon an indictment charging in one count larceny and in another count receiving the stolen goods, a verdict of guilty as charged is equivalent to a verdict of guilty as to each count and is not merely inconsistent, but contradictory, since a defendant may be guilty of larceny or of receiving, but not both. State v. Meshaw, 246 N.C. 205 98 S.E.2d 13 (1957).

The jury returned a verdict of guilty as charged to an indictment charging both larceny and receiving the stolen goods with knowledge that they had been stolen. A single judgment was entered on the verdict. There was error in the court's instruction to the jury on the count of receiving. Since defendant could not be guilty of both larceny and receiving the same goods, and it was impossible to determine to which count the verdict related, it was impossible to determine whether the error was prejudicial or harmless and therefore a new trial must be awarded. State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957).

A judgment upon a general verdict of guilty upon an indictment containing two counts — one for horse stealing, under § 14-81, and the other for receiving, under this section, is erroneous — the offenses not being of the same grade and the punishment being different. State v. Goings, 98 N.C. 766, 4 S.E. 121 (1887).

Same — Failure to Charge as to Guilty Knowledge. — Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a venire de novo will be ordered on appeal. State v. Barbee, 197 N.C. 248, 148 S.E. 249 (1929).

Conviction of Larceny Is Tantamount to Acquittal on Charge of Receiving. — Upon an indictment for larceny and for receiving property, knowing the same to have been stolen, a verdict of guilty of larceny is tantamount to an acquittal on the charge of receiving. State v. Holbrook, 223 N.C. 622, 27 S.E.2d 725 (1943).

Sentence. — An exception to a judgment of imprisonment in the State's prison for a term of three years, pronounced against a defendant upon a verdict of guilty of receiving stolen goods, knowing them to be stolen, was untenable, in that the judgment was within this section. State v. Reddick, 222 N.C. 520, 23 S.E.2d 909 (1943).

§ 14-71.1. Possessing stolen goods.

If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense, and may be indicted and convicted, whether the felon stealing and taking such chattels, property, money, valuable security or other thing shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and any such possessor may be dealt with, indicted, tried and punished in any county in which he shall have, or shall have had, any such property in his possession or in any county in which the thief may be tried, in the same manner as such possessor may be dealt with, indicted, tried and punished in the county where he actually possessed such chattel, money, security, or other thing; and such possessor shall be punished as one convicted of larceny. (1977, c. 978, s. 1.)

CASE NOTES

Purpose. — This section was apparently passed to provide protection for society in those incidents where the State does not have sufficient evidence to prove who committed the larceny, or the elements of receiving. State v. Kelly, 39 N.C. App. 246, 249 S.E.2d 832 (1978).

State Does Not Have to Prove Who Committed the Larceny. — To require the State to prove who committed the larceny as an element of this offense would defeat the obvious intent of the legislature. On a charge of possession of stolen property, it is not necessary that the State prove someone other than the defendant stole the property. State v. Kelly, 39 N.C. App. 246, 249 S.E.2d 832 (1978).

Defendant Can Be Convicted of Possessing Property Which He Has Stolen. — While it is true that a defendant cannot be convicted of receiving stolen property which he has stolen himself, such is not the case in a charge of possession of stolen property. State v. Kelly, 39 N.C. App. 246, 249 S.E.2d 832 (1978); State v. Davis, 48 N.C. App. 386, 269 S.E.2d 242 (1980); set aside on other grounds, 302 N.C. 370, 275 S.E.2d 491 (1981).

Cited in State v. Boltinhouse, 49 N.C. App. 660, 272 S.E.2d 148 (1980).

§ 14-72. Larceny of property; receiving stolen goods or possessing stolen goods not exceeding $400.00 in value.

(a) Larceny of goods of the value of more than four hundred dollars ($400.00) is a Class H felony. The receiving or possessing of stolen goods of the value of more than four hundred dollars ($400.00) while knowing or having reasonable grounds to believe that the goods are stolen is a Class H felony. Larceny as provided in subsection (b) of this section is a Class H felony. Receiving or possession of stolen goods as provided in subsection (c) of this section is a Class H felony. Except as provided in subsections (b) and (c) of this section, larceny of property, or the receiving or possession of stolen goods knowing or having reasonable grounds to believe them to be stolen, where the value of the property or goods is not more than four hundred dollars ($400.00), is a misdemeanor punishable under G.S. 14-3(a). In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen.

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:

(1) From the person; or

(2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57; or

(3) Of any explosive or incendiary device or substance. As used in this section, the phrase "explosive or incendiary device or substance" shall include any explosive or incendiary grenade or bomb; any dynamite, blasting powder, nitroglycerin, TNT, or other high explosive; or any device, ingredient for such device, or type or quantity of substance primarily useful for large-scale destruction of property by explosive or incendiary action or lethal injury to persons by explosive or incendiary action. This definition shall not include fireworks; or any form, type, or quantity of gasoline, butane gas, natural gas, or any other substance having explosive or incendiary properties but serving a legitimate nondestructive or nonlethal use in the form, type, or quantity stolen.

(4) Of any firearm. As used in this section, the term "firearm" shall include any instrument used in the propulsion of a shot, shell or bullet by the action of gunpowder or any other explosive substance within it. A "firearm," which at the time of theft is not capable of being fired, shall be included within this definition if it can be made to work. This definition shall not include air rifles or air pistols.

(5) Of any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8).

(c) The crime of possessing stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony or the crime of receiving stolen goods knowing or having reasonable grounds to believe them to be stolen in the circumstances described in subsection (b) is a felony, without regard to the value of the property in question. (1895, c. 285; Rev., s. 3506; 1913, c. 118, s. 1; C. S., s. 4251; 1941, c. 178, s. 1; 1949, c. 145, s. 2; 1959, c. 1285; 1961, c. 39, s. 1; 1965, c. 621, s. 5; 1969, c. 522, s. 2; 1973, c. 238, ss. 1, 2; 1975, c. 163, s. 2; c. 696, s. 4; 1977, c. 978, ss. 2, 3; 1979, c. 408, s. 1; c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 11.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14.1.1.

Effect of Amendments. — The first 1979 amendment, effective Jan. 1, 1980, and applicable to crimes committed on or after that date, substituted "four hundred dollars ($400.00)" for "two hundred dollars ($200.00)" in the first sentence of subsection (a).

The second 1979 amendment, effective July 1, 1981, rewrote subsection (a). The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, added "The" at the beginning, and inserted "or possessing" near the beginning, of the second sentence in subsection (a), inserted "while" and substituted "that the goods are" for "them to be" in that sentence and inserted "or possession" near the beginning of the fourth sentence and near the middle of the fifth sentence in subsection (a). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For case law survey as to punishment for larceny, see 45 N.C.L. Rev. 910 (1967).

For comment on alleging and proving elements of offense under this section and § 14-54, see 3 Wake Forest Intra. L. Rev. 1 (1967).

CASE NOTES

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I. GENERAL CONSIDERATION.

Constitutionality. — Section 14-54 and this section do not violate the equal protection or due process provisions of either the State or federal Constitutions. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Section 14-54 and this section are reasonably related to valid legislative goals. The legislature has determined that breaking or entering with intent to commit larceny is a more serious crime than breaking or entering without the intent to commit larceny or any felony, and that larceny committed pursuant to breaking or entering is more serious than simple larceny. The legislature was acting within its authority in designating these crimes as felonies and in fixing punishment commensurate with their serious nature. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Section 14-54 and this section meet the test of equal protection because all persons who fall under the terms of the statutes are subject to the same sentence. State v. Killian, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

Purpose of Amendments. — It seems probable the General Assembly, in enacting the amendments to this section, was not motivated by a disposition to protect thieves from the adverse effects of inflation, but to reduce the number of cases (involving felony charges) in the exclusive jurisdiction of the superior court. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

This section relates solely to punishment for the separate crime of larceny. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Breaking or Entering. — This section applies where there is no charge of breaking and entering or breaking or entering involved. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Section 14-54 concerns only the crimes of breaking and entering buildings and does not relate to the felony of larceny. The crime of larceny after breaking or entering is punishable as provided in this section. State v. Haigler, 14 N.C. App. 501, 188 S.E.2d 586, cert. denied, 281 N.C. 625, 190 S.E.2d 468 (1972).

Section Does Not Apply to Burglary. — A person who burglariously breaks and enters a dwelling at nighttime while the same is occupied is guilty of burglary in the first degree, and the fact that the value of goods stolen from the dwelling is less than $20 is no defense to the capital charge, this section dividing larceny into two degrees having no application to burglary. State v. Richardson, 216 N.C. 304, 4 S.E.2d 852 (1939).

Prosecution under § 14-74 Not Barred by Dismissal under this Section. — Since the element of trespass required in this section is not required for prosecution under § 14-74, and the element of trust required under § 14-74 is not required in this section, the dismissal in district court of a charge under this section cannot be considered a prior adjudication which would bar prosecution under § 14-74. State v. Bullin, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

Separate and Distinct Crimes. — Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy, since the four offenses were legally separate and distinct crimes, no one of which was a lesser included offense of the other; each clearly required the proof of at least one essential element not embodied in any of the other three offenses at issue; and the four felonies were factually distinct and independent crimes in this case. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

The offenses of larceny and receiving are separate and distinct. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (1974).

And Receiving Is Not Accessorial to Larceny. — This section, defining the offense of receiving, clearly creates an offense not accessorial to larceny. State v. Golden, 20 N.C. App. 451, 201 S.E.2d 546, cert. denied, 285 N.C. 88, 203 S.E.2d 60 (1974).

A defendant may be found guilty of larceny or receiving but not both. State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980).

Only difference between larceny and embezzlement is that in the former there must be a trespass, while in the latter that is not necessary. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

The misdemeanor of larceny is a lesser degree of the felony of larceny within the meaning of § 15-170. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

Felonious Larceny as Included Offense in Felony-Murder. — A separate judgment based on a verdict of guilty of felonious larceny was arrested on the ground that the commission of this crime was an essential of and the basis for the conviction of defendant for felony-murder and therefore no additional punishment could be imposed for it as an independent criminal offense. State v. Thompson, 280 N.C. 202, 185 S.E.2d 666 (1972).

Larceny Not Lesser Included Offense of Larceny by Employee. — Where defendant was charged with larceny by an employee he could not be convicted of the offense of larceny, since the two are wholly separate offenses, and each requires different evidentiary showings. In short, larceny is not a lesser included offense of larceny by an employee. State v. Daniels, 43 N.C. 556, 259 S.E.2d 396 (1979).

Unauthorized Use of Conveyance Is Lesser Included Offense of Larceny. — All of the essential elements of the crime of unauthorized use of a conveyance, § 14-72.2(a), are included in larceny, and it may be a lesser included offense of larceny where there is evidence to support the charge. State v. Ross, 46 N.C. App. 338, 264 S.E.2d 742 (1980).

Applied in State v. Davidson, 124 N.C. 839, 32 S.E. 957 (1899); State v. Bennett, 237 N.C. 749, 76 S.E.2d 42 (1953); State v. Davis, 253 N.C. 224, 116 S.E.2d 381 (1960); State v. Carter, 269 N.C. 697, 153 S.E.2d 388 (1967); State v. Barnes, 270 N.C. 146, 153 S.E.2d 868 (1967); State v. Martin, 270 N.C. 286, 153

S.E.2d 96 (1967); State v. Wilson, 270 N.C. 299, 154 S.E.2d 102 (1967); State v. Woody, 271 N.C. 544, 157 S.E.2d 108 (1967); State v. Burgess, 1 N.C. App. 142, 160 S.E.2d 105 (1968); State v. Crabb, 9 N.C. App. 333, 176 S.E.2d 39 (1970); State v. Sharpless, 13 N.C. App. 202, 184 S.E.2d 921 (1971); State v. Truesdale, 13 N.C. App. 622, 186 S.E.2d 604 (1972); State v. Gore, 14 N.C. App. 645, 188 S.E.2d 660 (1972); State v. Boggs, 16 N.C. App. 403, 192 S.E.2d 29 (1972); State v. Huffman, 16 N.C. App. 653, 192 S.E.2d 621 (1972); State v. Crowe, 25 N.C. App. 420, 213 S.E.2d 360 (1975); State v. Morrow, 31 N.C. App. 592, 230 S.E.2d 182 (1976); State v. Irick, 291 N.C. 480, 231 S.E.2d 833 (1977); State v. Greene, 33 N.C. App. 228, 234 S.E.2d 428 (1977); State v. Perry, 38 N.C. App. 735, 248 S.E.2d 755 (1978); State v. Haywood, 297 N.C. 686, 256 S.E.2d 715 (1979); State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979); State v. Herman, 45 N.C. App. 711, 264 S.E.2d 122 (1980).

Quoted in State v. Hill, 237 N.C. 764, 75 S.E.2d 915 (1953); State v. Tessnear, 254 N.C. 211, 118 S.E.2d 393 (1961).

Stated in State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970); State v. Boltinhouse, 49 N.C. App. 660, 272 S.E.2d 148 (1980).

Cited in State v. Corpening, 207 N.C. 805, 178 S.E. 564 (1935); State v. Parker, 220 N.C. 416, 17 S.E.2d 475 (1941); State v. Jones, 227 N.C. 47, 40 S.E.2d 458 (1946); State v. Meshaw, 246 N.C. 205, 98 S.E.2d 13 (1957); Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); State v. Perry, 265 N.C. 517, 144 S.E.2d 591 (1965); State v. Ford, 266 N.C. 743, 147 S.E.2d 198 (1966); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966); State v. Tilley, 272 N.C. 408, 158 S.E.2d 573 (1968); State v. Hemphill, 273 N.C. 388, 160 S.E.2d 53 (1968); State v. Stafford, 274 N.C. 519, 164 S.E.2d 371 (1968); State v. Johnson, 1 N.C. App. 15, 159 S.E.2d 249 (1968); State v. Harris, 279 N.C. 307, 182 S.E.2d 364 (1971); State v. Watson, 13 N.C. App. 189, 185 S.E.2d 33 (1971); State v. Oakley, 15 N.C. App. 224, 189 S.E.2d 605 (1972); State v. Gaddy, 16 N.C. App. 436, 192 S.E.2d 18 (1972); State v. Sanders, 294 N.C. 337, 240 S.E.2d 788 (1978); State v. Monk, 36 N.C. App. 337, 244 S.E.2d 186 (1978); State v. Johnston, 39 N.C. App. 179, 249 S.E.2d 879 (1978); State v. Stafford, 45 N.C. App. 297, 262 S.E.2d 695 (1980); State v. Graham, 47 N.C. App. 303, 267 S.E.2d 56 (1980).

II. ELEMENTS OF OFFENSES.

What Constitutes Larceny. — To constitute larceny there must be a wrongful taking and carrying away of the personal property of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Larceny is the felonious taking and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use. State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974).

Same — "Felonious intent" is an essential element of the crime of larceny without regard to the value of the stolen property. State v. cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

To constitute larceny the taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Where the evidence tended to show that a defendant charged with larceny took or obtained possession of the property by trick or fraud, the burden was on the State to prove that defendant had a felonious intent at the time he took or got possession by trick or fraud. State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

Same — Felonious Intent Defined. — For definitions of "felonious intent," an element of the crime of larceny, see State v. Powell, 103 N.C. 424, 9 S.E. 627 (1889); State v. Kirkland, 178 N.C. 810, 101 S.E. 560 (1919); State v. Booker, 250 N.C. 272, 108 S.E.2d 426 (1959); State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

The phrase "felonious intent" originated when both grand and petit larceny were felonies. Now "felonious intent," in the law of larceny, does not necessarily signify an intent to commit a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

The "felonious intent" as applied to the crime of larceny is the intent which exists where a person knowingly takes and carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property and to convert it to the use of the taker or to some other person than the owner. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973); State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974).

Same — Larceny involves a trespass either actual or constructive. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

An act of trespass is an essential element in the crime of larceny. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

Every larceny includes a trespass, and if there is no trespass in taking the goods, there can be no felony committed in carrying them away. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

A conviction under this section requires that either an actual or constructive trespass be shown. State v. Bullin, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

One who lawfully acquires possession of goods or money of another cannot commit larceny by feloniously converting them to his own use, for the reason that larceny, being a criminal trespass on the right of possession, cannot be committed by one who, being invested with that right, is consequently incapable of trespassing on it. State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

But actual trespass is not a necessary element of larceny when possession of property is fraudulently obtained by some trick or artifice. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Same — Taking and Carrying Away. — While there must be a taking and carrying away of the personal property of another to complete the crime of larceny, it is not necessary that the property be completely removed from the premises of the owner. The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Same — Severance from Owner's Possession. — Even if only for an instant, there must be a complete severance of the object from the owner's possession, to such an extent that the defendant has absolute possession of it. State v. Carswell, 36 N.C. App. 377, 243 S.E.2d 911, rev'd on other grounds, 296 N.C. 101, 249 S.E.2d 427 (1978).

Same — Length of Time Immaterial. — The fact that the property may have been in defendant's possession and under his control for only an instant is immaterial if his removal of the property from its original status was such as would constitute a complete severance from the possession of the owner. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Same — Exclusive Control. — It is not always necessary that the stolen property should have been actually in the hands or on the person of the accused and it is sufficient if such property was under his exclusive personal control. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

Same — Title to Property Taken. — It is no defense to a larceny charge that title to the property taken is in one other than the person from whom it was taken. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (1972).

Receiving Stolen Property. — Knowledge that the goods were stolen at the time of receiving them is an essential element of the offense of receiving stolen goods, and although guilty knowledge may be inferred from incriminating circumstances, a charge that such knowledge might be actual or implied, without specifying that it would have to exist at the time of the receiving, is erroneous. State v. Saulding, 211 N.C. 63, 188 S.E. 647 (1936).

Same — Under Subsection (c). — In order for the crime of receiving stolen property to be rendered a felony by subsection (c) without regard to the value of the property, the defendant must have known not only that the property was stolen, but also that the theft was accomplished under circumstances enumerated in subsection (b). State v. Scott, 11 N.C. App. 642, 182 S.E.2d 256 (1971), decided under this section as it stood before the 1975 amendment.

Possession of Stolen Goods. — There may be joint possession of stolen goods by two or more persons if they are shown to have acted in concert, the possession of one participant being the possession of all. State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (1972).

Same — Exclusive possession of stolen property may be joint possession if persons are shown to have acted in concert or to have been particeps criminis. State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

III. DEGREES OF OFFENSES.

A. Determined by Value of Property.

This section divides larceny into two degrees, one a misdemeanor, the other a felony. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957); State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

Degree of Offense Depends Solely on Value of Property Taken. — Whether a person who commits the crime of larceny is guilty of a felony or guilty of a misdemeanor depends solely upon the value of the property taken. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

In cases under this section, it is incumbent upon the State to prove beyond a reasonable doubt that the property stolen had a value in excess of $200 (now $400) in order for the punishment to be that provided for a felony. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

The dividing line between felonious and nonfelonious larceny, not perpetrated by breaking and entering, is $200 (now $400). Anders v. Turner, 379 F.2d 46 (4th Cir. 1967).

Thus, larceny of property of a value in excess of $200 (now $400) is a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Larceny of any property of another of any value after breaking and entering, and larceny of property of more than $200 (now $400) in value, are felonious, each of which may be punishable by imprisonment for as much as ten years. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36 (1969).

As Is Receiving Stolen Property of Such Value. — The criminal offense of receiving stolen property, defined in § 14-71, where the value of the property is in excess of $200 (now $400), is a felony. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

In order for the defendant to be found guilty of a felony under § 14-71, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the goods was more than $200 (now $400). This is an essential element of the crime because this section specifically provides that "the receiving of stolen goods knowing them to be stolen, of the value of not more than two hundred dollars is hereby declared a misdemeanor." State v. Wallace, 270 N.C. 155, 153 S.E.2d 873 (1967).

But Larceny of Property of a Value of Not More than $200 (now $400) Is Only a Misdemeanor. — If the value of the stolen property is found to be of the value of not more than $200 (now $400) or less, such larceny is only a misdemeanor and punishable as such. State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Nothing else appearing, larceny of goods of the value of not more than $200 (now $400) is a misdemeanor. State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

Actual Value of Property Not Taker's Intent Determines Grade of Larceny. — The actual value of the thing wrongfully appropriated, rather than the intention of the taker with respect to value, determines the grade of larceny. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

Value of Property Taken, Not Property Possessed, Is Determinative. — This section requires the State to prove the value of the property taken, not the property possessed by the accused, to be in excess of $200 (now $400). State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

"Value" as used in this section means fair market value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The "market value" of the stolen item is used in determining whether the crime is felonious or nonfelonious. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

In the case of common articles having a market value, the courts have usually rejected the original cost and any special value to the owner personally as standards of value for purposes of graduation of the offense, and have declared the proper criterion to be the price which the subject of the larceny would bring in open market — its "market value" or its "reasonable selling price," at the time and place of the theft and in the condition in which it was when the thief commenced the acts culminating in the larceny. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

For determining whether the crime is a felony or a misdemeanor under this section, the word "value" means the fair market value of the stolen item at the time of the theft. State v. Shaw, 26 N.C. App. 154, 215 S.E.2d 390 (1975).

The word "value" as used in this section does not mean the price at which the owner would sell, but means fair market value. State v. Haney, 28 N.C. App. 222, 220 S.E.2d 371 (1975).

And money is the standard of value. If the amount is known there can be no disagreement as to value. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

Price Received for Stolen Goods Is Irrelevant. — The price received for stolen tools had no relevance to the "market value." State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

State Must Prove That Value of Property Exceeded $200 (now $400). — Except in those instances where this section does not apply, to convict of the felony of larceny, it is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than $200 (now $400); and, this being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Holloway, 265 N.C. 581, 144 S.E.2d 634 (1965); State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Except in those cases where this section is inapplicable, the State must prove beyond a reasonable doubt that the value of the stolen property was more than $200 (now $400) in order to convict of felony-larceny, and the trial judge must so instruct the jury even though no request is made for such instruction. The reason for this requirement is that the defendant's plea of not guilty places in issue every essential element of the offense, including the element of value of the property stolen, and the

credibility of the testimony must be passed upon by the jury. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

The burden of proof as to value in excess of $200 (now $400) is upon the State as an essential element of the crime of felonious larceny where defendant is not charged with or found guilty of felonious breaking or entering as a part of the same occurrence. State v. Lilly, 25 N.C. App. 453, 213 S.E.2d 418 (1975).

Although an indictment charges, and all the evidence tends to show, that the value of the stolen property was more than $200 (now $400), the jury, under appropriate instructions, must find from the evidence beyond a reasonable doubt that this is the fact. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

It is incumbent upon the State to prove beyond a reasonable doubt that the value of the stolen property was more than $200 (now $400); and, value in excess of $200 (now $400) being an essential element of the offense, it is incumbent upon the trial judge to so instruct the jury. The basis for this requirement is the elementary proposition that the credibility of the tesimony, even though unequivocal and uncontradicted, must be passed upon by the jury. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

Effect of Plea of Not Guilty. — A plea of not guilty to an indictment charging the felony of larceny puts in issue every essential element of the crime and constitutes a denial of the charge that the value of the stolen property was more than $200 (now $400). State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

B. Offenses Which Are Felonies Regardless of Value of Property.

Where this section does not apply, the larceny is a felony, as at common law, without regard to the value of the stolen property. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Fowler, 266 N.C. 667, 147 S.E.2d 36 (1966).

Larceny from a person is a felony. State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964), overruled on other grounds, State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965).

In larceny from the person there must be a taking, though the value of the property is immaterial. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

Larceny from the person as at common law is a felony without regard to the value of the property stolen. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

Larceny from the person is a felony, without regard to the value of the property. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Larceny from Building. — Larceny from a building in violation of § 14-51, 14-53, 14-54 or 14-57 is a felony, without regard to the value of the property. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Same — Larceny by Breaking and Entering. — Under the amendment of this section, larceny by breaking and entering any building referred to therein is a felony without regard to the value of the stolen property. State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962); State v. Jones, 264 N.C. 134, 141 S.E.2d 27 (1965); State v. Wilson, 264 N.C. 595, 142 S.E.2d 180 (1965); State v. McKoy, 265 N.C. 380, 144 S.E.2d 46 (1965); State v. Brown, 266 N.C. 55, 145 S.E.2d 297 (1965), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969), and State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971).

Where larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 77 (1970); State v. Wright, 22 N.C. App. 428, 206 S.E.2d 787 (1974).

Larceny of any explosive or incendiary device or substance is a felony. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

IV. PRACTICE AND PROCEDURE.

A. Indictment.

Required Allegations Generally. — To convict of felony-larceny, the indictment must allege and the State must prove beyond a reasonable doubt, as an essential element of the crime, that the value of the property exceeded $200 (now $400), or that the larceny was from the person, or that the larceny was from a building in violation of § 14-51, 14-53, 14-54 or 14-57, or that the property involved was an explosive or incendiary device or substance. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971); State v. Corpening, 31 N.C. App. 376, 229 S.E.2d 206 (1976), appeal dismissed, 291 N.C. 712, 232 S.E.2d 205 (1977).

Decisions subsequent to the Act of 1913 and at variance with the legal propositions stated herein, for example, State v. Flynn, 230 N.C. 293, 52 S.E.2d 791 (1949), and State v. Stevens, 252 N.C. 331, 113 S.E.2d 577 (1960), to the extent of such variance, are overruled. Too, decisions based on the Act of 1895, including State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895), and State v. Harris, 119 N.C. 811, 26 S.E. 148 (1896), and other decisions based thereon, are no longer authoritative. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Ownership of Property. — The indictment in a larceny case must allege a person who has a property interest in the property stolen. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

In a prosecution for larceny the State must prove that the person alleged in the indictment to have a property interest in the property stolen has ownership, meaning title to the prop-

erty or some special property interest. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The purpose of the requirement that ownership be alleged in an indictment for larceny is to (1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The indictment for larceny must correctly charge the owner or the person in possession of the property stolen. State v. Vawter, 33 N.C. App. 131, 234 S.E.2d 438, cert. denied, 293 N.C. 257, 237 S.E.2d 539 (1977).

An indictment for larceny of property is fatally defective if it fails to allege the ownership of the property in a natural person or a legal entity capable of owning property. State v. Roberts, 14 N.C. App. 6 S.E.2d 610 (1972).

Same — Not in a Servant. — In an indictment for larceny, it is not sufficient to charge the stolen property to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no property, his possession is the possession of his master. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Description of Property. — The description in a warrant or bill of indictment of the goods alleged to have been stolen is sufficient if from it defendant can have a fair and reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to subsequent prosecution for the same offense, and the court is enabled, on conviction, to pronounce sentence according to law. State v. Fuller, 13 N.C. App. 193, 185 S.E.2d 312 (1971).

Whether the description of property in a larceny indictment is sufficient or so defective as to be void depends on the certainty educed by the description. The property alleged to have been taken must be described with "reasonable certainty." State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Reasonable certainty is attained when the description reasonably informs the accused of the transaction meant, when it protects the accused in the event of subsequent prosecutions for the same offense, when it enables the court to see that the property described is the subject of larceny, and when it enables the jury to say that the article proved to be stolen is the same as the one described. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

When describing an animal in an indictment for larceny, it is sufficient to refer to it by the name commonly applied to animals of its kind without further description. A specific description of the animal, such as its color, age, weight, sex, markings or brand, is not necessary. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

The general term "hogs" in a larceny indictment sufficiently described the animals taken so as to identify them with reasonable certainty. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Value of Property. — Where neither larceny from the person nor by breaking and entering is involved, an indictment for the felony of larceny must charge, as an essential element of the crime, that the value of the stolen goods was more than $200 (nor $400). State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Same — Misdemeanor. — Where the indictment charges the larceny of $200 (now $400) or less and does not charge that the larceny was from a building by breaking or entering, or by any other means of such nature as to make the larceny a felony, the indictment charges only a misdemeanor, and a sentence on the count in excess of two years must be vacated and the cause remanded for proper judgment. State v. Fowler, 266 N.C. 667, 147 S.E.2d 36 (1966).

Where an indictment charges larceny of property of the value of $200 (now $400) or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Felony Irrespective of Value. — In order to properly charge the felony of larceny of property, without regard to the value of the property, the bill of indictment must contain one or more of the elements set out in subsection (b) of this section. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Same — Larceny from the Person. — Solicitors would do well to include in bills of indictment the words "from the person" if and when they intend to prosecute for the felony of larceny from the person. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

A person may not be convicted and punished for the felony of larceny from the person when the indictment on which he is tried fails to allege that the larceny was from the person. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Decisions based on the Act of 1895, including State v. Bynum, 117 N.C. 749, 23 S.E. 218 (1895), and State v. Harris, 119 N.C. 811, 26 S.E. 148 (1896), and other decisions based

thereon, are no longer authoritative. Too, decisions subsequent to the Act of 1913 and at variance with the legal propositions stated herein, for example, State v. Flynn, 230 N.C. 293, 52 S.E.2d 791 (1949), and State v. Stevens, 252 N.C. 331, 113 S.E.2d 577 (1960), to the extent of such variance, are overruled. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

Variance — Value. — Where the offense charged is that of felonious larceny, in order to distinguish the offense of felonious larceny from misdemeanor larceny, it is necessary to show that the value of the property stolen was more than $200 (now $400); this having been done, a difference between the value alleged in the bill of indictment and the value shown by the evidence is immaterial. State v. McCall, 12 N.C. App. 85, 182 S.E.2d 617, cert. denied, 279 N.C. 513, 183 S.E.2d 689 (1971).

Same — Ownership. — There was no fatal variance between indictment and proof where the indictment charged the larceny of money from "Piggly Wiggly Store #7," and witnesses referred to the store as "Piggly Wiggly in Wilson," "Piggly Wiggly Store," "Piggly Wiggly," and "Piggly Wiggly Wilson, Inc.," there being no evidence that any other Piggly Wiggly store existed in the city or county, and there being nothing to indicate that the defendants, witnesses or jurors were confused by the difference in names. State v. McCall, 12 N.C. App. 85, 182 S.E.2d 617, cert. denied, 279 N.C. 513, 183 S.E.2d 689 (1971).

There was no fatal variance in a larceny indictment placing ownership of stolen tools in a corporation and evidence that, although the tools were personally owned by individual mechanics working for the corporation, they were left overnight on the corporation's premises and were in the possession of the corporation at the time of the theft. State v. Dees, 14 N.C. App. 110, 187 S.E.2d 433 (1972).

There is no fatal variance in an indictment for larceny where the indictment alleges that two persons had a property interest in the stolen property when in fact, one was the bailee or special owner of the property, and the other had legal title to the property, since the property may be laid in either the owner, the special owner or both. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

In a prosecution for larceny, if the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Same — Description of Property. — Where a larceny indictment described the stolen property as "a 1970 Plymouth, Serial # PM14360F239110, the personal property of George Edison Biggs," and the evidence showed the taking by defendant of a 1970 Plymouth which was owned by George Edison Biggs but there was no evidence as to the serial number, the variance was not fatal. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

The indictment was held sufficient in Doss v. North Carolina, 252 F. Supp. 298 (M.D.N.C. 1966).

The indictment charged store-breaking, larceny and receiving in the language of the statute under which it was drawn, § 14-54 and this section, and contained the elements of the offense intended to be charged, and sufficiently informed the petitioner of the crime with which he was charged so that he could adequately prepare his defense and could plead the judgment as a bar to any subsequent prosecution for the same offense. Nothing more was required. Harris v. North Carolina, 320 F. Supp. 770 (M.D.N.C. 1970), aff'd, 435 F.2d 1305 (4th Cir. (1971).

An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified a sum of money, charges the crime of larceny and not that of robbery. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

"Steal" Synonymous with "Felonious Intent" in Warrant Charging Misdemeanor Larceny. — The word "steal" as used in a warrant charging misdemeanor larceny encompassed and was synonymous with the required "felonious intent" and was therefore sufficient to withstand the defendant's motion to quash. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

"Larceny by trick" is not a crime separate and distinct from common-law larceny, but the term is often used to describe a larceny when possession was obtained by trick or fraud. It is not necessary that the manner in which the stolen property was taken and carried away be alleged, and the words "by trick" are not required in an indictment charging larceny. State v. Harris, 35 N.C. App. 401, 241 S.E.2d 370 (1978).

B. Evidence.

Opinion as to Value. — It is not necessary that a witness be an expert in order to give his opinion as to value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

A witness who has knowledge of value gained from experience, information and observation may give his opinion of the value of specific real property, personal property, or services. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

An estimate has been held to be some evidence of value. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The witness's testimony as to his opinion of the "value" of the stolen automobile was properly admitted and was sufficient to require submission to the jury of an issue as to defendant's guilt of felonious larceny under this section where defendant did not object to the form of the question or move to strike the answer. State v. Coleman, 24 N.C. App. 530, 211 S.E.2d 542 (1975).

Circumstantial Evidence Admissible. — All of the essential elements of larceny must be established by sufficient, competent evidence; and the essential facts can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. State v. Richardson, 8 N.C. App. 298, 174 S.E.2d 177 (1970); State v. Eppley, 14 N.C. App. 314, 188 S.E.2d 758, rev'd on other grounds, 282 N.C. 249, 192 S.E.2d 441 (1972).

Evidence Held Admissible. — In a prosecution for larceny and receiving of paper, evidence of size, weight, quantity and value of the paper, from experienced witnesses, who based their opinions on personal observation, is admissible to show a value of more than $50 (now $400) to establish a felony under this section. State v. Weinstein, 224 N.C. 645, 31 S.E.2d 920 (1944), cert. denied, 324 U.S. 849, 65 S. Ct. 689, 89 L. Ed. 1410 (1945).

Evidence Sufficient. — Evidence was held amply sufficient to support verdict of guilty of feloniously breaking and entering and larceny by means of such felonious breaking and entering in State v. Majors, 268 N.C. 146, 150 S.E.2d 35 (1966).

Evidence held sufficient to show a present intent on the part of defendant to take property belonging to another and convert it to his own use. State v. Thompson, 8 N.C. App. 313, 174 S.E.2d 130 (1970).

Nonsuit was properly denied upon proof of exercise of control over stolen goods by (1) offer of sale, (2) rental of warehouse space for storage of the goods, and (3) borrowing money upon pledge of the stolen goods. State v. Carter, 20 N.C. App. 461, 201 S.E.2d 500, cert. denied, 285 N.C. 87, 203 S.E.2d 60 (1974).

Evidence Insufficient. — Where the State's evidence was that $400 was stolen, and defendant testified that she received $420 by gift, and that she stole nothing, there was no evidence from which the jury could have found the defendant guilty of larceny of a value of $200 (now $400) or less. State v. Summers, 263 N.C. 517, 139 S.E.2d 627 (1965).

There was insufficient evidence from which the jury could find that defendant committed the larceny where no fingerprints were taken linking the defendant to the larceny, no effort was made to determine whether the footprints leading from the home matched the defendant's footprints, and where clearly defendant never had actual possession of the stolen merchandise. State v. McKinney, 25 N.C. App. 283, 212 S.E.2d 707 (1975).

C. Presumptive from Possession of Recently Stolen Property.

In General. — If the circumstances are such as to exclude the intervening agency of others between the theft and the recent possession of stolen goods, then such recent possession may afford presumptive evidence that the person in possession is the thief. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The principle of law known as recent possession of stolen property itself indicates the conditions under which it operates, and to bring it into play there must be proof of three things: (1) That the property described in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Black, 14 N.C. App. 373, 188 S.E.2d 634, appeal dismissed, 281 N.C. 624, 190 S.E.2d 467 (1972); State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975); State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The presumption of recent possession is not in aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The applicability of the doctrine of the inference of guilt derived from the recent possession of stolen goods depends upon the circumstance and character of the possession. It applies only when the possession is of a kind which manifests that the stolen goods came to the possessor by his own act or with his undoubted concurrence, and so recently and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder was himself the thief. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

Evidence that defendant was in possession of stolen property shortly after the property was stolen raises a presumption of defendant's guilt of larceny of such property. State v. Jones, 3 N.C. App. 455, 165 S.E.2d 36 (1969).

When goods are stolen and one is found in possession so soon thereafter that he could not have reasonably gotten the possession unless he had stolen them himself, the law presumes he was the thief. State v. Solomon, 24 N.C. App. 527, 211 S.E.2d 478 (1975).

The presumption spawned by possession of recently stolen property arises when, and only when, the State shows beyond a reasonable doubt that the property described in the indictment was stolen; the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of other, though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and the possession was recently after the larceny, mere possession of stolen property being insufficient to raise the presumption of guilt. State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

When there is evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering. State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

Larceny Must Be Established. — Before the presumption of guilt stemming from possession of recently stolen property can attach, the State must show by positive or circumstantial evidence a prima facie larceny of the goods. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

The identity of the fruits of the crime must be established before the presumption of recent possession can apply. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966); State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Possession of stolen property shortly after the time of theft raises a presumption of the possessor's guilt of larceny of such property but the presumption does not apply until the identity of the property is established. State v. Bembery, 33 N.C. App. 31, 234 S.E.2d 33, cert. denied, 293 N.C. 160, 236 S.E.2d 704 (1977).

Control of Stolen Property. — The principle of law known as recent possession of stolen property is usually applied to possession which involves custody about the person, but it is not necessarily so limited. It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

Possession of a part of the recently stolen property under some circumstances warrants the inference that the accused stole all of it. The inference of guilt is not always repelled by the fact that only part of the recently stolen property is found in the possession of the accused. State v. Boomer, 33 N.C. App. 324, 235 S.E.2d 284, cert. denied, 293 N.C. 254, 237 S.E.2d 536 (1977).

Strength of Presumption Depends on Lapse of Time and Other Circumstances. — The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker as the possession is nearer to or more distant from the time of the commission of the offense. State v. Cotten, 2 N.C. App. 305, 163 S.E.2d 100 (1968).

The presumption that the possessor is the thief, which arises from the possession of stolen goods, is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief. This is a factual presumption and is strong or weak depending on circumstances — the time between the theft and the possession, the type of property involved and its legitimate availability in the community. State v. Hagler, 32 N.C. App. 444, 232 S.E.2d 712, cert. denied, 292 N.C. 642, 235 S.E.2d 63 (1977).

The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in defendant's possession. State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

Proof of recent possession by the State does not shift the burden of proof to the defendant but the burden remains with the State to demonstrate defendant's guilt beyond a reasonable doubt. State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976).

Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975), is inapposite to the so-called recent possession doctrine because that doctrine does not shift the burden of proof to the defendant. The doctrine only allows the jury to infer that the defendant stole the goods, because the State first proved that the stolen goods were in defendant's possession so soon after the theft that it was unlikely that he obtained them honestly. The doctrine is only an evidentiary inference shifting to the defendant the burden of going forward with evidence. Evidentiary inferences and presumptions such as this are unaffected by Mullaney. State v. Hales, 32 N.C. App. 729, 233 S.E.2d 601, cert. denied, 292 N.C. 732, 235 S.E.2d 782 (1977).

Presumption is Evidential Fact. — The presumption, however, is one of fact only and is to be considered by the jury merely as an evidential fact along with other evidence in determining the defendant's guilt. State v. Foster, 268 N.C. 480, 151 S.E.2d 62 (1966).

The presumption that the possessor is the thief, which arises from the possession of stolen goods, is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976); State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

The presumption of recent possession, or inference as it is more properly called, is one of fact and not of law. The inference derived from recent possession is to be considered by the jury merely as an evidentiary fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. State v. Fair, 291 N.C. 171, 229 S.E.2d 189 (1976).

However, recent possession is not evidence of guilt; it just raises an inference that will permit the case to go to the jury under proper instructions from the court. State v. Greene, 289 N.C. 578, 223 S.E.2d 365 (1976).

Inference Insufficient to Support Conviction. — Evidence was insufficient to support the conviction of defendant of felonious breaking and entering and larceny under the doctrine of possession of recently stolen property where it tended to show that defendant was one of four persons in a car which contained stolen goods; the State did not demonstrate a criminal conspiracy among the four; only one of the four claimed a possessory interest in the stolen goods; that person also owned the car; in order to convict defendant, the jury must infer that he possessed the goods from the mere fact of driving with the owner of the car seated beside him, and then infer he was the thief that stole them based on the possession of recently stolen goods, and such a conviction based on stacked inferences could not stand. State v. Maines, 301 N.C. 669, 273 S.E.2d 289 (1981).

D. Instructions.

Larceny. — Where a defendant is indicted for the larceny of property of the value of more than $200 (now $400), except in those instances where this section does not apply, it is incumbent upon the trial judge to instruct the jury, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen property exceeds $200 (now $400), the jury should return a verdict of guilty of larceny of property of a value not exceeding $200 (now $400). State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

When there is evidence tending to show the value of the stolen goods was more than $200 (now $400) and other evidence tending to show the value thereof was $200 (now $400) or less, the jury should be instructed that if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny and that the value of the stolen property was more than $200 (now $400), it would be their duty to return a verdict of guilty of felony-larceny; however, if they find from the evidence beyond a reasonable doubt that the defendant is guilty of larceny but fail to find from the evidence beyond a reasonable doubt that the value of the stolen goods was more than $200 (now $400), it would be their duty to return a verdict of guilty of misdemeanor-larceny. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Although an indictment charges, and all the evidence tends to show, that the value of the stolen property was more than $200 (now $400), the jury, under appropriate instructions, must find from the evidence beyond a reasonable doubt that this is the fact. In such case, there is no basis, and it is inappropriate, for the court to instruct the jury with reference to a verdict of guilty of misdemeanor-larceny. State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

The court should submit to the jury the issue of defendant's guilt of misdemeanor-larceny, where the evidence of the State does not show the value of the property that was taken. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Trial judges should bear in mind that instructions requiring proof beyond a reasonable doubt and jury findings as to all essential elements thereof are prerequisite to a conviction of felony-larceny. State v. Benfield, 278 N.C. 199, 179 S.E.2d 388 (1971).

As to a possible verdict of misdemeanor-larceny, it is well-established that where there is no evidence from which it can be inferred that the value of the stolen property was less than $200 (now $400), defendant is not entitled to an instruction with respect to larceny of property of a value less than $200 (now $400). State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

Receiving Stolen Property. — Where the trial judge clearly charged the jury in substance that if it found beyond a reasonable doubt from the evidence that defendant was guilty of receiving stolen property (certain guns), knowing it to have been stolen, as he had defined the offense for it, and found beyond a reasonable doubt that the guns were of a value

of $600, then it would return a verdict of guilty as charged, but if under those circumstances it found the guns were of a value of $200 (now $400) or less, then it would return a verdict of guilty of receiving stolen goods, knowing them to have been stolen, of a value of $200 (now $400) or less, a misdemeanor, this conforms to the decision in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962). State v. Matthews, 267 N.C. 244, 148 S.E.2d 38 (1966).

What is meant by "felonious intent" is a matter for the court to explain to the jury and no exact words are required to instruct the jury as to its meaning. State v. Wesson, 16 N.C. App. 683, 193 S.E.2d 425 (1972), cert. denied, 282 N.C. 675, 194 S.E.2d 155 (1973).

E. Verdict.

Verdict Need Not Fix Precise Value of Stolen Property. — The final sentence of this section does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds $200 (now $400). When the jury is properly instructed, the verdict necessarily determines whether the value of the stolen property exceeds $200 (now $400). State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

This section does not require that the jury fix the precise value of the stolen property. The only issue of legal significance is whether the value thereof exceeds $200 (now $400). State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Except in Cases of Doubt. — The portion of this section which expressly states, "In all cases of doubt the jury shall in its verdict fix the value of the property stolen," means exactly what it says, and where all the evidence is to the effect that the stolen property had a value many times in excess of $200 (now $400), and there is no evidence or contention to the contrary, the trial court is under no legal obligation to require the jury to fix the value of the stolen property. State v. Brown, 267 N.C. 189, 147 S.E.2d 916 (1966), overruled on other grounds, State v. Jones, 275 N.C. 432, 168 S.E.2d 380 (1969).

Where the bill upon which the defendant was tried charged the defendant with the larceny of a 1961 Chevrolet automobile of the value of $1200 and the evidence amply supported the charge, and there was no evidence to the contrary, it was unnecessary upon such a factual situation to require the jury to find that a 1961 Chevrolet automobile of the value of $1200 was worth more than $200 (now $400). State v. Brown, 267 N.C. 189, 147 S.E.2d 916 (1966), overruled on other grounds, 275 N.C. 432, 168 S.E.2d 380 (1969).

Section 15A-1237(a) does not require that a verdict in a felonious larceny case establish the value of the allegedly stolen property. State v. Jefferies, 41 N.C. App. 95, 254 S.E.2d 550, cert. denied, 297 N.C. 614, 257 S.E.2d 438 (1979).

Verdict Where Court Failed to Instruct as to Duty to Find Value of Property. — A verdict finding the defendant guilty as charged in the bill of indictment must be considered as a verdict of guilty of larceny of personal property having a value of $200 (now $400) or less, a misdemeanor, where the trial court failed to instruct the jury as to their duty to fix the value of the property. State v. Walker, 6 N.C. App. 740, 171 S.E.2d 91 (1969).

Where, absent a finding of guilty of the breaking and entering, a verdict of guilty of larceny of property of a value of more than $200.00 (now $400) (a felony), or of guilty of larceny of property of a value of $200.00 (now $400) or less (a misdemeanor), was permissible under appropriate instructions, but the jury was not instructed as to its duty to fix the value of the property in question, the verdict must be considered as a verdict of guilty of larceny of property of a value of $200.00 (now $400) or less (a misdemeanor). State v. Teel, 20 N.C. App. 398, 201 S.E.2d 733 (1974).

Finding. — A finding that defendant stole property of the value of more than $50 was not a finding that the property had a value of more than $100 (now $400). State v. Williams, 235 N.C. 429, 70 S.E.2d 1 (1952).

Acquittal of Breaking and Entering Does Not Preclude Conviction of Larceny. — Where trial proceeded on the theory that defendant was guilty, if at all, as an aider and abettor of two other principal perpetrators, a not guilty verdict on a count of breaking and entering is not necessarily a finding by the jury that larceny was not committed by defendant pursuant to a breaking. It could be a finding simply that defendant was not an aider and abettor on the breaking count. The jury could, therefore, consistently with its verdict on the breaking count find that felonious larceny was committed pursuant to a breaking by the principal perpetrators and defendant, by reason of aiding and abetting, was guilty of the felony as a principal in the second degree, provided, of course, this theory of the case was presented to them in the trial judge's instructions. State v. Curry, 288 N.C. 312, 218 S.E.2d 374 (1975).

F. Sentencing.

Felony. — The punishment for larceny from the person may be for as much as ten years in State prison. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

The punishment for larceny from the person may include imprisonment for a term of ten years. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

The maximum punishment is ten years' imprisonment for the felony of larceny of property from a building referred to in this section

by breaking or entering therein with intent to steal. State v. Reed, 4 N.C. App. 109, 165 S.E.2d 674 (1969).

Misdemeanor. — A plea of guilty to the larceny of a sum less than $200 (now $400) does not support a sentence of ten years' imprisonment, and the imposition of such sentence must be vacated. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

The maximum imprisonment for the misdemeanor of larceny is two years. State v. Barber, 5 N.C. App. 126, 167 S.E.2d 883 (1969).

Where an indictment charges larceny of property of the value of $200 (now $400) or less, but contains no allegation the larceny was from a building by breaking and entering, the crime charged is a misdemeanor for which the maximum prison sentence is two years, notwithstanding all the evidence tends to show the larceny was accomplished by means of a felonious breaking and entering. State v. Bowers, 273 N.C. 652, 161 S.E.2d 11 (1968).

Where an indictment charges larceny of $200 (now $400) or less, but does not contain allegations that the larceny was from a building by breaking and entering, the punishment cannot exceed two years in prison, even though all the evidence tends to show the larceny was accomplished by a felonious breaking and entering. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

The punishment upon conviction of the misdemeanor of larceny may not exceed two years. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

Not Cruel and Unusual Punishment. — A sentence of twenty-five years imprisonment, imposed after a plea of guilty to four indictments charging felonious breaking and entering and larceny in violation of § 14-54 and this section, did not exceed the statutory maximum and was not cruel and unusual punishment in the constitutional sense. State v. Greer, 270 N.C. 143, 153 S.E.2d 849 (1967).

The imposition of a sentence of imprisonment of seven to nine years upon plea of nolo contendere to the offenses of breaking and entering and larceny is not cruel or unusual punishment in a constitutional sense. State v. Robinson, 271 N.C. 448, 156 S.E.2d 854 (1967).

Consolidated Counts. — Where defendant was tried and convicted upon an indictment charging felonious breaking and entering and misdemeanor-larceny, and both counts were consolidated for judgment, the fact that the one sentence imposed is in excess of that permissible upon conviction of the misdemeanor is immaterial and is not prejudicial where it does not exceed that permitted upon conviction of the felony. State v. Cleary, 9 N.C. App. 189, 175 S.E.2d 749 (1970).

§ 14-72.1. Concealment of merchandise in mercantile establishments.

(a) Whoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premises of such store, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars ($100.00), or by imprisonment for not more than six months, or by both such fine and imprisonment. Such goods or merchandise found concealed upon or about the person and which have not theretofore been purchased by such person shall be prima facie evidence of a willful concealment.

(b) Any person who has been found guilty of an offense under either subsection (a) or subsection (d) of this section and who is later found guilty of an offense under either subsection (a) or subsection (d) of this section shall be guilty of a general misdemeanor and shall be punished in the discretion of the court.

(c) A merchant, or his agent or employee, or a peace officer who detains or causes the arrest of any person shall not be held civilly liable for detention, malicious prosecution, false imprisonment, or false arrest of the person detained or arrested, where such detention is in a reasonable manner for a reasonable length of time, if in detaining or in causing the arrest of such person, the merchant, or his agent or employee, or the peace officer had at the time of the detention or arrest probable cause to believe that the person committed the offense created by this section. If the person being detained by the merchant, or his agent or employee, is a minor 16 years of age or younger, the merchant or his agent or employee, shall call or notify, or make a reasonable effort to call or notify the parent or guardian of the minor, during the period of detention.

(d) Whoever, without authority, willfully transfers any price tag from goods or merchandise to other goods or merchandise having a higher selling price or marks said goods at a lower price or substitutes or superimposes thereon a false price tag and then presents said goods or merchandise for purchase shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one hundred dollars ($100.00) or by imprisonment for not more than six months or by both fine and imprisonment.

Nothing herein shall be construed to provide that the mere possession of goods or the production by shoppers of improperly priced merchandise for checkout shall constitute prima facie evidence of guilt. (1957, c. 301; 1971, c. 238; 1973, c. 457, ss. 1, 2.)

Legal Periodicals. — For case law survey on shoplifting, see 41 N.C.L. Rev. 446 (1963).

For note on the 1971 amendment to this section with regard to the powers of the merchant and his immunity from suit for malicious prosecution, see 50 N.C.L. Rev. 188 (1971).

For note on the 1971 amendment to this section, concerning civil actions which may result from enforcement of the criminal sanction, see 7 Wake Forest L. Rev. 683 (1971).

CASE NOTES

This section violates neither N.C. Const., Art. I, § 17, (now Art. I, § 19) nor the due process clauses of the federal Constitution, by reason of vagueness and uncertainty, and of not informing a person of ordinary intelligence with reasonable precision of the acts it prohibits. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

It Is Sufficiently Definite. — This section is sufficiently definite to guide the judge in its application and the lawyer in defending one charged with its violation. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

This section defines with sufficient clarity and definiteness the acts which are penalized, and informs a person of ordinary intelligence with reasonable precision what acts it intends to prohibit so that he may know what acts he should avoid, in order that he may not "cross the line" and bring himself within its penalties. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

And Omits No Essential Provisions. — This section omits no essential provisions which go to impress the inhibited acts committed as being wrongful and criminal. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

And Has a Substantial Relation to the End Sought to Be Accomplished. — It is manifest that this section has a rational, real and substantial relation to the end sought to be accomplished, which is the protection of our merchants from shoplifting, and that such was the manifest purpose and design of the legislation. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Act May Be Made Criminal Irrespective of Intent. — It is within the power of the legislature to declare an act criminal irrespective of the intent of the doer of the act. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

The statutory offense of shoplifting is very limited in its application, particularly with respect to the owner or possessor of the property covered. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

This section, due to its narrow scope, would not cover property in a residence, bank, school or church — only "the goods or merchandise of any store." State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

Elements of Offense. — The statutory offense created by this section is composed of four essential elements: Whoever (1) without authority, (2) willfully conceals the goods or merchandise of any store, (3) not theretofore purchased by such person, (4) while still upon the premises of the store, shall be guilty of a misdemeanor. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961); State v. Watts, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

Felonious or Criminal Intent Is Not a Necessary Element. — It is manifest from the language of this section, in view of its manifest purpose and design, that the legislature intended that a felonious intent or a criminal intent should not be a necessary element of the statutory crime of shoplifting. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961).

Willful Concealment. — "Willfully conceals" as used in this section means that the concealing is done under the circumstances set forth in the statute voluntarily, intentionally, purposely and deliberately, indicating a purpose to do it without authority, and in viola-

tion of law, and this is an essential element of the statutory offense of shoplifting. State v. Hales, 256 N.C. 27, 122 S.E.2d 768 (1961); State v. Watts, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

Ownership Need Not Be Alleged. — Although a warrant for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective the rule is not applicable to the shoplifting statute. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

While drafters of warrants charging a violation of this statute would be well advised to allege whether the merchandising firm is a natural person or a corporation, the failure to do so did not here render the warrant fatally defective. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614, cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

Evidence Sufficient to Convict. — See State v. Watts, 31 N.C. App. 513, 229 S.E.2d 715 (1976).

Applied in State v. Thompson, 2 N.C. App. 508, 163 S.E.2d 410 (1968); State v. Wilson, 13 N.C. App. 260, 185 S.E.2d 4 (1971).

Cited in State v. Garcia, 16 N.C. App. 344, 192 S.E.2d 2 (1972).

§ 14-72.2. Unauthorized use of a motor-propelled conveyance.

(a) A person is guilty of an offense under this section if, without the express or implied consent of the owner or person in lawful possession, he takes or operates an aircraft, motorboat, motor vehicle, or other motor-propelled conveyance of another.

(b) Unauthorized use of an aircraft is a Class I felony. All other unauthorized use of a motor-propelled conveyance is a misdemeanor punishable by a fine, imprisonment not to exceed two years, or both, in the discretion of the court.

(c) Unauthorized use of a motor-propelled conveyance shall be a lesser-included offense of unauthorized use of an aircraft.

(d) As used in this section, "owner" means any person with a property interest in the motor-propelled conveyance. (1973, c. 1330, s. 38; 1977, c. 919; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "Class I felony" for "felony punishable by a fine, imprisonment not to exceed five years, or both, in the discretion of the court" at the end of the first sentence of subsection (b). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

CASE NOTES

Editor's Note. — Most of the cases cited below were decided under former § 20-105.

Constitutionality. — See State v. Graham, 32 N.C. App. 601, 233 S.E.2d 615 (1977), decided prior to the 1977 amendment.

Lesser Included Offense of Larceny. — All of the essential elements of the crime of unauthorized use of a conveyance are included in larceny, § 14-72, and it may be a lesser included offense of larceny where there is evidence to support the charge. State v. Ross, 46 N.C. App. 338, 264 S.E.2d 742 (1980).

Inference Arising from Unlawful Possession of Vehicle. — See State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966); State v. Hayes, 273 N.C. 712, 161 S.E.2d 185 (1968).

Possession of One Participant Is the Possession of All. — Possession may be personal and exclusive, although it is the joint possession of two or more persons, if they are shown to have acted in concert, or to have been particeps criminis, the possession of one partici-

pant being the possession of all. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

Immediate flight of both defendants, without explanation, at mere approach of officers may be considered more than slight corroborative evidence of relation between their then unlawful possession and the unlawful removal of automobile from parking lot. State v. Frazier, 268 N.C. 249, 150 S.E.2d 431 (1966).

Applied in Ford Marketing Corp. v. National Grange Mut. Ins. Co., 33 N.C. App. 297, 235 S.E.2d 82 (1977); State v. Herman, 45 N.C. App. 711, 264 S.E.2d 122 (1980).

Quoted in State v. Kaerner, 28 N.C. App. 223, 220 S.E.2d 397 (1975).

Cited in State v. Reese, 31 N.C. App. 575, 230 S.E.2d 213 (1976).

§ 14-73. Jurisdiction of the superior courts in cases of larceny and receiving stolen goods.

The superior courts shall have exclusive jurisdiction of the trial of all cases of the larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of more than four hundred dollars ($400.00). (1913, c. 118, s. 2; C.S., s. 4252; 1941, c. 178, s. 2; 1949, c. 145, s. 3; 1961, c. 39, s. 2; 1979, c. 408, s. 2.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, substituted "four hundred dollars ($400.00)" for "two hundred dollars" at the end of this section.

Session Laws 1979, c. 408, s. 3, provides: "This act shall become effective on January 1, 1980, and applies to all crimes committed on or after that date."

CASE NOTES

Applied in State v. Davis, 253 N.C. 224, 116 S.E.2d 381 (1960); State v. Perry, 21 N.C. App. 478, 204 S.E.2d 889 (1974).

Cited in State v. Cooper, 256 N.C. 372, 124 S.E.2d 91 (1962).

§ 14-73.1. Petty misdemeanors.

The offenses of larceny and the receiving of stolen goods knowing the same to have been stolen, which are made misdemeanors by Article 16, Subchapter V, Chapter 14 of the General Statutes, as amended, are hereby declared to be petty misdemeanors. (1949, c. 145, s. 4; 1973, c. 108, s. 1.)

Legal Periodicals. — For brief comment on section, see 27 N.C.L. Rev. 448.

§ 14-74. Larceny by servants and other employees.

If any servant or other employee, to whom any money, goods or other chattels, or any of the articles, securities or choses in action mentioned in the following section [G.S. 14-75], by his master shall be delivered safely to be kept to the use of his master, shall withdraw himself from his master and go away with such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, with intent to steal the same and defraud his master thereof, contrary to the trust and confidence in him reposed by his said master; or if any servant, being in the service of his master, without the assent of his master, shall embezzle such money, goods or other chattels, or any of the articles, securities or choses in action mentioned as aforesaid, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal them, or to defraud his master thereof, the servant so offending shall be punished as a Class H felon: Provided, that nothing contained in this section shall extend to apprentices or servants within the age

of 16 years. (21 Hen. VIII, c. 7, ss. 1, 2; R. C., c. 34, s. 18; Code, s. 1065; Rev., s. 3499; C. S., s. 4253; 1979, c. 760, s. 5.)

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "fined or imprisoned in the State prison or county jail not less than four months nor more than ten years, at the discretion of the court" immediately preceding the proviso at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1; as to embezzlement, see § 14-90 et seq.

CASE NOTES

The purpose of this section was to make the conduct described therein a crime because it does not constitute the crime of common-law larceny. State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

Larceny Not Lesser Included Offense. — Where defendant was charged with larceny by an employee he could not be convicted of the offense of larceny, since the two are wholly separate offenses, and each requires different evidentiary showings. In short, larceny is not a lesser included offense of larceny by an employee. State v. Daniels, 43 N.C. 556, 259 S.E.2d 396 (1979).

Servant Defined. — In a strict sense all employees are servants but the term servant is usually applied, and meant to apply to one of menial rank. State v. Higgins, 1 N.C. 36 (1792).

Trust Relation Necessary. — A person employed as a clerk, who takes goods from his employer's store and sends them to another at a distance to be sold cannot be convicted under this statute as there was no parting with possession by the owner which brought about a trust relation. State v. Higgins, 1 N.C. 36 (1792).

This section requires by its express terms that the larceny be committed in violation of a trust relationship between the employee and the employer. State v. Bullin, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

And Must Be Alleged. — In an indictment under this section, it is necessary to allege that the property was received and held by the defendant in trust, or for the use of the owner, and beng so held it was feloniously converted or made way with by the servant or agent. State v. Wilson, 101 N.C. 730, 7 S.E. 872 (1888).

Value Is Immaterial. — This section does not believe its terms require that the property stolen reflect a minimum value in order for a violation thereof to constitute a felony. State v. Monk, 36 N.C. App. 337, 244 S.E.2d 186 (1978).

Dismissal under § 14-72 No Bar to Prosecution under this Section. — Since the element of trespass required in § 14-72 is not required for prosecution under this section, and the element of trust required under this section is not required in § 14-72, the dismissal in district court of a charge under § 14-72 cannot be considered a prior adjudication which would bar prosecution under this section. State v. Bullin, 34 N.C. App. 589, 239 S.E.2d 278 (1977).

Adequate Notice of Charge. — The defendant was adequately notified in the indictment that he would be put on trial for the embezzlement of certain nuts and bolts during a certain period of time where the crime alleged in the bill of indictment was embezzlement but the proof adduced at trial showed that the defendant aided and abetted another in the crime of embezzlement. He could not be misled or prejudiced by being convicted of a lower grade of the principal offense charged. State v. Lancaster, 37 N.C. App. 528, 246 S.E.2d 575, cert. denied, 295 N.C. 650, 248 S.E.2d 255 (1978).

Evidence Admissible. — In a prosecution of defendant for embezzlement of merchandise from his employer, the trial court did not err in admitting testimony concerning certain state's exhibits and in admitting the exhibits consisting of cigarettes, matches, soup, soap and hams, since the items and the circumstances under which they were found were sufficiently identified and described by the officer who retrieved them, and since the evidence was relevant to show that the crime of embezzlement was committed. State v. Bryant, 50 N.C. App. 139, 272 S.E.2d 916 (1980).

Applied in State v. Hauser, 257 N.C. 158, 125 S.E.2d 389 (1962); State v. Lovick, 42 N.C. App. 577, 257 S.E.2d 146 (1979).

Cited in State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

§ 14-75. Larceny of chose in action.

If any person shall feloniously steal, take and carry away, or take by robbery, any bank note, check or other order for the payment of money issued by or drawn on any bank or other society or corporation within this State or within any of the United States, or any treasury warrant, debenture, certificate of stock or other public security, or certificate of stock in any corporation, or any order, bill of exchange, bond, promissory note or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be a crime of the same nature and degree and in the same manner as it would have been if the offender had feloniously stolen, or taken by robbery money, goods or property of the same value, and the offender for every such offense shall suffer the same punishment and be subject to the same pains, penalties and disabilities as he should or might have suffered if he had feloniously stolen or taken by robbery money, goods or other property of such value. (1811, c. 814, s. 1; R. C., c. 34, s. 20; Code, s. 1064; Rev., s. 3498; C. S., s. 4254; 1945, c. 635.)

Cross References. — As to description of stoeln money in indictment, see § 15-149.

CASE NOTES

Treasury Notes. — Treasury notes issued by the United States Treasury Department are covered by this statute as they are "public securities." Although a class of securities issued after the enactment of the statute they are subject to larceny the same as any other note issued after the enactment. State v. Thompson, 71 N.C. 146 (1874).

Due Bills. — While a "due bill" is not a promissory note, and negotiable by endorsement, it is within the meaning of the words, "or other obligation," in this section. The larceny of such a paper is indictable. State v. Campbell, 103 N.C. 344, 9 S.E. 410 (1889).

A pension check on the United States Treasury comes under this section. State v. Bishop, 98 N.C. 773, 4 S.E. 357 (1887).

Charter of Bank Issuing Immaterial. — If a stolen note was issued by a bank within one of the United States, it is within the letter of the act, and there cannot be the slightest doubt but that it is also within its spirit and meaning. The act is silent as to the authority by which the bank must be chartered, and the mischief of stealing one of its notes from a bona fide holder is the same, whether it derives its existence from an act of Congress or from the legislature of New York. State v. Banks, 61 N.C. 577 (1868).

Larceny of the Instrument and Paper Distinguished. — When a person is indicted for stealing a promissory note or any other chose in action, it is upon the State to prove the larceny of the instrument, and proof of larceny of a piece of paper is not sufficient. If the instrument has been paid before the alleged felonious taking, the indictment charging only larceny of a chose in action is not sufficient to convict. State v. Campbell, 103 N.C. 344, 9 S.E. 410 (1889).

Sufficient Description. — An indictment for larceny which describes the thing stolen, as "one promissory note issued by the Treasury Department of the government of the United States for the payment of one dollar," is in that respect sufficient. State v. Fulford, 61 N.C. 563 (1868).

Amount Must Be Set Out. — An indictment for stealing a bank note is sufficient if it states the amount of the note and what bank it was drawn on. Some cases hold that the mere statement of the amount of the note is sufficient description. State v. Rout, 10 N.C. 618 (1825).

Cited in State v. Freeman, 88 N.C. 469 (1883).

§ 14-75.1. Larceny of secret technical processes.

Any person who steals property consisting of a sample, culture, microorganism, specimen, record, recording, document, drawing, or any other article, material, device, or substance which constitutes, represents, evidences, reflects, or records a secret scientific or technical process, invention, formula, or any phase or part thereof shall be punished as a Class H felon. A process, invention, or formula is "secret" when it is not, and is not intended to be, available to anyone other than the owner thereof or selected persons having access thereto for limited purposes with his consent, and when it accords or may accord the owner an advantage over competitors or other persons who do not have knowledge or the benefit thereof. (1967, c. 1175; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to an employee's right to certain inventions, see § 66-57.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony punishable by imprisonment not exceeding four years or by a fine not exceeding five thousand dollars ($5,000), or by both" at the end of the first sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-76. Larceny, mutilation, or destruction of public records and papers.

If any person shall steal, or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order or decree or any original document whatsoever, of or belonging to any court or relating to any cause or matter begun, pending or terminated in any such court, every such offender shall be guilty of a misdemeanor; and in any indictment for such offense it shall not be necessary to allege that the article, in respect to which the offense is committed, is the property of any person or that the same is of any value. If any person shall steal or for any fraudulent purpose shall take from the register's office, or from any person having the lawful custody thereof, or shall unlawfully and willfully obliterate, injure or destroy any book wherein deeds or other instruments of writing are registered, or any other book of registration or record required to be kept by the register of deeds or shall unlawfully destroy, obliterate, deface or remove any records of proceedings of the board of county commissioners, or unlawfully and fraudulently abstract any record, receipt, order or voucher or other paper writing required to be kept by the clerk of the board of commissioners of any county, he shall be guilty of a misdemeanor. (8 Hen. VI, c. 12, s. 3; R. C., c. 34, s. 31; 1881, c. 17; Code, s. 1071; Rev., s. 3508; C. S., s. 4255.)

CASE NOTES

History of Section. — See State v. West, 31 N.C. App. 431, 229 S.E.2d 826 (1976), aff'd, 293 N.C. 18, 235 S.E.2d 150 (1977).

Offense Is a Felony. — Nonmenclature does not always determine the grade or class of a crime; a felony is a crime which is or may be punishable either by death or by imprisonment in the State prison and any other crime is a misdemeanor. Calling an offense a misdemeanor does not make it so when the punishment imposed makes it a felony and construed with § 14-3 the offense prescribed by this section is punishable by imprisonment in the penitentiary, and therefore a felony. State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934).

Injury to Tax Books. — An indictment will lie under this section for changing, injuring or obliterating tax books, and the oral testimony of the register of deeds is competent to show the amount of the abstract made by him and sent to the auditor, the changed amount, and the acts of the deputy sheriff, as circumstances to show his guilt. State v. Gouge, 157 N.C. 602, 72 S.E. 994 (1911).

Evidence Insufficient. — On a trial under this section for the destruction of certain pages of a book in the office of the register of deeds, wherein the defendant's interest in so doing was shown, it was required of the State to show that the offense was committed on the day the defendant had an opportunity to commit the offense, and a margin of several weeks, in which the offense might have been committed, during which time the books were open to the public generally, was insufficient evidence to be submitted to the jury, and defendant's motion as of nonsuit should have been allowed. State v. Swinson, 196 N.C. 100, 144 S.E. 555 (1928).

Quoted in State v. Bellar, 16 N.C. App. 339, 192 S.E.2d 86 (1972).

§ 14-76.1. Mutilation or defacement of records and papers in the North Carolina State Archives.

If any person shall willfully or maliciously obliterate, injure, deface, or alter any record or paper in the custody of the North Carolina State Archives as defined by G.S. 121-2(7) and 121-2(8), he shall be guilty of a misdemeanor and upon conviction imprisoned for a term not exceeding two years or fined not exceeding one thousand dollars ($1,000) or both. The provisions of this section do not apply to employees of the Department of Cultural Resources who may destroy any accessioned records or papers that are approved for destruction by the North Carolina Historical Commission pursuant to the authority contained in G.S. 121-4(12). (1975, c. 696, s. 3.)

§ 14-77. Larceny, concealment or destruction of wills.

If any person, either during the life of the testator or after his death, shall steal or, for any fraudulent purpose, shall destroy or conceal any will, codicil or other testamentary instrument, he shall be guilty of a misdemeanor. (R. C., c. 34, s. 32; Code, s. 1072; Rev., s. 3510; C. S., s. 4256.)

Cross References. — As to clerk's power to compel production of will when one in whose custody it is refuses to produce it, see § 31-15.

CASE NOTES

Purpose of Section. — Obviously the basis for making the fraudulent suppression of a will a crime as provided by this section is the fact that it is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law. Wells v. Odum, 207 N.C. 226, 176 S.E. 563 (1934).

A family settlement agreement was supported by consideration and was not void as against public policy because it included an agreement not to probate a codicil to testatrix's will. Holt v. Holt, 47 N.C. App. 618, 267 S.E.2d 711 (1980).

Applied in State v. McLean, 17 N.C. App. 629, 195 S.E.2d 336 (1973).

Cited in In re Will of Pendergrass, 251 N.C. 737, 112 S.E.2d 562 (1960); In re Will of Covington, 252 N.C. 546, 114 S.E.2d 257 (1960).

§ 14-78. Larceny of ungathered crops.

If any person shall steal or feloniously take and carry away any maize, corn, wheat, rice or other grain, or any cotton, tobacco, potatoes, peanuts, pulse, fruit, vegetable or other product cultivated for food or market, growing, standing or remaining ungathered in any field or ground, he shall be guilty of larceny, and shall be punished accordingly, such punishment to include a fine of not less than fifty dollars ($50.00) nor more than two hundred fifty dollars ($250.00). (1811, c. 816, P. R.; R. C., c. 34, s. 21; 1868-9, c. 251; Code, s. 1069; Rev., s. 3503; C. S., s. 4257; 1975, c. 697.)

CASE NOTES

At Common Law. — By the common law, larceny cannot be committed of things which savor of the realty, and are at the time they are taken a part of the freehold, such as corn and the produce of land. State v. Foy, 82 N.C. 679 (1880); State v. Thompson, 93 N.C. 537 (1885).

What Indictment Must Allege. — On trial of an indictment for larceny charging the defendant with stealing "seed cotton and lint cotton," evidence that defendant took the gleanings of the cotton from the field, was not admissible. To render such evidence competent, the indictment should have been framed under the statute, and described the crop as "growing, standing or ungathered" in the field, and cultivated for food or market. State v. Bragg, 86 N.C. 687 (1882).

In the case of State v. Liles, 78 N.C. 496 (1878), the defendant was indicted for the larceny of figs, "remaining ungathered in a certain field," etc., and the words "cultivated for food or market," were omitted and it was held that the indictment, for that reason, was fatally defective. State v. Thompson, 93 N.C. 537 (1885).

Indictment Must Conclude against the Statute. — An indictment for larceny of growing cabbage must conclude against the statute, and a failure to so conclude makes the indictment one at common law. As the offense at common law was not larceny but only a civil trespass, there can be no judgment. State v. Foy, 82 N.C. 679 (1880).

Applies to All Crops. — This section applies to any growing crops cultivated for food or market, and is not restricted to serveral articles specifically named. State v. Ballard, 97 N.C. 443, 1 S.E. 685 (1887).

§ 14-78.1. Trading for corn without permission of owner of premises.

Any person engaged in traveling from house to house or from place to place, buying or trading for corn, without the permission of the landowner upon whose premises such buying or trading is conducted, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. This section shall apply only to the counties of Bertie, Columbus, Craven, Edgecombe, Greene, Halifax, Harnett, Hertford, Martin, Nash, Northampton, Perquimans, Robeson, Sampson, Wake, Warren, Wayne and Wilson. (1951, c. 30; 1955, c. 684; 1957, c. 356; 1969, c. 1224, s. 4.)

§ 14-79. Larceny of ginseng.

If any person shall take and carry away, or shall aid in taking or carrying away, any ginseng growing upon the lands of another person, with intent to steal the same, he shall be punished as a Class I felon: Provided, that such ginseng, at the time the same is taken, shall be in beds and the land upon which such beds are located shall be surrounded by a lawful fence. (1905, c. 211; Rev., s. 3502; C. S., s. 4258; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to digging ginseng out of season on the lands of another, § 14-392.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony, and shall be imprisoned not less than two years nor more than five years, in the discretion of the court" near the middle of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-80. Larceny of wood and other property from land.

If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor. (1866, c. 60; Code, s. 1070; Rev., s. 3511; C. S., s. 4259.)

Cross References. — As to cutting, injuring, or removing another's timber, see § 14-135. As to larceny of branded timber, see §§ 80-21 and 80-22.

CASE NOTES

Purpose of Section. — This section was enacted immediately after the Civil War to protect landowners from aimless wanderers who entered land without force, but often did great damage. It was not intended to prevent entry by person who had an honest claim to the land, nor was it intended to apply when force was employed. State v. Crawley, 103 N.C. 353, 9 S.E. 409 (1889). It was intended to prevent the willful and unlawful taking from the land of another property that was not by common law or prior statute subject to larceny. State v. Vosburg, 111 N.C. 718, 16 S.E. 392 (1892).

This section was enacted to eliminate a defect in the common-law rule and to extend it so as to make chattels real, such as growing trees, plants, minerals, metals and fences, connected in some way with the land, the subject of larceny. The obvious intent of the act was to prevent the willful and unlawful entry upon the land of another and the taking and carrying away of such articles as were not, at common law or by previous statute, the subject of larceny. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940).

This section was enacted in 1866, immediately after the Civil War, to suppress aimless wanderers, from entering land and doing great damage. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

Prior to the enactment of this section, landowners had little or no protection against the willful and unlawful taking from their land property which was not, either by common law or previous statute, the subject of larceny. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

No latitude of construction is permitted in the interpretation of a penal statute. This section is highly penal in character, and the court is not at liberty to extend its import by implication or equitable construction to include an offense not clearly described. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

The word "whatsoever" shows a clear intent of the legislature to make it general in its application. State v. Beck, 141 N.C. 829, 53 S.E. 843 (1906).

Trespass upon land is an essential element of the offense hereby created. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940); State v. Gaddy, 16 N.C. App. 436, 192 S.E.2d 18 (1972).

Bona Fide Claimants Not Liable. — One having title to the land or a bona fide claim thereto is not liable under this section by its express terms. One who enters as a servant of a bona fide claimant or one having title is not subject to the application of this section as the protection afforded the master extends to his servant. State v. Boyce, 109 N.C. 739, 14 S.E. 98 (1891).

A tenant of seven acres being a part of a tract of thirty-five acres claimed by the landlord,

when expressly prohibited from cutting timber on any of the tract except the seven acres on which he is a tenant, could as the servant of a third person claiming adversely go on the other part of the tract and cut timber, and he would not be estopped to deny his landlord's title except as to the seven acres leased to him, nor would he be liable under this section if the person whose servant he had been could prove his title or bona fide claim. State v. Boyce, 109 N.C. 739, 14 S.E. 98 (1891).

Claim of Interest Must Be Founded. — An entry, without a survey and grant from the State was not sufficient to support a claim to the land, and was no defense to an indictment under this section. State v. Calloway, 119 N.C. 864, 26 S.E. 46 (1896).

Warrant Not Charging Offense. — A warrant charging that defendant unlawfully and willfully authorized and directed his employee to enter upon the lands of another and carry off sand and gravel therefrom, without alleging what, if anything, the employee did pursuant to such authorization, did not charge a criminal offense. State v. Everett, 244 N.C. 596, 94 S.E.2d 576 (1956).

Indictment Must Allege That Property Taken Was Property of Landowner. — The particularly peculiar wording of this section clearly requires that the indictment allege that the property taken was the property of the owner of the land. State v. Andrews, 11 N.C. App. 341, 181 S.E.2d 142 (1971).

Tombstones. — Defendant was charged with feloniously stealing and carrying away one tombstone erected at the grave of a deceased person, being the goods and chattels of a named person. The court instructed the jury that the offense charged was larceny, which is the wrongful and felonious taking and carrying away of personal property of some value belonging to another, with felonious intent. Held: Neither the indictment nor the theory of trial referred to trespass constituting an element of the statutory crime of larceny of chattels real, nor to the distinction of taking with, and taking without felonious intent set forth in this section, and there was a fatal variance between the indictment for common-law larceny and the proof of the statutory larceny of a chattel real, and defendant's motion to nonsuit should have been granted. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940).

Turpentine which has flowed down trees into boxes made to catch it, and is in a state to be dipped out, is a subject of larceny. State v. Moore, 33 N.C. 70 (1850); State v. King, 98 N.C. 648, 4 S.E. 44 (1887).

Brass Rails from Stationary Engine. — The taking of a brass rail from around an engine that is stationary is larceny under this section. State v. Beck, 141 N.C. 829, 53 S.E. 843 (1906).

Money Not Included. — The penalty for entering the lands of another and carrying off wood or any other kind of property whatsoever growing or being thereon, does not contemplate or embrace such taking and carrying away of money; it means such property as was not, at common law, subject to larceny. State v. Vosburg, 111 N.C. 718, 16 S.E. 392 (1892).

Evidence Insufficient to Go to Jury. — Testimony that defendant was paid for dogwood delivered to a woodyard, without evidence that defendant actually delivered the wood with further evidence that dogwood taken from the yard fitted stumps on prosecuting witness land from which the wood had been wrongfully taken, was held insufficient to be submitted to the jury in a prosecution under this section, even though the doctrine of recent possession be invoked, since the evidence did not disclose that defendant had been in possession of the wood. State v. Turner, 238 N.C. 411, 77 S.E.2d 782 (1953).

Instructions Held Error. — In a prosecution for larceny of property from land in violation of this section, the trial court erred in giving the jury instructions which would have permitted it to return a verdict of guilty upon a finding of the elements of common-law larceny. State v. Gaddy, 16 N.C. App. 436, 192 S.E.2d 18 (1972).

Cemetery Urns Unconnected to Land. — Where was nothing in the record to establish that the urns or vases stolen by defendant from cemeteries were so connected to the land that they could not be the subject of common-law larceny or that they were affixed to the soil as tombstones, or markers but rather were movable object of a decorative nature that were easily moved from the grave markers on which they rested, defendant was properly convicted of common-law larceny rather than the offenses under this section, or § 14-148. State v. Schultz, 34 N.C. App. 120, 237 S.E.2d 349 (1977), aff'd 294 N.C. 281, 240 S.E.2d 451 (1978).

Applied in State v. Schultz, 294 N.C. 281, 240 S.E.2d 451 (1978).

§ 14-81. Larceny of horses, mules, swine, and cattle.

(a) Larceny of horses, mules, swine, or cattle is a Class H felony.

(b) In sentencing a person convicted of violating this section, the judge shall, as a minimum punishment, place a person on probation subject to the following conditions:

(1) A person must make restitution for the damage or loss caused by the larceny of the livestock, and

(2) A person must pay a fine of not less than the amount of the damages or loss caused by the larceny of the livestock.

(c) No provision in this section shall limit the authority of the judge to sentence the person convicted of violating this section to an active sentence. (1866-7, c. 62; 1868, c. 37, s. 1; 1879, c. 234, s. 2; Code, s. 1066; Rev., s. 3505; 1917, c. 162, s. 2; C. S., s. 4260; 1965, c. 621, s. 6; 1981, c. 664, s. 2.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, rewrote this section, which formerly read, in its entirety: "If any person shall steal any horse, mare, gelding, or mule he shall be guilty of larceny and punished as provided by this Article for the crime of larceny."

CASE NOTES

Taking with Belief of Interest. — One taking a mule from the stable of another at night and without the consent of the owner is not guilty of larceny if he believed at the time when he took the mule that he had an interest in it. State v. Thompson, 95 N.C. 596 (1886).

Same — Question for a Jury. — One who takes a mule from the stable of another in a manner indicating felonious purpose but under a claim of interest should have the question of his act being under a bona fide claim submitted to the jury, and a charge that if the taking was not under a bona fide belief that he had a property or interest in the mule he would be guilty of larceny was not error. State v. Thompson, 95 N.C. 596 (1886).

Joinder with Charge of Receiving Stolen Goods. — An indictment for horse stealing concluded at common law is punishable as petit larceny. If there are two counts and the second is for receiving stolen goods and concludes against the statute, the punishment for the two is the same and they may be joined, but on conviction a sentence of ten years is all that can be given. State v. Lawrence, 81 N.C. 522 (1879).

§ 14-82. Taking horses or mules for temporary purposes.

If any person shall unlawfully take and carry away any horse, gelding, mare or mule, the property of another person, secretly and against the will of the owner of such property, with intent to deprive the owner of the special or temporary use of the same, or with the intent to use such property for a special or temporary purpose, the person so offending shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1879, c. 234, s. 1; Code, s. 1067; Rev., s. 3509; 1913, c. 11; C. S., s. 4261; 1969, c. 1224, s. 3.)

CASE NOTES

Indictment. — An indictment for stealing the temporary use of a horse in violation of this section was not defective because it charged the stealing of the temporary use of a buggy also. State v. Darden, 117 N.C. 697, 23 S.E. 106 (1895).

Employee Liable. — An occasional employee, who took the employer's mule at night and drove it off without the knowledge or consent of the employer, was guilty of a tortious conversion, and an act indictable under this section; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental. Clark v. Whitehurst, 171 N.C. 1, 86 S.E. 78 (1915).

§ 14-83: Repealed by Session Laws 1943, c. 543.

§ 14-84. Larceny of dogs misdemeanor.

The larceny of any dog upon which a license tax has or has not been paid shall be a misdemeanor. Any person convicted of a larceny of any dog shall be fined or imprisoned in the discretion of the court. (1919, c. 116, s. 9; C. S., 4263; 1955, c. 804.)

Cross References. — As to dogs, when listed for taxes, becoming personal property, see § 67-15.

CASE NOTES

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 14-85. Pursuing or injuring livestock with intent to steal.

If any person shall pursue, kill or wound any horse, mule, ass, jennet, cattle, hog, sheep or goat, the property of another, with the intent unlawfully and feloniously to convert the same to his own use, he shall be guilty of a felony, and shall be punishable, in all respects, as if convicted of larceny, though such animal may not have come into the actual possession of the person so offending. (1866, c. 57; Code, s. 1068; Rev., s. 3504; C. S., s. 4264.)

CASE NOTES

Sufficiency of Indictment. — An indictment under this section for injury to livestock, in which the animal alleged to have been injured is described as a "certain cattle beast," was sufficiently definite. State v. Credle, 91 N.C. 640 (1884).

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 14-86. Destruction or taking of soft drink bottles.

It shall be unlawful for any person, firm or corporation, or any employee thereof, to maliciously take up, carry away, destroy or in any way dispose of bottles or other property belonging to any bottler, bottling company, person, firm or corporation engaged in the business of bottling and/or distributing in bottles or other closed containers soda water, Coca-Cola, Pepsi-Cola, cheri-wine, Chero-Cola, ginger ale, grape and other fruit juices or imitations thereof, carbonated or malted beverages and like preparations commonly known as soft drinks. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1937, c. 322, ss. 1, 2; 1969, c. 1224, s. 5.)

Cross References. — As to pollution of soft drink bottles, see § 14-288.

§ 14-86.1. Seizure and forfeiture of conveyances used in committing larceny and similar crimes.

(a) All conveyances, including vehicles, watercraft or aircraft, used to unlawfully conceal, convey or transport property in violation of G.S. 14-71, 14-71.1, or 20-106 or used by any person in the commission of any larceny when the value of the property taken is more than four hundred dollars ($400.00) shall be subject to forfeiture as provided herein, except that:

(1) No conveyance used by any person as a common carrier in the transaction of the business of the common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in custody or control of such conveyance was a consenting party or privy to a violation that may subject the conveyance to forfeiture under this section;

(2) No conveyance shall be forfeited under the provisions of this section by reason of any act or omission committed or omitted while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or any state;

(3) No conveyance shall be forfeited pursuant to this section unless the violation involved is a felony;

(4) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party who neither had knowledge of nor consented to the act or omission;

(5) No conveyance shall be forfeited under the provisions of this section unless the owner knew or had reason to believe the vehicle was being used in the commission of any violation that may subject the conveyance to forfeiture under this section;

(6) The trial judge in the criminal proceeding which may subject the conveyance to forfeiture may order the seized conveyance returned to the owner if he finds forfeiture inappropriate. If the conveyance is not returned to the owner the procedures provided in subsection (e) shall apply.

(b) Any conveyance subject to forfeiture under this section may be seized by any law-enforcement officer upon process issued by any district or superior court having original jurisdiction over the offense except that seizure without such process may be made when:

(1) The seizure is incident to an arrest or subject to a search under a search warrant; or

(2) The property subject to seizure has been the subject of a prior judgment in favor of the State in a criminal injunction or forfeiture proceeding under this section.

(c) The conveyance shall be deemed to be in custody of the law-enforcement agency seizing it. The law-enforcement agency may remove the property to a place designated by it or request that the North Carolina Department of Justice or Department of Crime Control and Public Safety take custody of the property and remove it to an appropriate location for disposition in accordance with law; provided, the conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by an officer of the agency seizing the conveyance and shall be conditioned upon the return of said property to the custody of said officer on the day of trial to abide the judgment of the court.

(d) Whenever a conveyance is forfeited under this section, the law-enforcement agency having custody of it may:

(1) Retain the conveyance for official use; or

(2) Transfer the conveyance which was forfeited under the provisions of this section to the North Carolina Department of Justice or to the North Carolina Department of Crime Control and Public Safety when, in the discretion of the presiding judge and upon application of the North Carolina Department of Justice or the North Carolina Department of Crime Control and Public Safety, said conveyance may be of official use to the North Carolina Department of Justice or the North Carolina Department of Crime Control and Public Safety; or

(3) Upon determination by the director of any law-enforcement agency that a conveyance transferred pursuant to the provisions of this section is of no further use to said agency, such conveyance may be sold as surplus property in the same manner as other conveyances owned by the law-enforcement agency. The proceeds from such sale, after deducting the cost thereof, shall be paid to the school fund of the county in which said conveyance was seized. Any conveyance transferred to any law-enforcement agency under the provisions of this section which has been modified or especially equipped from its original manufactured condition so as to increase its speed shall be used in the performance of official duties only. Such conveyance shall not be resold, transferred or disposed of other than as junk unless the special equipment or modification has been removed and destroyed, and the vehicle restored to its original manufactured condition.

(e) All conveyances subject to forfeiture under the provisions of this section shall be forfeited pursuant to the procedures for forfeiture of conveyances used to conceal, convey, or transport intoxicating beverages found in G.S. 18A-21. Provided, nothing in this section or G.S. 18A-21 shall be construed to require a conveyance to be sold when it can be used in the performance of official duties of the law-enforcement agency. (1979, c. 592.)

Editor's Note. — Section 18A-21, referred to in subsection (e) of this section, was repealed by Session Laws 1981, c. 412, s. 1, effective Jan. 1, 1982. As to forfeiture of conveyances, see § 18B-504, effective Jan. 1, 1982.

Article 17.

Robbery.

§ 14-87. Robbery with firearms or other dangerous weapons.

(a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

(b) Repealed by Session Laws 1979, c. 760, s. 5, effective July 1, 1981.

(c) Repealed by Session Laws 1979, c. 760, s. 5, effective July 1, 1981.

(d) Notwithstanding any other provision of law, with the exception of persons sentenced as committed youthful offenders, a person convicted of robbery with firearms or other dangerous weapons shall serve a term of not less than seven years in prison, excluding gain time granted under G.S. 148-13. A person convicted of robbery with firearms or other dangerous weapons shall

receive a sentence of at least 14 years in the State's prison and shall be entitled to credit for good behavior under G.S. 15A-1340.7. The sentencing judge may not suspend the sentence and may not place the person sentenced on probation. Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder. (1929, c. 187, s. 1; 1975, cc. 543, 846; 1977, c. 871, ss. 1, 6; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1316, s. 12.)

Cross References. For statute providing the maximum punishment for felonies, see § 14-1.1. As to facilities and programs for youthful offenders, see §§ 148-49.10 through 148-49.16.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class D felon" for "punished by imprisonment for not less than seven years nor more than life imprisonment in the State's prison" at the end of subsection (a), deleted subsections (b), relating to punishment for second and subsequent offenses, and (c), requiring a person convicted under subsection (a) to serve seven years without benefit of parole, probation, suspended sentence or any other judicial or administrative procedure except for time off for good behavior, and providing that sentences imposed pursuant to this section shall run consecutively, and added subsection (d). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class D felony" for "punished as a Class D felon" at the end of subsection (a). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For a note on lesser included offenses, see 2 Campbell L. Rev. 145 (1980).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
A. In General.
B. Common Law Robbery.
C. Attempted Robbery.

II. Elements of Crime.
A. In General.
B. Use or Threatened Use of Dangerous Weapons.
C. Taking and Intent.

III. Lesser Included Offenses

IV. Indictment.

V. Evidence.

VI. Instructions.

VII. Punishment.

VIII. Double Jeopardy.

I. GENERAL CONSIDERATION.

A. In General.

The primary purpose and intent of the legislature in enacting this section, was to provide for more severe punishment for the commission of robbery when such offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. It does not add to or subtract from the

common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission or attempted commission of the offense sentence shall be imposed as therein directed. State v. Jones, 227 N.C. 402, 42 S.E.2d 465 (1947), State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955), See State v. Chase, 231 N.C. 589, 58 S.E.2d 364 (1950).

Common-Law Offense Not Changed. — This section does not change the offense of common-law robbery or divide it into degrees. State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955).

This section creates no new offense. It does not add to or subtract from the common-law offense of robbery except to provide that when firearms or other dangerous weapons are used in the commission of the offense, more severe punishment may be imposed. In re Sellers, 234 N.C. 648, 68 S.E.2d 308 (1951); State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Bell, 270 N.C. 25, 153 S.E.2d 741 (1967); State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972); State v. Ribens, 299 N.C. 385, 261 S.E.2d 867 (1980).

The use, or threatened use, of firearms or other dangerous weapons in perpetrating a robbery does not add to or subtract from the common-law offense of robbery, but this section provides a more severe punishment for a robbery attempted or accomplished with the use of a dangerous weapon. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969); State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

This section creates no new offense, but provides that when firearms or other dangerous weapons are used, more severe punishment may be imposed. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

This section does not attempt to change the offense of common-law robbery or divide it into degrees. State v. Massey, 273 N.C. 721, 161 S.E.2d 103 (1968).

This section creates no new offense, but merely provides for more severe punishment for the commission, or attempt to commit, common-law robbery when that offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. State v. Barksdale, 16 N.C. App. 559, 192 S.E.2d 659 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 152 (1973).

State must show active participation or accessory before the fact in a prosecution for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Principals Equally Guilty. — All who are present at the place of a crime and are either aiding, abetting, assisting or advising in its commission, or are present for such purpose to the knowledge of the actual perpetrator, are principals and equally guilty. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

Armed robbery is a crime of violence, the very nature of which suffices to support a reasonable belief that defendant would evade arrest if not immediately taken into custody. State v. Shore, 285 N.C. 328, 204 S.E.2d 682 (1974).

Applied in State v. Riddle, 205 N.C. 591, 172 S.E. 400 (1934); State v. Marsh, 243 N.C. 101, 66 S.E.2d 684 (1951); State v. Kerley, 246 N.C. 157, 97 S.E.2d 876 (1957); State v. Sheffield, 251 N.C. 309, 1 S.E.2d 195 (1959); State v. Graves, 251 N.C. 550, 112 S.E.2d 85 (1960); State v. Patton, 260 N.C. 359, 132 S.E.2d 891 (1963); State v. Goins, 261 N.C. 707, 136 S.E.2d 97 (1964); State v. McNeil, 263 N.C. 260, 139 S.E.2d 667 (1965); State v. Chamberlain, 263 N.C. 406, 139 S.E.2d 620 (1965); State v. Haney, 263 N.C. 816, 140 S.E.2d 544 (1965); State v. Reid, 263 N.C. 825, 140 S.E.2d 547 (1965); State v. Benfield, 264 N.C. 75, 140 S.E.2d 706 (1965); State v. Fletcher, 264 N.C. 482, 141 S.E.2d 873 (1965); State v. Childs, 265 N.C. 575, 144 S.E.2d 653 (1965); State v. Bridges, 266 N.C. 354, 146 S.E.2d 107 (1966); State v. McKissick, 268 N.C. 411, 150 S.E.2d 767 (1966); State v. Day, 268 N.C. 464, 150 S.E.2d 863 (1966); State v. Barber, 268 N.C. 509, 151 S.E.2d 51 (1966); State v. Goodman, 269 N.C. 305, 152 S.E.2d 116 (1967); State v. Childs, 269 N.C. 307, 152 S.E.2d 453 (1967); State v. Aycoth, 270 N.C. 270, 154 S.E.2d 59 (1967); State v. Prince, 270 N.C. 769, 154 S.E.2d 897 (1967); State v. George, 271 N.C. 438, 156 S.E.2d 845 (1967); State v. McKissick, 271 N.C. 500, 157 S.E.2d 112 (1967); State v. Aycoth, 272 N.C. 48, 157 S.E.2d 655 (1967); State v. McNair, 272 N.C. 130, 157 S.E.2d 660 (1967); State v. Paige, 272 N.C. 417, 158 S.E.2d 522 (1968); State v. Davis, 273 N.C. 349, 160 S.E.2d 75 (1968); State v. Williams, 1 N.C. App. 127, 160 S.E.2d 121 (1968); State v. Hamm, 1 N.C. App. 444, 161 S.E.2d 758 (1968); State v. Reid, 5 N.C. App. 424, 168 S.E.2d 511 (1969); State v. Gwyn, 7 N.C. App. 397, 172 S.E.2d 105 (1970); State v. Basden, 8 N.C. App. 401, 174 S.E.2d 613 (1970); State v. Elliott, 9 N.C. App. 1, 175 S.E.2d 312 (1970); State v. Summerlin, 9 N.C. App. 457, 176 S.E.2d 356 (1970); State v. Carnes, 279 N.C. 549, 184 S.E.2d 235 (1971); State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971); State v. Little, 13

N.C. App. 228, 185 S.E.2d 23 (1971); State v. Brown, 13 N.C. App. 261, 185 S.E.2d 471 (1971); State v. Gainey, 280 N.C. 366, 185 S.E.2d 874 (1972); State v. Long, 280 N.C. 633, 187 S.E.2d 47 (1972); State v. Davis, 14 N.C. App. 278, 188 S.E.2d 13 (1972); State v. Jackson, 14 N.C. App. 288, 188 S.E.2d 28 (1972); State v. Wynn, 14 N.C. App. 291, 187 S.E.2d 881 (1972); State v. Blake, 14 N.C. App. 367, 188 S.E.2d 607 (1972); State v. Long, 14 N.C. App. 653, 188 S.E.2d 533 (1972); State v. McLean, 14 N.C. App. 664, 188 S.E.2d 525 (1972); State v. Wiggins, 16 N.C. App. 527, 192 S.E.2d 680 (1972); State v. Howes, 19 N.C. App. 155, 198 S.E.2d 86 (1973); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Capel, 21 N.C. App. 311, 204 S.E.2d 226 (1974); State v. Lucas, 21 N.C. App. 343, 204 S.E.2d 195 (1974); State v. Wallace, 21 N.C. App. 523, 204 S.E.2d 855 (1974); State v. Teat, 22 N.C. App. 484, 206 S.E.2d 732 (1974); State v. Jackson, 287 N.C. 470, 215 S.E.2d 123 (1975); State v. Carey, 288 N.C. 254, 218 S.E.2d 387 (1975); State v. Dunn, 26 N.C. App. 475, 216 S.E.2d 412 (1975); State v. Portee, 28 N.C. App. 507, 221 S.E.2d 722 (1976); State v. Artis, 31 N.C. App. 193, 228 S.E.2d 768 (1976); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Joyner, 297 N.C. 349, 255 S.E.2d 390 (1979).

Quoted in Broyhill v. Morris, 408 F.2d 820 (4th Cir. 1969).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964); Gainey v. Turner, 266 F. Supp. 95 (E.D.N.C. 1967); State v. Daniels, 300 N.C. 105, 265 S.E.2d 217 (1980).

Cited in State v. Murph, 212 N.C. 494, 193 S.E. 709 (1937); State v. Proctor, 213 N.C. 221, 195 S.E. 816 (1938); State v. Holland, 234 N.C. 354, 67 S.E.2d 272 (1951); State v. Guthrie, 269 N.C. 699, 153 S.E.2d 361 (1967); State v. Green, 2 N.C. App. 391, 163 S.E.2d 14 (1968); State v. Bumper, 5 N.C. App. 528, 169 S.E.2d 65 (1969); State v. Smith, 278 N.C. 476, 180 S.E.2d 7 (1971); State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971); State v. Carthens, 284 N.C. 111, 199 S.E.2d 456 (1973); State v. Hill, 287 N.C. 207, 214 S.E.2d 67 (1975); State v. Sanders, 288 N.C. 285, 218 S.E.2d 352 (1975); State v. Jones, 26 N.C. App. 467, 216 S.E.2d 387 (1975); State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Gray, 292 N.C. 270, 233 S.E.2d 905 (1977); State v. Jones, 295 N.C. 345, 245 S.E.2d 711 (1978); State v. Haywood, 295 N.C. 709, 249 S.E.2d 429 (1978); State v. Faircloth, 297 N.C. 100, 253 S.E.2d 890 (1979); State v. Brown, 39 N.C. App. 548, 251 S.E.2d 706 (1979); In re Vinson, 40 N.C. App. 423, 252 S.E.2d 854 (1979); In re Vinson, 298 N.C. 640, 260 S.E.2d 591 (1979); State v. Griffin, 44 N.C. App. 601, 261 S.E.2d 292 (1980).

B. Common Law Robbery.

Definitions. — Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him fear. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969); State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972); State v. Hoover, 14 N.C. App. 154, 187 S.E.2d 453, cert. denied, 281 N.C. 316, 188 S.E.2d 899 (1972); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974); State v. Dixon, 34 N.C. App. 388, 238 S.E.2d 183 (1977).

An essential element of the offense of common-law robbery is a felonious taking, i.e., a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965); State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); State v. Young, 16 N.C. App. 101, 191 S.E.2d 369 (1972); State v. Rivens, 299 N.C. 385, 261 S.E.2d 867 (1980); State v. Chapman, 49 N.C. 103, 270 S.E.2d 524 (1980).

The word "fear" as used in the phrase, "putting him in fear," in the definition of common-law robbery is not confined to fear of death. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971).

Not Defined by Statute. — Robbery, a common-law offense not defined by statute in North Carolina, is merely an aggravated from of larceny State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Hullender, 8 N.C. App. 41, 173 S.E.2d 581 (1970); State v. Chapman, 49 N.C. App. 103, 270 S.E.2d 524 (1980).

Proof of Necessary Elements. — For robbery at common law it is not necessary to prove both violence and putting in fear — proof of either is sufficient. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971); State v. Dixon, 34 N.C. App. 388, 238 S.E.2d 183 (1977).

The use or threatened use of a firearm or other dangerous weapon is not an essential of common-law robbery. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971).

The degree of force used in common-law robbery is immaterial so long as it is sufficient to cause the victim to part with his property. State v. Dixon, 34 N.C. App. 388, 238 S.E.2d 183 (1977).

Absent the elements of violence or intimidation, the offense becomes larceny. State v. Chapman, 49 N.C. App. 103, 270 S.E.2d 524 (1980).

Highway robbery is a common-law offense and is frequently denominated "common-law robbery." State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

This section superadds to the minimum essentials of common-law robbery the additional requirement that the robbery must be committed "with the use or threatened use of . . . firearms or other dangerous weapon, implement or means whereby the life of a person is endangered or threatened." State v. Rogers, 246 N.C. 611, 99 S.E.2d 803 (1957); State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961); State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

The critical and essential difference between armed robbery and common-law robbery is that in order for the jury to convict for armed robbery the victim must be endangered or threatened by the use or threatened use of a "firearm or other dangerous weapon, implement or means." State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Where a weapon which is dangerous within the meaning of this section is used in a robbery, the only difference between common-law robbery and armed robbery is whether the life of the person robbed is endangered or threatened by the weapon. State v. Osborne, 13 N.C. App. 420, 185 S.E.2d 593 (1972).

The essential difference between armed robbery and common-law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Clemmons, 34 N.C. App. 101, 237 S.E.2d 298 (1977), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979); State v. Coats, 301 N.C. 216, 270 S.E.2d 422 (1980).

The essential difference between armed robbery and common-law robbery is that, to prove the former, the State must produce evidence sufficient to show that the victim was endangered or threatened by the use or threatened use of a firearm or other dangerous weapon, implement or means. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

C. Attempted Robbery.

This section makes the attempt to commit the offense an offense of equal gravity with the completed act. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

The attempt to rob now is on equal level with the taking: Each offense is of equal gravity. State v. Cherry, 29 N.C. App. 599, 225 S.E.2d 119 (1976).

By its express terms, this section extends to one who aids and abets in an attempt to commit armed robbery. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

What Constitutes Attempt. — In determining whether a person has been guilty of the offense of attempting to commit robbery, the courts are guided by the peculiar facts of each case, in order to decide whether the acts of the defendant have advanced beyond the stage of mere preparation, to the point where it can be said that an attempt to commit the crime has been made. The question is one of degree, and cannot be controlled by exact definition. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

There can be no attempt to commit robbery in the absence of an overt act in part execution of the intent to commit the crime. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

An attempt occurs when the defendant, with the requisite intent to rob, does some overt act calculated and designed to bring about the robbery, thereby endangering or threatening the life of a person. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971); State v. Cherry, 29 N.C. App. 599, 225 S.E.2d 119 (1976); State v. May, 292 N.C. 644, 235 S.E.2d 178, rehearing denied, 293 N.C. 261, 247 S.E.2d 234 (1977).

In order to constitute an attempt, it is essential that the defendant, with the intent of committing the particular crime, should have done some overt act adapted to, approximating, and which in the ordinary and likely course of things would result in the commission thereof. State v. Dowd, 28 N.C. App. 32, 220 S.E.2d 393 (1975).

In a prosecution for attempted armed robbery, the evidence did no more than place defendant in the hardware store with a pistol in his belt. He had no accomplice. He did not make a gesture indicating an intent to touch, withdraw or otherwise threaten the use of the pistol. There was, therefore, no threat, actual or constructive, of the use of a deadly weapon. He did not make a demand, express or implied, for money or other property. The evidence raised a suspicion that defendant may have intended to commit a robbery or other crime but fell short of showing an overt act in furtherance of an intent to rob. State v. Jacobs, 31 N.C. App. 582, 230 S.E.2d 550 (1976).

Completed Offense. — An attempt to take money or other personal property from another

under the circumstances delineated by this section constitutes an accomplished offense, and is punishable to the same extent as if there was an actual taking. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

The attempt to take property by the forbidden means, all other elements being present, completes the offense of armed robbery. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

The offense is complete if there is either a taking or an attempt to take the personal property of another by the means and in the manner prescribed by this section, but there must be one or the other. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971); State v. Clemmons, 35 N.C. App. 192, 241 S.E.2d 116, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978).

Under this section an attempt to rob another of personal property, made with the use of a dangerous weapon, whereby the life of a person is endangered or threatened, is a completed crime and is punishable to the same extent as if the property had been taken as intended. State v. Price, 280 N.C. 154, 184 S.E.2d 866 (1971); State v. Cherry, 29 N.C. App. 599, 225 S.E.2d 119 (1976).

Under this section the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapon. State v. Duncan, 14 N.C. App. 113, 187 S.E.2d 353 (1972); State v. Hunt, 297 N.C. 447, 255 S.E.2d 182 (1979).

If all of the elements are present, the offense is complete whether the taking is successful or amounts only to an attempt to take personalty from the victim. State v. Kinsey, 17 N.C. App. 57, 193 S.E.2d 430 (1972), cert. denied, 282 N.C. 674, 194 S.E.2d 153 (1973).

By the terms of this section, the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapons. The attempt itself is a violation of the statute and is a felony. State v. May, 292 N.C. 644, 235 S.E.2d 178, rehearing denied, 293 N.C. 261, 247 S.E.2d 234 (1977).

The crime of armed robbery was complete as the defendant stood over the man he had stabbed and made the decision whether to keep the small sum of money that he had taken from his victim or to discard it before fleeing. State v. King, 299 N.C. 707, 264 S.E.2d 40 (1980).

Where defendant entered a store, pulled a gun from under his shirt, pointed it at the proprietor at close range and ordered the proprietor not to move and not to put his hands under the counter, and having obtained the owner's compliance with his demands, then proceeded to order him to move away from the counter, directing him to move to the center of the store, and at this point the intended robbery was interrupted, the crime of attempted armed robbery was complete because defendant had manifested an intent to rob and had done an affirmative act beyond mere preparation in furtherance of that intent. State v. Smith, 300 N.C. 71, 265 S.E.2d 164 (1980).

II. ELEMENTS OF CRIME.

A. In General.

Prerequisite to conviction for armed robbery, the jury must find from the evidence, beyond a reasonable doubt, that the life of the victim was endangered or threatened by the use, or threatened use, of firearms or other dangerous weapon, implement, or means. A conviction of "guilty as charged" may not be based on a finding that the accused "used force or intimidation sufficient to create an apprehension of danger." This is a critical distinction between armed robbery as defined in this section, and common-law robbery. State v. Covington, 273 N.C. 690, 161 S.E.2d 140 (1968).

Under this section, an armed robbery is defined as the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property. State v. May, 292 N.C. 644, 235 S.E.2d 178, rehearing denied, 293 N.C. 261, 247 S.E.2d 234 (1977); State v. Davis, 301 N.C. 394, 271 S.E.2d 263 (1980).

The crime of armed robbery includes an assault on the person with a deadly weapon, but it does not include the additional elements of (1) intent to kill or (2) inflicting serious injury. State v. Kearns, 27 N.C. App. 354, 219 S.E.2d 228 (1975), cert. denied, 289 N.C. 300, 222 S.E.2d 700 (1976).

This section requires, among other things, that a robbery be accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened. State v. Jones, 292 N.C. 255, 232 S.E.2d 707 (1977).

The essentials of the offense set forth in this section are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of "firearms or other dangerous weapon, implement or means"; and (3) danger or threat to the life of the victim. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978); State v. Moore, 37 N.C. App. 248, 245 S.E.2d 898, appeal dismissed, 295 N.C. 651, 248 S.E.2d 255 (1978).

Presence of the Victim. — The definition of robbery necessarily carries with it the concept that the offense can only be committed in the presence of the victim. State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (1975).

The word "presence" taken from the common-law elements and used in an indictment under this section, must be interpreted broadly and with due consideration to the main element of the crime — intimidation or force by the use or threatened use of firearms. State v. Clemmons, 35 N.C. App. 192, 241 S.E.2d 116, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978).

If the force or intimidation by the use of firearms for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in a continuous course of conduct, the taking is from the "presence" of the victim. State v. Clemmons, 35 N.C. App. 192, 241 S.E.2d 116, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

Possession Raises Presumption. — If and when it is established that there was an armed robbery in which property was stolen, then the possession of such recently stolen property raises a presumption of fact that the possessor is guilty of the armed robbery. State v. Hickson, 25 N.C. App. 619, 214 S.E.2d 259, appeal dismissed, 288 N.C. 246, 217 S.E.2d 670 (1975).

Profit Immaterial. — So great is the offense when life is endangered and threatened by the use of firearms or other dangerous weapons, that it is not of controlling consequence whether the assailants profit much or little, or nothing, from their felonious undertaking. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964); State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

B. Use or Threatened Use of Dangerous Weapons.

The main element of the offense is force or intimidation occasioned by the use or threatened use of firearms. State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944); State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972); State v. Clemmons, 35 N.C. App. 192, 241 S.E.2d 116, cert. denied, 294 N.C. 737, 244 S.E.2d 155 (1978).

The gist of the offense of robbery with firearms is the accomplishment of the robbery by the use of or threatened use of firearms or other dangerous weapon. State v. Williams, 265 N.C. 446, 144 S.E.2d 267 (1965); State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971); State v. Black 286 N.C. 191, 209 S.E.2d 458 (1974).

In an indictment for robbery, the kind and value of the property taken is not material — the gist of the offense is not the taking, but a taking by force or putting in fear. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

In an indictment for robbery with firearms or other dangerous weapons, the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapons. State v. Harris, 8 N.C. App. 653, 175 S.E.2d 334 (1970).

The gist of the offense of armed robbery is not the taking but the taking by force or putting in fear. Testimony by the victim of the armed robbery that he was scared is sufficient to meet the requirements of the statute. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (1971); State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

The gravemen of the offense of armed robbery is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

The gist of the offense of robbery with firearms is the accomplishment of the robbery by the use or threatened use of firearms or other dangerous weapons whereby the life of a person is endangered or threatenred. State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972); State v. Martin, 47 N.C. App. 223, 267 S.E.2d 35 (1980).

The question in an armed robbery case is whether a person's life was in fact endangered or threatened by defendant's possession, use or threatened use of a dangerous weapon, not whether the victim was scared or in fear of his life. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

State Must Show That Life of Victim Was Endangered or Threatened. — For a conviction of robbery with firearms or other dangerous weapons, the State must further show beyond a reasonable doubt that the life of a person was endangered or threatened by the defendant's, or his accomplice's, possession, use or threatened use of a firearm or other dangerous weapon, implement or means; proof of this additional element is not required for conviction of the offense of common-law robbery. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971).

Where there was evidence sufficient to show that the victim was in fear for her life, the State did not have to prove such fear to overcome defendant's motion for nonsuit. Rather, the State could prove, at the least, that during the course of the robbery or attempted robbery, there was a threatened use of a dangerous weapon which endangered or threatened the life of the victim. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

The question under this section is whether a person's life was in fact

endangered or threatened by defendant's possession, use or threatened use of the opened knife, not whether the person was scared or in fear of his life. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971).

"Endangered or Threatened" Construed Conjunctively. — Although this section sets forth disjunctively, "endangered or threatened," several means or ways by which this offense may be committed, a warrant thereunder correctly charges them conjunctively, as "endangered and threatened." State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (1971).

Force May Be Actual or Constructive. — The element of force in the offense of robbery may be actual or constructive. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

"Actual Force". — Actual force implies physical violence. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

"Constructive Force". — Under constructive force are included all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

Threatened Use of Firearm. — Where, although the victim did not testify that defendant actually pointed the gun at her at the time she gave her ring to his accomplice, earlier there had been such "use" of the firearm as to force her to commit certain acts, and it had been made clear to her on several occasions prior to the actual taking of her ring that the firearm would be used against her if she did not comply, this continuing threat extended to every subsequent act by her, and thus constituted a "threatened use" of a firearm which "endangered or threatened" her life within the terms of subsection (a). State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Dangerous Character of Weapon Inferred. — Evidence tending to show that the victim of a robbery was left unconscious from a blow, inflicting a wound in the back of her head requiring eight stitches to close and causing her to be hospitalized for two weeks, was sufficient to show that the robbery was committed by the use of a dangerous weapon, since the dangerous character of the weapon may be inferred from the wound. State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

It may be inferred that the threat of use and actual use of a knife constitute a danger to a person's life for the purposes of this section. State v. Moore, 279 N.C. 455, 183 S.E.2d 546 (1971).

Serious injury need not be shown at all in a prosecution for armed robbery. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Nor Need Intent to Kill. — Neither the infliction of serious injury nor an intent to kill is an essential element of the charge of armed robbery. State v. Wheeler, 21 N.C. App. 514, 204 S.E.2d 862 (1974).

Actual Possession of Firearms Necessary. — The purpose and intent of this section is to provide for more severe punishment for the commission of robbery with firearms, and other specified weapons, than is prescribed for common-law robbery, and construing the title and context of the statute together to ascertain the legislative intent, it was held that possession of firearms or other of the specified weapons is necessary to constitute the offense of "robbery with firearms" under this section, and it was reversible error for the court to refuse to so instruct the jury in accordance with defendants' prayers for special instructions upon evidence tending to show that defendants sought to make their victim believe they had firearms, and threatened to use same, but that they actually carried no weapon. State v. Keller, 214 N.C. 447, 199 S.E. 620 (1938).

In a prosecution for robbery by use of a knife, an instruction to return a verdict of guilty "as charged," without any reference to a knife or other weapon whereby the life of the victim was endangered or threatened, was erroneous. State v. Ross, 268 N.C. 282, 150 S.E.2d 421 (1966).

The actual possession and use or threatened use of firearms or other dangerous weapon is necessary to constitute the offense of robbery with firearms or other dangerous weapon. Whether it was a firearm or a toy pistol, and if a toy pistol, whether it was a dangerous weapon were questions for the jury under proper instructions. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969).

Pocketknife as Dangerous Weapon. — A pocketknife, considering its use or threatened use by defendant, was a dangerous weapon. State v. Norris, 264 N.C. 470, 141 S.E.2d 869 (1965).

Exhibition of a pistol while demanding money conveyed the message loud and clear that the victim's life was being threatened. State v. Green, 2 N.C. App. 170, 162 S.E.2d 641 (1968).

Inability to Identify Weapon. — When a witness testified that he was robbed by use of a firearm or other dangerous weapon, his admission on cross-examination that he could not positively say it was a gun or dangerous weapon was without probative value. State v. Thompson, 297 N.C. 285, 254 S.E.2d 526 (1979).

When the State offered evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what appeared to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or wit-

nesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon was not of sufficient probative value to warrant submission of the lesser included offense of common-law robbery. That portion of State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972), which is inconsistent with this is no longer authoritative. State v. Thompson, 297 N.C. 285, 254 S.E.2d 526 (1979).

Verbal Demand to Surrender Money Not Required. — The fact that neither defendant nor a companion made any verbal demand on the prosecuting witness to surrender money did not entitle defendant to a nonsuit in an armed robbery prosecution, where evidence showed that the witness had immediately pitched the money onto the floor when a gun was pointed in his face. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

Threats Expressed by Nonverbal Conduct. — Threats under this section may be expressed by nonverbal conduct as well as by words, and the fact that defendant left the pistol stuck in his belt or pants instead of pointing it directly at his victim did not lessen his implied threat to use it or the danger to the life of his victim had they not yielded. State v. Allen, 47 N.C. App. 482, 267 S.E.2d 514 (1980).

C. Taking and Intent.

The offense requires the taking, or the attempt to take, in robbery with firearms. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964).

The taking must be done animo furandi, with a felonious intent to appropriate the goods taken to some use or purpose of the taker. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

There must be an actual taking of property for there to be the crime of common-law robbery, whereas under this section the offense is complete if there is an attempt to take personal property by use of firearms or other dangerous weapon. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Black, 286 N.C. 191, 209 S.E.2d 458 (1974).

In order to commit robbery, property must be taken, which is larceny; thus the taking or attempted taking of property is an essential element of robbery. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

It is not incumbent upon the State to prove that defendants actually took money. In a prosecution for the offense of armed robbery the offense is complete if there is an attempt to take personal property by use of firearms. State v. Jenkins, 8 N.C. App. 532, 174 S.E.2d 690 (1970).

In common-law robbery a taking is necessary, but in armed robbery either the taking or the attempt to take will support a verdict under this section. State v. Lock, 284 N.C. 182, 200 S.E.2d 49 (1973).

The taking and carrying away is an essential element of the crime of robbery. State v. Bobbitt, 29 N.C. App. 155, 223 S.E.2d 398 (1976).

A taking with "felonious intent" is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common-law robbery, and it is prejudicial error for the court to charge that defendant may be convicted of such offense even though the taking was without felonious intent. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

A taking of personal property with felonious intent is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common-law robbery. The court must so instruct the jury in every robbery case, and must in some sufficient form explain and define the term "felonious intent." The extent of the definition required depends upon the evidence in the particular case. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. Thus, if one disarms another in self-defense with no intent to steal his weapon, he is not guilty of robbery. If he takes another's property for the taker's immediate and temporary use with no intent permanently to deprive the owner of his property, he is not guilty of larceny. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

"Felonious taking" is an essential element of the crime of armed robbery, and it means "a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker." State v. Harmon, 21 N.C. App. 508, 204 S.E.2d 883, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (1974); State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

The felonious intent to take the goods of another and appropriate them to defendant's own use is a necessary element of armed robbery. State v. Webb, 27 N.C. App. 391, 219 S.E.2d 268 (1975).

Determining Definition of "Felonious Intent." — The comprehensiveness and specificality of the definition and explanation of "felonious intent" required in a charge depends on the facts in the particular case. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

"Intent to Rob" Is a Sufficient Definition of "Felonious Intent." — The word "rob" was known to the common law and the expression "intent to rob" is a sufficient definition of "felonious intent" as applied to this section, in the absence of evidence raising an inference of a different intent or purpose. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

In some cases, as where the defense is an alibi or the evidence develops no direct issue or contention that the taking was under a bona fide claim of right or was without any intent to steal, "felonious intent" may be simply defined as an "intent to rob" or "intent to steal." On the other hand, where the evidence raises a direct issue as to the intent and purpose of the taking, a more comprehensive definition is required. State v. Mundy, 265 N.C. 528, 144 S.E.2d 572 (1965).

The expression "intent to rob" is a sufficient definition of "felonious intent" as applied to the robbery statute, in the absence of evidence raising an inference of a different intent to purpose. State v. Webb, 27 N.C. App. 391, 219 S.E.2d 268 (1975); State v. Hunter, 290 N.C. 556, 227 S.E.2d 535 (1976), cert. denied, 429 U.S. 1093, 97 S. Ct. 1106, 51 L. Ed. 2d 539 (1977).

Since "Rob" Imports an Intent to Steal. — "Rob" or "robbery" has a well-defined meaning and imports an intent to steal. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Proof of Intent. — When, in order to serve a temporary purpose of his own, one takes property (1) with the specific intent wholly and permanently to deprive the owner of it, or (2) under circumstances which render it unlikely that the owner will ever recover his property and which disclose the taker's total indifference to his rights, one takes it with the intent to steal (animus furandi). State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Reaves, 9 N.C. App. 315, 176 S.E.2d 13 (1970).

Where the evidence did not permit the inference that defendant ever intended to return the property forcibly taken but required the conclusion that defendant was totally indifferent as to whether the owner ever recovered the property, there was no justification for indulging the fiction that the taking was for a temporary purpose, without any animus furandi or lucri causa. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, or for the personal protection and safety of defendant and others, or as a frolic, prank or practical joke, or under color of official authority. State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

Defendant's Claim of Title. — In a prosecution for armed robbery the defendant's contention that he could not be found guilty of robbery and forcibly taking property from the actual possession of another where he had a bona fide claim of right or title to the property since such belief negates the requisite animus furandi or intent to steal was without merit where (1) the defendant denied taking any property from the prosecuting witness at all; (2) the defendant and others were "dealing" in marijuana, which is prohibited by Chapter 90 of the General Statutes; (3) the alleged claim or debt was an unliquidated amount of money; and (4) the defendant used a "sawed-off" shotgun to aid him in collection of the debt or claim to the property taken over the objections of the prosecuting witness. State v. Oxner, 37 N.C. 600, 246 S.E.2d 546 (1978), aff'd 297 N.C. 44, 252 S.E.2d 705 (1979).

Bill of indictment for armed robbery sufficiently charged felonious intent where it alleged that defendants, by the use and threatened use of firearms whereby the life of a motel night clerk was endangered, unlawfully, willfully and feloniously took money from the motel. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

Bill Need Not Allege That Defendant Intended Conversion of Property. — A bill of indictment for armed robbery need not allege that defendants intended to convert the personal property stolen to their own use. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

The distinction between robbery and forcible trespass is that in the former there is, and in the latter is not, a felonious intention to take the goods, and appropriate them to the offender's own use. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966); State v. Spratt, 265 N.C. 524, 144 S.E.2d 569 (1965).

III. LESSER INCLUDED OFFENSES.

An indictment for robbery with firearms will support a conviction of the lesser offenses of common-law robbery, assault, larceny from the person, or simple larceny, if there is evidence of guilt of such lesser offenses. State v. Bell, 228 N.C. 659, 46 S.E.2d 834 (1948); State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955); State v. Wenrich, 251 N.C. 460, 111 S.E.2d 582 (1959); State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (1971).

Highway robbery is a lesser offense embraced in the charge of robbery with firearms or other dangerous weapon. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

In a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. State v. Parker, 262 N.C. 679, 138 S.E.2d 496 (1964); State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. Conrad, 275 N.C. 342, 168 S.E.2d 39 (1969); State v. Black, 286, N.C. 191, 209 S.E.2d 458 (1974); State v. Fletcher, 27 N.C. App. 672, 220 S.E.2d 101 (1975).

An indictment under this section includes common-law robbery. State v. Rowland, 263 N.C. 353, 139 S.E.2d 661 (1965).

An indictment for robbery with firearms will support a conviction of a lesser offense such as common-law robbery, assault with a deadly weapon, larceny from the person, simple larceny or simple assault, if a verdict for the included or lesser offense is supported by the evidence on the trial. State v. Faulkner, 5 N.C. App. 113, 168 S.E.2d 9 (1969); State v. Allen, 47 N.C. App. 482, 267 S.E.2d 514 (1980).

The crime of robbery ex vi termini includes an assault on the person. State v. Powell, 6 N.C. App. 8, 169 S.E.2d 210 (1969).

An indictment for armed robbery under this section will support a verdict of guilty of common-law robbery. State v. Jackson, 6 N.C. App. 406, 170 S.E.2d 137 (1969); State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

The fact that the allegations in an armed robbery indictment include a charge of assault does not render the indictment invalid. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (1971).

The crime of armed robbery defined in this section includes an assault on the person with a deadly weapon. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975); State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976); State v. Mullen, 47 N.C. App. 667, 267 S.E.2d 564 (1980).

The crime of accessory before the fact to robbery is included in the indictment for robbery. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

In a prosecution for robbery with a dangerous weapon, the accused may be acquitted of the crime charged and convicted of a lesser offense included in the offense charged, such as common-law robbery, if there is evidence from which the commission of such lesser offense can be found. State v. Black, 21 N.C. App. 640, 205 S.E.2d 154, aff'd, 286 N.C. 191, 209 S.E.2d 458 (1974).

The crime of armed robbery includes an assault on a person with a deadly weapon; however, where the assault charged contains a necessary ingredient which is not an essential ingredient of armed robbery, the fact that the assault is committed during the perpetration of the armed robbery does not deprive the assault of its character as a complete and separate offense. State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

Assault with a deadly weapon is a lesser included offense of robbery with firearms, and the jury may acquit as to the greater charge and return a verdict as to the lesser if the evidence warrants such a finding. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Defendant's conviction of felonious larceny, armed robbery, burglary, and rape, all of which arose out of the same series of events, did not place defendant in double jeopardy, since the four offenses were legally separate and distinct crimes, no one of which was a lesser included offense of the other; each clearly required the proof of at least one essential element not embodied in any of the other three offenses at issue; and the four felonies were factually distinct and independent crimes in this case. State v. Revelle, 301 N.C. 153, 270 S.E.2d 476 (1980).

But Felonious Assault under § 14-32 Is Not Lesser Included Offense in Armed Robbery. — The crime of felonious assault defined in § 14-32(a) is an assault with a deadly weapon which is made with intent to kill and which inflicts serious injury. These additional elements of the crime of felonious assault are not elements of the crime of armed robbery defined in this section. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

A conviction of armed robbery does not establish a defendant's guilt of felonious assault. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974).

The fact that a felonious assault is committed during the perpetration of armed robbery does not deprive the felonious assault of its character as a complete and separate felony. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

An assault with a deadly weapon inflicting serious injury, defined by § 14-32(b), is not a lesser included offense of armed robbery because the infliction of serious injury is not an essential ingredient of armed robbery. State v. Stepney, 280 N.C. 306, 185 S.E.2d 844 (1972); State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975); State v. Edwards, 49 N.C. App. 547, 272 S.E.2d 384 (1980).

Where defendant was charged with armed robbery but found guilty of assault with a deadly weapon inflicting serious bodily injury, the trial court should have granted his motion in arrest of judgment, since assault with a deadly weapon inflicting serious injury is not a lesser included offense of armed robbery, but a separate offense. State v. Perry, 18 N.C. App. 141, 196 S.E.2d 369 (1973).

Armed robbery and felonious assault charges are separate and distinct offenses. State v. Wheeler, 21 N.C. App. 514, 204 S.E.2d 862 (1974).

Assault with a deadly weapon inflicting serious injury is not a lesser included offense of attempted common-law robbery. State v. Wilson, 26 N.C. App. 188, 215 S.E.2d 167 (1975).

Assault with a deadly weapon with intent to kill inflicting serious injury cannot be considered a lesser included offense of armed robbery. The two offenses are separate and complete and an acquittal on the assault charge would not bar a conviction on the armed robbery charge. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

And Neither Is a Charge of Accessory After the Fact. — Armed robbery differs in fact and in law from accessory after the fact under § 14-7. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L. Ed. 2d 302 (1964).

Where the bill of indictment charges armed robbery, both a waiver and information are necessary, under § 15-140.1 (now § 15A-642), to vest the court with jurisdiction to try the defendant, or to entertain his plea, on a charge of accessory after the fact of armed robbery, because the offense of accessory after the fact is not a lesser included offense of the principal crime. State v. Brown, 21 N.C. App. 87, 202 S.E.2d 798 (1974).

A directed verdict of not guilty of armed robbery foreclosed the State from subsequent prosecutions of defendant for armed robbery or for any lesser included offenses of armed robbery. But accessory after the fact of armed robbery is not a lesser included offense of armed robbery. Therefore, general double jeopardy principles would not bar the trial of defendant on charges of accessory after the fact to armed robbery. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, cert. denied, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S. Ct. 1268, 59 L. Ed. 2d 487 (1979).

When Instructions on Lesser Included Offenses Required. — The court should not submit to the jury an included lesser crime where there is no testimony tending to show that such lesser offense was committed. But where there is evidence tending to show the commission of a lesser offense the court, of its own motion, should submit such offense to the jury for its determination. State v. Wenrich, 251 N.C. 460, 111 S.E.2d 582 (1959).

It is true that in a prosecution for robbery with firearms, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. However, the trial court is not required to submit to the jury the question of a lesser offense, included in that charged in the indictment, where there is no evidence to support such a verdict. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

The necessity for instructing the jury as to an included crime of lesser degree than that charged, arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed, and the presence of such evidence is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972); State v. Allen, 47 N.C. App. 482, 267 S.E.2d 514 (1980).

In a prosecution for attempted armed robbery, the necessity for instructing the jury as to included crimes of assault with a deadly weapon and simple assault arises when and only when there is evidence from which the jury could find that such included crimes of lesser degree were committed. The presence of such evidence is the determinative factor. State v. Sanders, 29 N.C. App. 662, 225 S.E.2d 620 (1976).

Common-law robbery is a lesser included offense of armed robbery. However, the necessity for instructing the jury as to a lesser included offense arises only when there is evidence to support such a verdict. State v. Wilson, 31 N.C. App. 323, 229 S.E.2d 314 (1976).

Defendant Entitled to Charge on Assault with Deadly Weapon. — Although there was evidence of all the essntial elements of the crime of robbery, defendant's evidence asserting a claim of ownership of the stereo created a conflict in the evidence as to felonious intent. There certainly was ample evidence of the lesser included crime of an assault with a deadly weapon. Thus, defendant was entitled to a charge on the crime of assault with a deadly weapon in order to have the different views arising on the evidence presented to the jury upon proper instructions. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Failure to Instruct on Common-Law Robbery. — Where the State's evidence was to the effect that defendant's companion held a knife to the victim's throat in perpetrating a robbery, and that the victim received a cut on his neck, and that defendant and his companion attacked and beat their victim and took money from his person, but no knife was introduced in evidence or described by any witness, it was error for the court to fail to submit the question of defendant's guilt of the lesser crime of common-law robbery. State v. Ross, 268 N.C. 282, 150 S.E.2d 421 (1966).

When there is evidence of defendant's guilt of common-law robbery, it is error for the court to fail to submit the lesser offense to the jury. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Where conflicting testimony raised an issue for the jury as to whether defendant had in his possession and used or threatened to use a firearm or other dangerous weapon to perpetrate the robbery, the trial judge, even without request for special instructions, should have submitted the lesser offense of common-law robbery to the jury under proper instructions. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

In an armed robbery prosecution where there was no other evidence of a weapon, and the robbery victim was not sure whether defendant actually had a weapon, it was error for the trial judge to fail to charge on the lesser offense of common-law robbery. State v. Jackson, 27 N.C. App. 675, 219 S.E.2d 816 (1975).

Failure to Instruct on Lesser Included Offense Held Error. — In a prosecution for armed robbery the trial court erred in failing to instruct the jury on the lesser included offense of felonious larceny where defendant's testimony, that he did not at any time draw a knife on the victim's assistant manager, did not have a knife in his possession at any time while he was with the assistant manager, did not say anything at any time to threaten or force the assistant manager to give him money, but merely walked out with the money when the assistant manager turned his back to defendant, would have negated the element of violence or intimidation required to elevate the crime of felonious larceny to that of common-law robbery or armed robbery; moreover, the fact that defendant closed the door to the assistant manager's office as he ran out and locked it from the outside, leaving the assistant manager confined inside was not precedent to nor concomitant or contemporaneous with the act of taking the money bag, and the act of closing and locking the door therefore could not be held to constitute the requisite violence or putting in fear to make the crime in question robbery as a matter of law. State v. Chapman, 49 N.C. App. 103, 270 S.E.2d 524 (1980).

Necessity for Instruction as to Lesser Included Offense Arises Only Where Evidence Warrants. — In an armed robbery prosecution, there is no necessity for the trial judge to instruct the jury as to an included crime of lesser degree where the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to the elements of the crime charged. State v. Reaves, 9 N.C. App. 315, 176 S.E.2d 13 (1970).

Where the evidence for the State clearly shows an armed robbery and there is no evidence of a lesser offense, the trial court is not required to submit to the jury the lesser included offenses of common-law robbery and assault. State v. Swaney, 277 N.C. 602, 178 S.E.2d 399, appeal dismissed, 402 U.S. 1006, 91 S. Ct. 199, 29 L. Ed. 2d 428 (1971).

Where under the State's evidence, a defendant would be guilty of attempted armed robbery, and under the defendant's evidence, he would not be guilty of attempted armed robbery or attempted common-law robbery, the judge is not required to instruct the jury that it might return a verdict of guilty of attempted common-law robbery. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

The evidence did not support an instruction on common-law robbery, where there was no evidence in the record of a taking, an essential element of the crime of common-law robbery. State v. Duncan, 14 N.C. App. 113, 187 S.E.2d 353 (1972).

The trial court is not rquired to charge the jury upon the question of a defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. State v. Hailstock, 15 N.C. App. 556, 190 S.E.2d 376, cert. denied, 281 N.C. 760, 191 S.E.2d 363 (1972).

If the State's evidence shows an armed robbery as charged in the indictment and there is no conflicting evidence relating to the elements of the crime charged, an instruction on common-law robbery is not required. State v. Lee, 282 N.C. 566, 193 S.E.2d 705 (1973); State v. Martin, 29 N.C. App. 17, 222 S.E.2d 718, cert. denied, 290 N.C. 96, 225 S.E.2d 325 (1976); State v. Dollar, 292 N.C. 344, 233 S.E.2d 521 (1977); State v. Clemmons, 34 N.C. App. 101, 237 S.E.2d 298 (1977), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979); State v. Coats, 301 N.C. 216, 270 S.E.2d 422 (1980).

Where all of the evidence tended to show that an armed robbery was committed by the defendant, and others, acting in concert, and that the defendant aided and abetted in the use and threatened use of a firearm wielded by another, and there was no evidence tending to show the commission of common-law robbery, it would have been error for the trial court to charge on the unsupported lesser degree of the crime. State v. Curtis, 18 N.C. App. 116, 196 S.E.2d 278 (1973).

The trial court is not required to submit to the jury the question of a lesser offense included in that charged where there is no evidence to support such a verdict. State v. Black, 21 N.C. App. 640, 205 S.E.2d 154, aff'd, 286 N.C. 191, 209 S.E.2d 458 (1974).

When the State's evidence tends to show armed robbery, there is no conflicting evidence relating to elements of the offense and the only offense committed, if any, was the one charged, the court is not required to instruct on the lesser included offense of assault with a deadly weapon. State v. Davis, 31 N.C. App. 590, 230 S.E.2d 203 (1976).

Where the State's evidence was positive and without conflict on all of the elements of the charge of robbery with a firearm, and there was no evidence to the contrary, instructions on the lesser included offenses of common-law robbery, assault with a deadly weapon and simple assault were not required. State v. Wheeler, 34 N.C. App. 243, 237 S.E.2d 874 (1977), cert. denied, 294 N.C. 187, 241 S.E.2d 522 (1978).

The trial court in a prosecution for attempted armed robbery was not required to submit the lesser offense of attempted common-law robbery because of the failure of the State's witnesess to testify that the sawed-off shotgun used by defendant was not a toy, where all of the evidence indicated that defendant used a sawed-off shotgun in the crime and there was no evidence that the shotgun was not a real and functioning deadly weapon. State v. Davis, 37 N.C. App. 173, 245 S.E.2d 583, cert. denied, 295 N.C. 650, 248 S.E.2d 254 (1978).

It is not necessary to submit the lesser included offense to the jury if the evidence discloses no conflicting evidence relating to the essential elements of the greater crime. State v. Brown, 300 N.C. 41, 265 S.E.2d 191 (1980).

Failing to Submit Issues of Assault with a Deadly Weapon and Simple Assault. — Where there was no evidence in an armed robbery prosecution that any offense other than armed robbery or common-law robbery had been committed, the trial court did not err in failing to submit the issues of assault with a deadly weapon and simple assault. State v. Gurkin, 8 N.C. App. 304, 174 S.E.2d 20 (1970).

Where all of the State's evidence tended to show the armed robbery of another person and where all of defendant's evidence tended to show that he committed no crime, the trial court was not required to charge on the lesser offense of assault with a deadly weapon. State v. Allison, 280 N.C. 175, 184 S.E.2d 857 (1971).

Even though the crime of attempted armed robbery as defined in this section includes the crime of assault with a deadly weapon, the absence of any evidence that the defendant committed such a crime of lesser degree made it unnecessary for the court to sumbit to the jury as one of its permissible verdicts the crime of assault with a deadly weapon. State v. Harris, 27 N.C. App. 520, 219 S.E.2d 538 (1975).

Refusal to charge on lesser included offenses held proper. State v. Harmon, 21 N.C. App. 508, 204 S.E.2d 883, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (1974).

IV. INDICTMENT.

An indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

An indictment was defective under this section where it did not describe any property sufficiently to show that it was the subject of robbery, and although the indictment stated a value, what property had that value did not appear. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

It is not necessary to describe accurately or prove the particular identity or value of the property further than to show it was the property of the person assaulted or in his care, and had a value. State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944); State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Property alleged to have been taken should be described by the name usually applied to it when in the condition it was in when taken, and where possible to state the number or quantity, kind, quality, distinguishing features, etc., thereof. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

It is not necessary that ownership of the property be laid in any particular person in order to allege and prove the crime of armed robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968); State v. McGilvery, 9 N.C. App. 15, 175 S.E.2d 328 (1970); State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972); State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

In an indictment for robbery the allegation of ownership of the property taken is sufficient when it negatives the idea that the accused was taking his own property. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

To allege and prove the crime of armed robbery, it is not necessary that ownership of the property be laid in any particular person, at least so long as the allegation and proof are sufficient to negative the idea of the accused's taking his own property. State v. Fountain, 14 N.C. App. 82, 187 S.E.2d 493 (1972).

It Must Appear That Article Taken Had Some Value. — Although value need not be averred by a specific allegation, it must appear from the indictment that the article taken had some value. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

The allegation in a bill of indictment that the property taken was "personal property of the value of . . ." was insufficient to charge the offense of robbery. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969).

Where the gist of the offense as described in the indictment is the attempt to commit

robbery by the use or threatened use of firearms, the force or intimidation occasioned by the use or threatened use of firearms is the main element of the offense. In such a case, it is not necessary or material to describe accurately or prove the particular identity or value of the property, provided the indictment shows that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Where the property involved is described in an indictment under this section as "U.S. currency," it is the subject of robbery and some value can be inferred from the description of the property itself. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property. State v. Spillars, 280 N.C. 341, 185 S.E.2d 881 (1972).

The kind and value of the property taken is not material so long as it is described by allegation and proof sufficient to show that it is the subject of robbery. State v. Fountain, 14 N.C. App. 82, 187 S.E.2d 493 (1972).

It is not necessary in an armed robbery prosecution to allege or prove the particular value of the property taken, provided the indictment and proof show that the property was that of the person assaulted or under his care, and that such property is the subject of robbery and that it had some value. State v. Reaves, 15 N.C. App. 476, 190 S.E.2d 358, cert. denied, 282 N.C. 155, 191 S.E.2d 604 (1972).

The bill of indictment upon which defendant is tried for attempted armed robbery is fatally defective when it fails to allege that defendant attempted to take any property or thing of value from anyone. State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

And That It May Be Subject of Larceny. — The property taken must be such as is the subject of larceny to constitute the offense of robbery. State v. Rogers, 273 N.C. 208, 159 S.E.2d 525 (1968).

An indictment for robbery must contain a description of the property sufficient, at least, to show that such property is the subject of robbery. To constitute the offense of robbery the property must be such as is the subject of larceny. State v. Council, 6 N.C. App. 397, 169 S.E.2d 921 (1969); State v. Johnson, 20 N.C. App. 53, 200 S.E.2d 395 (1973), appeal dismissed, 284 N.C. 620, 202 S.E.2d 276 (1974).

Money is recognized by law as property which may be the subject of larceny, and hence of robbery. State v. Owens, 277 N.C. 697, 178 S.E.2d 442 (1971).

Indictments Consolidated. — An indictment charging defendants with rape and an indictment charging defendants with armed robbery could be consolidated for trial when it appeared that defendants stopped the car in which husband and wife were riding, forced them into the woods where each raped the wife while the other held a pistol on the husband, and that one of them committed robbery from the person of the husband while he was being held at the point of the pistol, since the crimes were so connected in time and place that the evidence on the trial of the one was competent and admissible on the trial of the other. State v. Morrow, 262 N.C. 592, 138 S.E.2d 245 (1964).

In a prosecution of defendant for armed robbery and murder, the trial court did not err in consolidating defendant's case for trial with that of a codefendant since defendants were charged in separate indictments for the same crimes; they were tried upon the theory that the murder with which they were charged was committed in connection with a robbery committed by them jointly; their defenses were not antagonistic; and neither attempted to incriminate the other in the presentation of an alibi. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

Bill of indictment illegally amended to charge felony of attempted armed robbery. — See State v. Teel, 24 N.C. App. 385, 210 S.E.2d 517 (1975).

Indictment Charged Larceny Not Robbery. — An indictment charging that defendant at a specified time and place did "with force and arms" feloniously steal, take, and carry away from a person specified, a sum of money, charged the crime of larceny and not that of robbery. State v. Acrey, 262 N.C. 90, 136 S.E.2d 201 (1964).

V. EVIDENCE.

Admissibility. — Upon a conviction of robbery with firearms, the verdict conforming to the charge and evidence, there was no error where evidence, of a demand on the victim for property not mentioned in the indictment, was admitted without objection and referred to in the court's charge. State v. Mull, 224 N.C. 574, 31 S.E.2d 764 (1944).

In prosecution for armed robbery the trial court did not err in allowing an eyewitness to testify that the defendant robbed the same restaurant three days before the crime for which he was on trial. State v. Garnett, 24 N.C. App. 489, 211 S.E.2d 519, appeal dismissed, 286 N.C. 724, 215 S.E.2d 622 (1975).

The trial court properly allowed the photographs of the robbery to be admitted into evidence where the accuracy of the photographs was established by the testimony of a witness who was familiar with the scene, object and person portrayed therein. State v. Garnett, 24 N.C.

App. 489, 211 S.E.2d 519, appeal dismissed, 286 N.C. 724, 215 S.E.2d 622 (1975).

In a prosecution of defendant for armed robbery and murder, trial court did not commit prejudicial error in denying defendant's motion for a mistrial after striking the testimony of several witnesses concerning the absence of fingerprints of defendant at the murder scene and the absence of gunpowder on the hands of bystanders after the robbery-murder, since, the trial court, after the motions to strike were allowed, instructed the jury not to consider the striken evidence and specifically referred to the evidence and the witness who provided it, there was no way in which defendant would have been prejudiced by the evidence had it not been withdrawn from the jury's consideration, and defendant's motion for mistrial was a matter addressed to the sound discretion of the trial judge, and no abuse of that discretion appeared. State v. Smith, 301 N.C. 695, — S.E.2d — (1981).

In a prosecution for armed robbery, the Court of Appeals erred in determining that the admission of handguns taken from defendants five weeks after the crime with which they were charged was prejudicial error, since (1) on the basis of the record before the court, it was unable to conclude that the admission of the exhibits by the trial court was in fact error, as the exhibits in question were not placed before the court for its examination, nor was there any stipulation placed in the record which would serve to describe the exhibits; and (2) even if the exhibits were erroneously admitted, defendants were not prejudicied by their admission into evidence, as several witnesses positively identified defendants as the persons who perpetrated the robbery. State v. Milby, 302 N.C. 137, 273 S.E.2d 716 (1981).

Evidence held sufficient to be submitted to the jury on the charge of robbery with firearms. State v. Dorsett, 245 N.C. 47, 95 S.E.2d 90 (1956); overruled on other grounds, State v. Ingland, 278 N.C. 42, 178 S.E.2d 577 (1971).

Testimony by armed robbery victim, including identification of defendant, was sufficient for submission of case to the jury. State v. Canady, 8 N.C. App. 320, 174 S.E.2d 140 (1970).

The evidence that defendant had a pistol within easy reach, that he had threatened the prosecutrix with it, and that she was in fear for her life when he took her money, was sufficient to go to the jury on the robbery with firearms charge. State v. Harris, 281 N.C. 542, 189 S.E.2d 249 (1972).

Evidence Sufficient to Be Submitted to Jury in Prosecution for Conspiracy to Commit Armed Robbery. — See State v. Mason, 24 N.C. App. 568, 211 S.E.2d 501, cert. denied, 286 N.C. 725, 213 S.E.2d 725 (1975).

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where the evidence tended to show that the night manager of a motel sensed an object against his head which felt like a pistol barrel and he heard it click, a toy pistol was found in defendant's room, and money and a .38 caliber pistol were taken in the robbery. State v. Dark, 26 N.C. App. 610, 216 S.E.2d 498, cert. denied, 288 N.C. 245, 217 S.E.2d 669 (1975).

Where the State's evidence showed that the defendant held a dangerous weapon in his hand at the time he assaulted the victim, that he still had the weapon hanging from his arm at the time he went into the kitchen to take food from the refrigerator, and that it was no longer necessary for him to use or threaten to use the weapon at the time of the robbery since he had already injured and subdued the victim, viewing this evidence in the light most favorable to the State, there was sufficient evidence to submit the charge of armed robbery to the jury and the trial court properly denied the defendant's motion for nonsuit as to that charge. State v. Lilly, 32 N.C. App. 467, 232 S.E.2d 495, cert. denied, 292 N.C. 643, 235 S.E.2d 64 (1977).

Evidence was sufficient to be submitted to the jury in a prosecution for armed robbery where it tended to show that a male wearing a stocking mask over his face ran toward the manager of a grocery store who was leaving the store after closing; the man had a gun pointed at the manager; the manager, who was carrying an automatic pistol, turned and fired six times at the man who then fled; approximately an hour later police went to an apartment about six blocks from the store where they found defendant lying on the floor bleeding from gunshot wounds; the apartment was the residence of defendant's aunt; defendant was taken to the hospital where clothes he was wearing, including trousers and tennis shoes, were taken into custody by police; the tread pattern on the bottom of the tennis shoes was found to be similar to a footprint found near a mud puddle behind the store and to other footprints in the area; and no other shootings were reported that evening. State v. Quinerly, 50 N.C. App. 563, — S.E.2d — (1981).

Evidence Insufficient to Require Submission of Lesser Offenses. — The evidence tended to show that defendant was apprehended by the owner of a filling station after defendant had broken into the station, and that defendant by the use of a pistol disarmed such owner and took his rifle. Even conceding that defendant took the rifle "for a temporary use" and that he intended thereafter to abandon the rifle at the first opportunity, the evidence conclusively showed that defendant intended to deprive the owner permanently of the rifle or to leave the recovery of the rifle by the owner to

mere chance, and therefore the evidence disclosed the animus furandi, and did not require the court to submit the question of defendant's guilt of assault as a less degree of the offense of robbery with firearms. State v. Smith, 268 N.C. 167, 150 S.E.2d 194 (1966).

In a prosecution for robbery with a dangerous weapon, defendant's denial of his participation in the robbery and his denial that he saw a gun during the robbery did not constitute evidence sufficient to require the trial court to submit an issue of common-law robbery to the jury. State v. Coats, 46 N.C. App. 615, 265 S.E.2d 486 (1980).

Evidence held sufficient to sustain conviction in State v. Vance, 268 N.C. 287, 150 S.E.2d 418 (1966).

The evidence of the State was sufficient to support the verdict of robbery with a firearm where it was established that defendant picked the victim, furnished the weapon, was present during the robbery, refused to identify the robbers, and tried to mislead the officers by identifying another person. State v. Moore, 22 N.C. App. 679, 207 S.E.2d 358 (1974), cert. denied, 285 N.C. 762, 209 S.E.2d 286 (1974).

The evidence was sufficent to show that the crime of armed robbery was committed and that defendant committed it, where it tended to show that the victim's personal property was taken from his person without his consent by violent means with the intent to steal, and a firearm was used, even though the victim was shot first and then his money was taken. State v. Handsome, 300 N.C. 313, 266 S.E.2d 670 (1980).

Insufficient to Support Conviction. — Proof of the defendant's presence in a place of business, his possession therein of a firearm and his intent to commit the offense of robbery was not sufficient to support a conviction of the offense described in this section, for it omitted the essential elements of (1) a taking or attempt to take personal property, and (2) the endangering or threatening of the life of a person. State v. Evans, 279 N.C. 447, 183 S.E.2d 540 (1971).

Failure to Show Material or Prejudicial Errors. — In the appeal of a conviction for robbery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury, where defendant assigned as error the failure of the trial court to sustain three objections made by defendant during the testimony of the victim in which the victim stated that she was not sure how good her husband's hearing was on the side where he had been shot; that she can still see the defendant's face when she closes her eyes; and that she let the defendant take the money because he had a gun, the defendant may have been correct in his assertion that these answers were in places speculative or unresponsive, but neither the defendant nor the record showed that the errors were material or prejudicial, and absent such a showing defendant was not entitled to a new trial. State v. Billups, 301 N.C. 607, — S.E.2d — (1981).

Exception to signing of judgment entered upon defendant's conviction of armed robbery was without merit where the indictment properly charged defendant with armed robbery, the evidence supported the judgment and the sentence was within the statutory limits. State v. Hughes, 8 N.C. App. 334, 174 S.E.2d 1 (1970).

No Fatal Variance between Indictment and Evidence. — There was no fatal variance between an indictment which charged that property was taken from the "residence" or "place of business" of a named person and evidence that the armed robbery occurred at a finance company where the person named was employed, the property having been in the lawful custody of such person. State v. McGilvery, 9 N.C. App. 15, 175 S.E.2d 328 (1970).

Variance as to Ownership of Store from Which Property Taken. — A variance between the allegation in the indictment which alleged that one person was the owner and in charge of the store from which the property was forcibly taken and the evidence which disclosed that another person owned the store was not fatal to an indictment which contained all essential averments required by the statute. State v. Waddell, 279 N.C. 442, 183 S.E.2d 644 (1971).

Variance between Allegations and Proof as to Property Taken Not Material. — Variance between the allegations of the indictment and the proof in respect of the property taken was not material. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

Judgment of Nonsuit for Variance Improvidently Entered. — The fact that one employee named in the indictment as the person endangered and threatened and from whom the store's money had been taken happened to be farther from the store's money than two other employees when it was taken into possession by robbers did not negate the fact that the money was taken from the presence of that employee and all other employees then on duty in the store; therefore a judgment of nonsuit for variance was improvidently entered. State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972).

VI. INSTRUCTIONS.

Instruction on Element of Felonious Taking. — In every armed robbery case the judge must instruct the jury on the element of felonious taking, but he need not use the specific words "felonious taking;" he is only required to describe in accurate terms the state of mind necessary for the crime. State v.

Harmon, 21 N.C. App. 508, 204 S.E.2d 883, cert. denied, 285 N.C. 593, 206 S.E.2d 864 (1974).

Explanation of Principles of Aiding and Abetting. — When the State presents evidence tending to show defendant might have aided and abetted, it is incumbent upon the trial court to explain the principles of aiding and abetting which apply to the particular evidence in the case. State v. Logan, 25 N.C. App. 49, 212 S.E.2d 236 (1975).

Reading Statute to Jury without Further Comment. — Any error resulting from a plain reading of the statute to the jury without further comment is neither material nor prejudicial. State v. Westry, 15 N.C. App. 1, 189 S.E.2d 618, cert. denied, 281 N.C. 763, 191 S.E.2d 360 (1972).

Instruction Not Misleading. — In its instructions, the trial court's use of the words "some weapon" rather than "firearms or other dangerous weapon," although not approved, was not such as to mislead or misinform the jury, where the court specified a pistol as the weapon allegedly used elsewhere in the charge. State v. Bailey, 278 N.C. 80, 178 S.E.2d 809 (1971), cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Instruction Not Relieving State of Proving Essential Element. — An instruction which merely informed the jury that a .22 caliber pistol was, in fact, a firearm, and should the jury find that defendant used a .22 caliber pistol on the occasion in question then such a weapon would be a firearm within the meaning of that term as used in this section, was not objectionable on the ground that the instruction in effect told the jury that defendant used a firearm in the commission of the robbery, thereby relieving the State of the burden of proving an essential element of armed robbery. State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 93 S. Ct. 293, 34 L. Ed. 2d 218 (1972).

Unauthorized Expression of Opinion. — Where defendants entered pleas of not guilty to charges of armed robbery and there was nothing in the record to show that they made any judicial admission that the offense had actually occurred, a trial court's instruction to the jury that defendants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," was an unauthorized expression of opinion on the evidence in violation of this section. State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

Facts Supporting Only One Count of Robbery. — Where defendant took money from a store owner and no injury was inflicted on any one of the employees, even though the lives of all employees present were endangered, a charge and conviction of two counts of robbery was erroneous: Defendant committed only one robbery. State v. Potter, 285 N.C. 238, 204 S.E.2d 649 (1974).

Evidence Supporting Charge on Both Kidnapping and Armed Robbery. — Where a victim was forced from his residence at gunpoint and transported by a car for a distance of eight miles where he was robbed, there was sufficient asportation and evidence to support a charge to the jury on both kidnapping and armed robbery, and the State is not required to elect between charges. State v. Sommerset, 21 N.C. App. 272, 204 S.E.2d 206, cert. denied, 285 N.C. 594, 205 S.E.2d 725 (1974).

VII. PUNISHMENT.

Punishment Provisions of Section Valid. — It is within the province of the General Assembly to prescribe maximum punishments which may be imposed upon those convicted of crime. It is not for courts to say that the policy judgment of the General Assembly with respect to punishment for armed robbery is wrong. Armed robbery is a crime of violence and those who take the risk must assume the consequences involved. The punishment provisions of this section are constitutionally valid. State v. Legette, 292 N.C. 44, 231 S.E.2d 896 (1977); State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

Punishment Within Statutory Limits. — A sentence of 24 to 30 years for the offense of robbery with firearms does not exceed the maximum prescribed by this section and does not constitute cruel and unusual punishment. State v. LePard, 270 N.C. 157, 153 S.E.2d 875 (1967).

A sentence for robbery which was within the statutory maximum did not constitute the cruel and unusual punishment forbidden by N.C. Const., Art. I, § 14 (now N.C. Const., Art. I, § 27). State v. Witherspoon, 271 N.C. 714, 157 S.E.2d 362 (1967).

Punishment under this section which does not exceed the limit fixed by this section cannot be considered cruel and unusual in a constitutional sense. State v. Frietch, 8 N.C. App. 331, 174 S.E.2d 149 (1970).

The sentences of defendants cannot be considered cruel and unusual punishment, where they are within the limits established by this section. State v. Neal, 19 N.C. App. 426, 199 S.E.2d 143 (1973); State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

In a prosecution for armed robbery, the trial court did not err in sentencing defendant to prison "for the term of not less than thirty (30) years" without specifying a minimum term, since the maximum punishment for armed robbery was 30 years (now 40 years), and the judge set the minimum sentence at the maximum allowed by law. State v. Lipscomb, 27 N.C. App. 416, 219 S.E.2d 349 (1975).

A sentence which is within the maximum authorized by statute is not cruel and unusual

in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

If defendant believes that the sentence imposed under this section upon his plea of guilty, understandingly and voluntarily made, is excessive, his sole recourse is to executive clemency, the sentence being within the statutory maximum. State v. Baugh, 268 N.C. 294, 150 S.E.2d 437 (1966).

Maximum Punishment for Common Law Robbery. — When, on a charge of robbery with firearms or other dangerous weapon, the jury returns a verdict of guilty of robbery, the maximum sentence that may be imposed is ten years. State v. Williams, 265 N.C. 446, 144 S.E.2d 267 (1965).

Discretion of Trial Judge in Imposing Sentence. — As long as a sentence is within the statutory limits, the punishment imposed by a trial judge is in his discretion. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976).

By virtue of subsection (a) of this section, the legislature has granted a wide discretion to the trained presiding judge who has had the opportunity to hear the facts, observe the parties to the proceeding and, after verdict, to inquire into the habits, mentality and past record of the person to be sentenced before imposing punishment within the limits of this section. The use of this discretionary power by the trial judge is not a denial of equal protection of the laws. State v. Jenkins, 292 N.C. 179, 232 S.E.2d 648 (1977).

Where a sentence is within statutory limits the punishment actually imposed by the trial judge is a discretionary matter. State v. Barrow, 292 N.C. 227, 232 S.E.2d 693 (1977).

The actual length of a sentence imposed is at the discretion of a trial judge so long as it is within statutory limits. State v. Watson, 294 N.C. 159, 240 S.E.2d 440 (1978).

Allowing Victim to Comment on Punishment of Defendant. — In a prosecution for armed robbery the trial court did not commit prejudicial error by allowing a victim of the attempted armed robbery to make a statement relating to the punishment of the defendant. State v. Clemmons, 34 N.C. App. 101, 237 S.E.2d 298 (1977), cert. denied, 296 N.C. 412, 251 S.E.2d 471 (1979).

Indictment Insufficient to Permit Punishment under Section. — A bill of indictment was sufficient to support a plea or conviction of highway robbery, for the facts alleged were sufficient to charge robbery by intimidation or violence, which is the gist of common-law robbery, but it did not allege that the life of a person was endangered or threatened by the use or threatened use of a dangerous weapon, instrument or means; hence, the indictment did not contain the additional allegations required in order to permit the more severe punishment provided for in this section. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

Plea of Guilty of Robbery without Firearms. — Where defendant was charged with attempted robbery with firearms, his plea of guilty of robbery without firearms was insufficient to support judgment, and the court erred in accepting such plea. State v. Hare, 243 N.C. 262, 90 S.E.2d 550 (1955).

Court May Not Change Effect of Guilty Plea by Increasing Punishment. — Upon a plea of guilty of highway robbery the court could not change the effect of the plea by finding facts and thereby exposing defendant to greater punishment than the plea would support. State v. Stewart, 255 N.C. 571, 122 S.E.2d 355 (1961).

VIII. DOUBLE JEOPARDY.

Effect of Directed Verdict. — Since the crime of accessory after the fact has its beginning after the principal offense has been committed, a directed verdict of not guilty of armed robbery does not decide the issue of whether the defendant joined the criminal scheme after the robbery was complete. State v. Cox, 37 N.C. App. 356, 246 S.E.2d 152, cert. denied, 295 N.C. 649, 248 S.E.2d 253 (1978), cert. denied, 440 U.S. 930, 99 S.Ct. 1268, 59 L.Ed.2d 487 (1979).

Trial Court Erred in Allowing Conviction. — The trial court erred in allowing the jury to convict defendant of attempted armed robbery and of aiding and abetting in common-law robbery, a lesser included offense of armed robbery. State v. Barksdale, 16 N.C. App. 559, 192 S.E.2d 659 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 152 (1973).

Prosecution As Accessory Before the Fact Not Barred by Insufficiency of Evidence to Support Armed Robbery Charge. — Insufficiency of the evidence to support a conviction for robbery did not entitle defendant to his discharge, and the State properly tried defendant on the same indictment as an accessory before the fact to the robbery. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

Prosecution for Armed Robbery Not Barred by Accquittal as Accessory. — An acquittal of a charge of accessory after the fact of armed robbery will not support a plea of former jeopardy in a subsequent prosecution of the same defendant for armed robbery. State v. McIntosh, 260 N.C. 749, 133 S.E.2d 652 (1963), cert. denied, 377 U.S. 939, 84 S. Ct. 1345, 12 L.Ed.2d 302 (1964).

Where an indictment charged defendants with robbery with firearms from the companion of the person they were formerly

charged with killing, even though the two offenses were committed at the same time, and evidence of guilt of one of the offenses was substantially the same as the evidence of guilt of the other, the acquittal or conviction for one offense would not bar a subsequent prosecution for the other. State v. Dills, 210 N.C. 178, 185 S.E. 677 (1936).

Merger of Armed Robbery and Murder Charges. — Where it appeared conclusively that armed robbery charges were proved as essential elements in the capital offense of murder in the first degree upon which the defendants were convicted, the robberies became a part of and were merged into the murder charges, and having been so used, the defendants could not again be charged, convicted and sentenced for these elements although the robberies constituted crimes within themselves. State v. Carroll, 282 N.C. 326, 193 S.E.2d 85 (1972).

A defendant may be convicted for both conspiracy to commit robbery and the commission of the same robbery without being subject to double jeopardy. State v. Wiggins, 21 N.C. App. 441, 204 S.E.2d 692, appeal dismissed, 285 N.C. 595, 206 S.E.2d 866 (1974).

Separate Judgments May Be Entered for Armed Robbery and Felonious Assault. — When separate indictments for armed robbery and felonious assault based on separate features of one continuous course of conduct are tried together, and verdicts of guilty as charged are returned, these verdicts provide support for separate judgments. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971).

Convictions of Armed Robbery and Assault with a Deadly Weapon Arising from Same Conduct Will Not Support Separate Judgments. — If a person is convicted simultaneously of armed robbery and of the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, and separate judgments are pronounced, the judgment on the separate verdict of guilty of assault with a deadly weapon must be arrested because in such case, the armed robbery is accomplished by the assault with a deadly weapon and all essentials of this assault charge are essentials of the armed robbery charge. State v. Richardson, 279 N.C. 621, 185 S.E.2d 102 (1971); State v. Lunsford, 26 N.C. App. 78, 214 S.E.2d 619 (1975).

If a person is convicted simultaneously of armed robbery and the lesser included offense of assault with a deadly weapon, and both offenses arise out of the same conduct, separate judgments may not be pronounced. State v. Alexander, 284 N.C. 87, 199 S.E.2d 450 (1973), cert. denied, 415 U.S. 927, 94 S. Ct. 1434, 39 L. Ed. 2d 484 (1974).

§ 14-87.1. Punishment for common-law robbery and attempted common-law robbery.

Robbery and attempted robbery as defined at common law, other than robbery with a firearm or other dangerous weapon as defined by G.S. 14-87, shall be punishable as a Class H felony. (1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 14-88. Train robbery.

If any person shall enter upon any locomotive engine or car on any railroad in this State, and by threats, the exhibition of deadly weapons or the discharge of any pistol or gun, in or near any such engine or car, shall induce or compel any person on such engine or car to submit and deliver up, or allow to be taken therefrom, or from him, anything of value, he shall be guilty of train robbery, and on conviction thereof shall be punished as a Class F felon. (1895, c. 204, s. 2; Rev., s. 3765; C. S., s. 4266; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class F felon" for "by imprisonment in the State's prison for not less than ten years nor more than twenty years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws

1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

Cited in State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978).

§ 14-89. Attempted train robbery.

If any person shall stop, or cause to be stopped, or impede, or cause to be impeded, or conspire with others for that purpose, any locomotive engine or car on any railroad in this State, by intimidation of those in charge thereof or by force, threats or otherwise, for the purpose of taking therefrom or causing to be delivered up to such person so forcing, threatening or intimidating, anything of value, to be appropriated to his own use, he shall be guilty of attempting train robbery, and, on conviction thereof, shall be punished as a Class F felon. (1895, c. 204, s. 1; Rev., s. 3766; C. S., s. 4267; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class F felon" for "by confinement in the State's prison for not less than two years nor more than twenty years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1961).

CASE NOTES

Cited in State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964).

§ 14-89.1. Safecracking.

(a) A person is guilty of safecracking if he unlawfully opens, enters, or attempts to open or enter a safe or vault:

(1) By the use of explosives, drills, or tools; or

(2) Through the use of a stolen combination, key, electronic device, or other fraudulently acquired implement or means; or

(3) Through the use of a master key, duplicate key or device made or obtained in an unauthorized manner, stethoscope or other listening device, electronic device used for unauthorized entry in a safe or vault, or other surreptitious means; or

(4) By the use of any other safecracking implement or means.

(b) A person is also guilty of safecracking if he unlawfully removes from its premises a safe or vault for the purpose of stealing, tampering with, or ascertaining its contents.

(c) Safecracking shall be punishable as a Class H felony. (1961, c. 653; 1973, c. 235, s. 1; 1977, c. 1106; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote subsection (c), which formerly provided that safecracking should be a felony punishable by imprisonment for not less than two nor more than 30 years. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

For survey of 1977 criminal law, see 56 N.C.L. Rev. 965 (1978).

CASE NOTES

Violation of this section is a felony. State v. Whaley, 262 N.C. 536, 138 S.E.2d 138 (1964).

Safecracking is a separate and distinct crime, usually requiring special implements or explosives and particular skills. State v. Buie, 26 N.C. App. 151, 215 S.E.2d 401 (1975).

Attempt and Completed Offense Are of Equal Dignity. — This section makes the completed act of safecracking and attempted safecracking offenses of equal dignity. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

This section makes an attempt to force open a safe or vault a crime of equal dignity with the completed offense. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

Acts Constituting Attempted Safecracking. — Removing the dial, sawing off the hinges, chiseling out a part of the concrete bottom of a small safe and smudging it with a blowtorch were held to go beyond mere preparation for safecracking and in law to constitute attempted safecracking. State v. Sanders, 280 N.C. 81, 185 S.E.2d 158 (1971).

Evidence sufficient to sustain conviction for safecracking. State v. Walker, 6 N.C. App. 447, 170 S.E.2d 627 (1969).

Evidence sufficient to sustain conviction of defendant as abettor of offense of attempted safecracking. State v. Spears, 268 N.C. 303, 150 S.E.2d 499 (1966).

Failure to Allege "Feloniously". — An indictment for violation of this section which does not contain the word "feloniously" is fatally defective. State v. Whaley, 262 N.C. 536, 138 S.E.2d 138 (1964).

An indictment which clearly states that a safe was opened "by the use of chopping tools," follows the language of the safecracking statute, and is entirely proper. State v. Martin, 20 N.C. App. 477, 201 S.E.2d 540 (1974).

Sentence of 48-50 years under former section held cruel and unusual punishment. See Thacker v. Garrison, 445 F. Supp. 376 (W.D.N.C. 1978).

Applied in State v. Cox, 262 N.C. 609, 138 S.E.2d 224 (1964); State v. Bullock, 268 N.C. 560, 151 S.E.2d 9 (1966); State v. Watson, 272 N.C. 526, 158 S.E.2d 334 (1968); State v. Thacker, 5 N.C. App. 197, 167 S.E. 879 (1969); State v. Battle, 279 N.C. 484, 183 S.E.2d 641 (1971); State v. McNeil, 280 N.C. 159, 185 S.E.2d 156 (1971); State v. Jones, 280 N.C. 322, 185 S.E.2d 858 (1972); State v. Lewis, 281 N.C. 564, 189 S.E.2d 216 (1972); State v. Broadway, 16 N.C. App. 167, 191 S.E.2d 243 (1972); State v. Smith, 17 N.C. App. 694, 195 S.E.2d 369 (1973); State v. Brady, 18 N.C. App. 325, 196 S.E.2d 813 (1973); State v. Thomas, 292 N.C. 251, 232 S.E.2d 411 (1977).

Stated in State v. Hodge, 267 N.C. 238, 147 S.E.2d 881 (1966); State v. Johnson, 7 N.C. App. 53, 171 S.E.2d 106 (1969).

Cited in State v. Lawrence, 262 N.C. 162, 136 S.E.2d 595 (1964); State v. Logner, 266 N.C. 238, 145 S.E.2d 867 (1966); Blackledge v. Allison, 431 U.S. 63, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977).

ARTICLE 18.

Embezzlement.

§ 14-90. Embezzlement of property received by virtue of office or employment.

If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or any other fiduciary, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of 16 years, of any person, shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, unincorporated association or organization which shall have come into his possession or under his care, he shall be punished as a Class H felon. (21 Hen. VII, c. 7; 1871-2, c. 145, s. 2; Code, s. 1014; 1889, c. 226; 1891, c. 188; 1897, c. 31; Rev., s. 3406; 1919, c. 97, s. 25; C. S., s. 4268; 1931, c. 158; 1939, c. 1; 1941, c. 31; 1967, c. 819; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to larceny by servants or other employees, see § 14-74. As to the embezzlement of funds of a corporation by its officers, see § 14-254. As to embezzlement of funds of a bank by its officers, see § 53-129. As to embezzlement by a member of the State Sinking Fund Commission, see § 142-40. As to description in indictment for embezzlement, see § 15-150.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall be punished as in cases of larceny" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

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I. GENERAL CONSIDERATION.

Origin and Purpose. — Embezzlement was not a common-law offense. State v. Hill, 91 N.C. 561 (1884). It was first made a criminal offense in England by statute, 21 Henry VIII, ch. 7, to punish the appropriation by servants of the property of their masters in violation of the trust and confidence reposed in them. 1 McLain Cr. Law, § 621. It was enacted in consequence of a decision that a banker's clerk, who received money from a customer and appropriated it to his own use, could not be convicted of larceny on the ground that the money had never been in the employer's possession. Clark's Cr. Law, p. 308. State v. McDonald, 133 N.C. 680, 45 S.E.

582 (1903); State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

Strict Construction. — Statutes creating criminal offenses must be strictly construed. This rule has been applied with vigor in the construction of the embezzlement statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

This section is a penal statute, creating a new offense, and cannot be extended by construction to persons not within the classes designated. State v. Eurell, 220 N.C. 519, 17 S.E.2d 669 (1941).

The words "or any other fiduciary" show clearly the General Assembly did not intend to restrict the application of the 1939 amendment to receivers. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

The manifest purpose of the 1939 amendment was to enlarge the scope of the embezzlement statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

The offense of embezzlement is exclusively statutory. State v. Blair, 227 N.C. 70, 40 S.E.2d 460 (1946); State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

The crime of embezzlement, unknown to the common law, was created and is defined by statute. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967); State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971); State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973), cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973); State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

Embezzlement is a statutory crime. State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

Embezzlement Defined. — Embezzlement is simply a fraudulent breach of trust by misapplying the property entrusted to the defendant to the use either of himself or another, when done with a fraudulent intent. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Embezzlement and fraudulent conversion are not necessarily and strictly synonymous. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-168.1 Compared. — Section 14-168.1 is more limited in its scope with regard to bailees than this section; it appears to embrace a bailee "who fraudulent converts the same" to his own use, while this section covers the bailee who "shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use." State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-168.1 does not remove bailees from this section or make embezzlement by a bailee a misdemeanor. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

There is no irreconcilable conflict between this section and § 14-168.1 as they relate to bailees. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-254 Compared. — The use of the word "abstract" in § 14-254 differentiates it from this section. The latter applies to embezzlement and excepts offenders under sixteen years of age. It is not necessary under § 14-254 to allege that the defendant is more than sixteen years old. State v. Switzer, 187 N.C. 88, 121 S.E. 143 (1924).

Accusation of Embezzlement Actionable Per Se in Slander. — The offense defined in this section is a felony, and a false accusation thereof is slander, actionable per se, and malice is presumed. Elmore v. Atlantic Coast Line R.R., 189 N.C. 658, 127 S.E. 710 (1925).

Applied in State v. Hitt, 25 N.C. App. 216, 212 S.E.2d 540 (1975).

Stated in In re Hege, 205 N.C. 625, 172 S.E. 345 (1934).

Cited in State v. Hill, 91 N.C. 561 (1884); State v. Harper, 94 N.C. 936 (1886); State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904); State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906); Beck v. Bank of Thomasville, 161 N.C. 201, 76 S.E. 722 (1912); State v. Wadford, 194 N.C. 336, 139 S.E. 608 (1927); State v. Harwood, 206 N.C. 87, 173 S.E. 24 (1934); State v. Shore, 206 N.C. 743, 175 S.E. 116 (1934); State v. Babb, 34 N.C. App. 336, 238 S.E.2d 308 (1977).

II. WHO MAY BE GUILTY OF EMBEZZLEMENT.

Fiduciary Defined. — The trial court in a prosecution for embezzlement in violation of this section properly defined a fiduciary as "a person having a duty created by his undertaking to act primarily for another's benefit." State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979), cert. denied, 299 N.C. 333, 265 S.E.2d 401, — U.S. —, 101 S. Ct. 89, 66 L. Ed. 2d 29 (1980).

Bailee. — The fact that ch. 31, Public Laws 1941, amended this section, by adding "bailee" to the classes of persons specified constitutes a legislative declaration that theretofore a bailee was not included in the definition of classes of persons made by the statute. State v. Eurell, 220 N.C. 519, 17 S.E.2d 669 (1941).

A contractor is not an officer, clerk or servant within the meaning of this section. State v. Barton, 125 N.C. 702, 34 S.E. 553 (1899).

Vendor. — This section does not embrace a vendor in an executory contract of purchase and sale. State v. Blair, 227 N.C. 70, 40 S.E.2d 460 (1946); State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

The relation of lessor and lessee is not embraced by this section. State v. Keith, 126 N.C. 1114, 36 S.E. 169 (1900).

Debtor and Creditor. — Where the relationship between the parties is that of debtor and creditor and not that of employee

and employer the debtor cannot be guilty of embezzlement of any funds due on the account. Gray v. Bennett, 250 N.C. 707, 110 S.E.2d 324 (1959).

Clerks of the Superior Courts. — This section does not apply to clerks of the superior courts and like officers who would seem to fall within the terms of § 14-92. State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

One Commissioned by Clerk of Superior Court. — One who, under authority of and subject to the orders of the clerk of the superior court, is commissioned to collect, receive and handle money, and to disburse it to those entitled thereto under the law, has substantially the same status as a court-appointed receiver. Such commissioner is a fiduciary in the same sense a receiver is a fiduciary. State v. Ross, 272 N.C. 67, 157 S.E.2d 712 (1967).

Commissioner in Equity Cannot Be Convicted as Agent or Attorney. — A commissioner appointed by a court of equity to sell land is empowered to do one specific act, viz: to sell the land and distribute the proceeds to the parties entitled thereto; immediately upon his appointment he ceases to be an attorney or agent for either party, and where the indictment charges the defendant with embezzlement of funds under this section as commissioner the defendant could not be convicted as agent or attorney. State v. Ray, 207 N.C. 642, 178 S.E. 224 (1935).

III. ELEMENTS OF THE OFFENSE.

Elements Generally. — To convict a defendant of embezzlement in violation of this section the Supreme Court has declared that "four distinct propositions of fact must be established, (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use." State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (1971).

Embezzlement in violation of this section requires the establishment of four elements: (1) that the defendant was the agent of the prosecutor; (2) that by the terms of his employment he was to receive the property of his principal; (3) that he received the property in the course of his employment; and (4) that, knowing it was not his own, he converted it to his own use or fraudulently misapplied it. State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977); State v. Seay, 44 N.C. App. 301, 260 S.E.2d 786 (1979), cert. denied, 299 N.C. 333, 265 S.E.2d 401, — U.S. —, 101 S. Ct. 89, 66 L. Ed. 2d 29 (1980).

In order to convict a defendant of embezzlement under this section, the State must prove three distinct elements: (1) that the defendant, being more than 16 years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly and willfully misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1979).

This section makes criminal the fraudulent conversion of personal property by one occupying some position of trust or some fiduciary relationship. The person accused must have been entrusted with and received into his possession lawfully the personal property of another, and thereafter with felonious intent must have fraudulent converted the property to his own use. State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

In order to convict a defendant of embezzlement, four distinct propositions of fact must be established: (1) that the defendant was the agent of the prosecutor, and (2) by the terms of his employment had received property of his principal; (3) that he received it in the course of his employment; and (4) knowing it was not his own, converted it to his own use. State v. Block, 245 N.C. 661, 97 S.E.2d 243 (1957); State v. McCaskill, 47 N.C. App. 289, 267 S.E.2d 331 (1980).

The establishment by the State of the following elements was sufficient to constitute embezzlement under this section: (1) Defendant was the agent of his principal and charged with the duty of receiving from his principal in his fiduciary capacity, and paying over to a third party certain payments; (2) that he did in fact receive such money; (3) that he received his money in the course of his employment and by virtue of his fiduciary relationship; and (4) defendant knowing this money was not his own fraudulently embezzled and converted some of these payments entrusted to him in his fiduciary relationship to his own use. State v. Helsabeck, 258 N.C. 107, 128 S.E.2d 205 (1962).

To withstand the defendant's motion to dismiss, the burden was on the State to offer substantial evidence of the material elements of embezzlement as follow: (1) defendant, President of employer-corporation, was the agent of the employees of the corporation with the duty of receiving in his fiduciary capacity money of the employees deducted from their wages for payment over to an insurance company on a group life, medical, and accidental death policy; (2) he did in fact receive such money; (3) he received this money as such agent by virtue of his fiduciary relationship; and (4) he, knowing this money was not his own, with fraudulent intent embezzled or misapplied the money so

entrusted to him. State v. Seufert, 49 N.C. App. 524, — S.E.2d — (1980).

Fraudulent intent is a necessary element of the statutory offense of embezzlement and the State must prove such intent beyond a reasonable doubt, but direct proof is not necessary, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred. State v. McLean, 209 N.C. 38, 182 S.E. 700 (1935).

The criminality of the act of embezzlement depends upon the intent, and therefore the State must show the intent to defraud beyond a reasonable doubt. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

The intent to fraudulently or willfully misapply the principal's property for purposes other than that for which it was received is an essential element of embezzlement that the State must prove beyond a reasonable doubt. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1979).

Conversion To Own Use Not Necessary. — To embezzle is for an agent fraudulently to misapply the property of his principal; it is not necessary that the agent should convert it to his own use, that is, expend the money for his own benefit. State v. Foust, 114 N.C. 842, 19 S.E. 276 (1894).

It is not necessary to show that the agent converted his principal's property to the agent's own use. It is sufficient to show that the agent fraudulently or knowingly and willfully misapplied it, or that he secreted it with intent to embezzle or fraudulently or knowingly and willfully misapply it. State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972); State v. Bryant, 50 N.C. App. 139, 272 S.E.2d 916 (1980).

It is not necessary to show that the agent converted his principal's property to his own use so long as it is shown that the agent fraudulently or knowingly and willfully misapplied it. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1979).

And Mere Conversion Is Insufficient. — The mere converting or appropriating the property of another to one's own use is not sufficient to constitute the crime of embezzlement, fraudulent intent in the act of such conversion or appropriation being an essential element of the offense. State v. Cahoon, 206 N.C. 388, 174 S.E. 91 (1934).

And the act of conversion does not raise the presumption of a felonious intent in a prosecution of an indictment for embezzlement. State v. Agnew, 33 N.C. App. 496, 236 S.E.2d 287 (1977), aff'd in part, rev'd in part on other grounds, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Meaning of Fraudulent Intent. — Fraudulent intent within the meaning of this section is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held, and evidence tending to show that defendant, without authorization, applied funds of his employer to his own use, although defendant testified that he used the funds to pay a debt due him by his employer, is sufficient to be submitted to the jury on the question of fraudulent intent. State v. McLean, 209 N.C. 38, 182 S.E. 700 (1935); State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942); State v. Agnew, 33 N.C. App. 496, 236 S.E.2d 287 (1977), aff'd in part, rev'd in part on other grounds, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

Fraudulent intent which constitutes a necessary element of embezzlement, within the meaning of this section, is the intent of the agent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. State v. Gentry, 228 N.C. 643, 46 S.E.2d 863, cert. denied, 335 U.S. 818, 69 S. Ct. 39, 93 L. Ed. 372 (1948); State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972).

The fraudulent intent required under this section is the intent to willfully or corruptly use or misapply the property of another for purposes other than those for which the agent or fiduciary received it in the course of his employment. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1979).

Intent to Repay No Defense. — An intent to restore the property embezzled or a readiness and willingness at a latter date is not a defense to a prosecution under this section. State v. Summers, 141 N.C. 841, 53 S.E. 856 (1906).

It is no defense to a prosecution for embezzlement that the defendant intended to return the property obtained or was able and willing to do so at a later date. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

Trespass is not a necessary element. In embezzlement the possession of the property is acquired lawfully by virtue of the fiduciary relationship and thereafter the felonious intent and fraudulent conversion enter in to make the act of appropriation a crime. State v. Griffin, 239 N.C. 41, 79 S.E.2d 230 (1953).

Nor Is Demand for Payment. — A demand is not necessary to support a prosecution under this section as it is not made a prerequisite to prosecution. State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905).

Property of Prosecutor. — The property alleged to have been embezzled must be the property of the prosecutor. State v. Barton, 125 N.C. 702, 34 S.E. 553 (1899).

Goods Received under Special Directions. — Where goods come into the possession of a servant, out of the ordinary course of his employment, but in pursuance of special directions from the master to receive them, and the servant embezzles the same, he is indictable under this section. State v. Costin, 89 N.C. 511 (1883).

IV. PRACTICE AND PROCEDURE.

A. In General.

Burden of Proof — Intent. — The conversion being admitted or shown, the burden is on the State to show beyond a reasonable doubt the intent to defraud. State v. McDonald, 133 N.C. 680, 45 S.E. 582 (1903).

Same — Age of Defendant. — The burden of showing that he is under age is on the defendant and the State is not called on to prove that he is past sixteen years old, for this is a matter of defense and within the defendant's knowledge. State v. Blackley, 138 N.C. 620, 50 S.E. 310 (1905).

B. Indictment.

The name of the person from whom the money was received need not be stated. State v. Lanier, 88 N.C. 658 (1883); State v. Lanier, 89 N.C. 517 (1883).

Name of Corporation. — In an indictment for embezzlement, where the property belongs to a corporation, the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation. State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

Age of Defendant. — The averment that the defendant is neither an apprentice nor under the age of sixteen years, is a substantial compliance with the statute. State v. Lanier, 88 N.C. 658 (1883); State v. Lanier, 89 N.C. 517 (1883).

It need not be alleged or proved that the property had been committed to the care of defendant, nor that any breach of confidence or trust, save that which grows out of the relation of owner and servant or agent, had occurred. State v. Wilson, 101 N.C. 730, 7 S.E. 872 (1888).

Necessity of Alleging Ownership. — In an indictment for embezzlement it is necessary to allege ownership of the property in a person, corporation, or other legal entity able to own property. State v. Ellis, 33 N.C. App. 667, 236 S.E.2d 299, cert. denied, 293 N.C. 255, 236 S.E.2d 708 (1977).

Where the owner of embezzled property is an association, partnership, corporation, or other firm or organization, there must be allegations showing such organization to be a legal entity capable of owning property as such, or the individuals comprising the same and owing the property should be set out as owners. State v. Thornton, 251 N.C. 658, 111 S.E.2d 901 (1960).

The common-law offense of larceny contemplates that the property taken must belong to or be in the possession of another and the statutory offense of embezzlement provides that the misappropriated property must belong to "any other person or corporation, unincorporated association, or organization." In view of the breadth of the offenses, the warrant or bill of indictment charging these offenses must allege the ownership of the property either in a natural person or a legal entity capable of owning property. State v. Wooten, 18 N.C. App. 652, 197 S.E.2d 614 (1973), cert. denied, 283 N.C. 758, 198 S.E.2d 728 (1973).

It is unnecessary to determine whether an indictment could be sustained under other of the cognate statutes, §§ 14-91 through 14-99; where an indictment of a bank receiver for embezzlement is drawn under this section. State v. Whitehurst, 212 N.C. 300, 193 S.E. 657 (1937).

Fatal Variance Where Only Violation of § 14-92 Charged. — The crime of embezzlement rests upon statute alone and conviction thereof under an indictment drawn under this section, when the evidence tends only to show a violation of § 14-92, is erroneous upon the ground that the proof is at variance with the offense charged in the bill. State v. Grace, 196 N.C. 280, 145 S.E. 399 (1928).

Indictment Sufficient under Both This Section and § 14-92. — There was no merit to defendant city clerk's contention that her convictions for embezzlement from the city were invalid in that she was convicted for violations of this section, which is a private sector embezzlement statute, when she should have been tried for violations of § 14-92, a statute applicable to public officials, since the indictments against defendant did not refer specifically to any statute, they were sufficient to charge defendant with violations of either this section or § 14-92, and the sentence imposed for each offense of which defendant was convicted was within the maximum permissible under either statute. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Indictment under This Section Rather Than § 14-168.1. — It was proper for the State to elect to indict the defendant for felonious embezzlement under this section, the broader statute, rather than to indict him under § 14-168.1, the narrower statute. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

C. Evidence.

Proof of Fraudulent Intent. — The element of fraudulent intent necessary to sustain an embezzlement conviction may be established

by evidence of facts and circumstances from which it reasonably may be inferred, as well as by direct evidence. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

The fraudulent intent within the meaning of this section may be shown by direct evidence, or by evidence of facts and circumstances from which it may reasonably be inferred. State v. Helsabeck, 258 N.C. 107, 128 S.E.2d 205 (1962); State v. Smithey, 15 N.C. App. 427, 190 S.E.2d 369 (1972).

It is not necessary that the State offer direct proof of fraudulent intent, it being sufficient if facts and circumstances are shown from which it may be reasonably inferred. State v. Pate, 40 N.C. App. 580, 253 S.E.2d 266, cert. denied, 297 N.C. 616, 257 S.E.2d 222 (1977).

Sufficiency To Show Conversion. — The mere making of false entries in books of account is not sufficient evidence of an act of conversion constituent to the crime of embezzlement regardless of the defendant's fraudulent intent at the time of making such a false entry. But depositing funds of another in one's own account, together with the making of incorrect entries in books of account, and failing to turn the other's funds over to him at a time when obligated to do so, is sufficient evidence of conversion. State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (1971).

Evidence of Defendant's Spending and Deposits. — Evidence that during a period in which a defendant had allegedly been guilty of embezzling money from his employer the defendant spent money considerably in excess of his known income or made large bank deposits has been held admissible. State v. Buzzelli, 11 N.C. App. 52, 180 S.E.2d 472, cert. denied, 279 N.C. 350, 182 S.E.2d 583 (1971).

Testimony as to Signatures. — The trial court in an embezzlement case properly allowed a State's witness to testify that the signature on checks introduced as State's exhibits was that of defendant where the witness testified that he had seen defendant write her signature on thousands of occasions. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

D. Instructions.

Reference to Crime of Larceny. — The trial court in an embezzlement case did not err in referring in the instructions to the crime of larceny where the court was simply explaining the crime of embezzlement by contrasting it with the crime of larceny. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

§ 14-91. Embezzlement of State property by public officers and employees.

If any officer, agent, or employee of the State, or other person having or holding in trust for the same any bonds issued by the State, or any security, or other property and effects of the same, shall embezzle or knowingly and willfully misapply or convert the same to his own use, or otherwise willfully or corruptly abuse such trust, such offender and all persons knowingly and willfully aiding and abetting or otherwise assisting therein shall be punished as a Class F felon. (1874-5, c. 52; Code, s. 1015; Rev., s. 3407; C. S., s. 4269; 1979, c. 716; c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The first 1979 amendment inserted "knowingly and willfully" preceding "aiding and abetting or otherwise assisting" near the end of the section, and deleted "and shall be fined not less than ten thousand dollars, or imprisoned in the State's prison not less than twenty years, or both, at the discretion of the court" at the end of this section.

The second 1979 amendment, effective July 1, 1981, substituted "punished as a Class F felon" for "guilty of a felony" at the end of the section. The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

The word "property" is sufficiently all inclusive to embrace money, goods, chattels, evidences of debt and things in action. State v. Ward, 222 N.C. 316, 22 S.E.2d 922 (1942).

The fraudulent intent which constitutes a necessary element of the crime of embezzlement, within this section, is the intent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

Cited in State v. Hill, 91 N.C. 561 (1874); State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889); State v. Ward, 222 N.C. 316, 22 S.E.2d 922 (1942); State v. Howard, 222 N.C. 291, 22 S.E.2d 917 (1942).

§ 14-92. Embezzlement of funds by public officers and trustees.

If any officer, agent, or employee of any city, county or incorporated town, or of any penal, charitable, religious or educational institution; or if any person having or holding any moneys or property in trust for any city, county, incorporated town, penal, charitable, religious or educational institution, shall embezzle or otherwise willfully and corruptly use or misapply the same for any purpose other than that for which such moneys or property is held, such person shall be punished as a Class H felon. If any clerk of the superior court or any sheriff, treasurer, register of deeds or other public officer of any county or town of the State shall embezzle or wrongfully convert to his own use, or corruptly use, or shall misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be punished as a Class H felon. The provisions of this section shall apply to all persons who shall go out of office and fail or neglect to account to or deliver over to their successors in office or other persons lawfully entitled to receive the same all such moneys, funds and securities or property aforesaid. (1876-7, c. 47; Code, s. 1016; 1891, c. 241; Rev., s. 3408; C. S., s. 4270; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall be fined and imprisoned in the State's prison in the discretion of the court" at the end of the first sentence, substituted "shall be punished as a Class H felon" for "shall be guilty of a felony" at the end of the second sentence and deleted the former last sentence, which read: "The punishment shall be imprisonment in the State's prison or county jail, or fine in the discretion of the court." The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Section 14-231 Compared. — See State v. Windley, 178 N.C. 670, 100 S.E. 116 (1919).

Section Inapplicable to Private Property. — This section does not embrace the unlawful appropriation of the property of private individuals. State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

Meaning of "Willfully and Corruptly". — The words "willfully" and "corruptly," as they relate to misapplication of funds under this section, have been defined as "[d]one with an unlawful intent," and "the act of an official or

fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others," State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

In a charge upon the trial of county officials for the misapplication of county funds under the provisions of this section, the definition that "wilfully and corruptly" meant with "bad faith and without regard to the rights of others and in the interest of such parties for whom the funds were held" was not erroneous under the circumstances of the case. State v. Shipman, 202 N.C. 518, 163 S.E. 657 (1932).

Fraudulent Intent Is Necessary. — Unless fraudulent intent is proved, the offense under this section is not proved. State v. Agnew, 33 N.C. App. 496, 236 S.E.2d 287, cert. denied, 293 N.C. 361, 237 S.E.2d 848 (1977), aff'd in part, rev'd in part on other grounds, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 99 S. Ct. 107, 58 L. Ed. 2d 124 (1978).

The State need not prove embezzlement or misapplication of the entire sum alleged in the indictment. State v. Agnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

Nor Exclusive Possession. — It is not necessary for the State to prove that defendant had exclusive possession of the funds to sustain a charge of embezzlement under this section. More than one person can have possession of the same property at the same time. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Knowledge of Supervisory Board No Excuse. — The fact that a supervisory board has knowledge of a subordinate's unlawful use of public moneys, does not excuse or justify one who knowingly misapplies such funds unlawfully. State v. Angnew, 294 N.C. 382, 241 S.E.2d 684 (1978).

Sufficiency of Indictment under Both this Section and § 14-90. — There was no merit to defendant city clerk's contention that her convictions for embezzlement from the city were invalid in that she was convicted for violations of § 14-90, which is a private sector embezzlement statute, when she should have been tried for violations of this section, a statute applicable to public officials, since the indictments against defendant did not refer specifically to any statute, they were sufficient to charge defendant with violations of either § 14-90 or this section, and the sentence imposed for each offense of which defendant was convicted was within the maximum permissible under either statute. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Fraudulent Intent Can Be Inferred. — The fraudulent intent required in the charge of embezzlement can be inferred from the facts proven. It is not necessary that there be direct evidence of such intent. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Evidence that defendant city clerk wrote salary checks to herself in excess of the amount authorized was sufficient to permit a reasonable inference that defendant fraudulently or knowingly and willfully misapplied the city's funds to her own use without authorization so as to support her conviction of embezzlement. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Testimony as to Signature. — The trial court in an embezzlement case properly allowed a State's witness to testify that the signature on checks introduced as State's exhibits was that of defendant where the witness testified that he had seen defendant write her signature on thousands of occasions. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Instructions — Use of Words "Fiduciary Person". — Trial court in an embezzlement case did not commit prejudicial error in charging the jury that defendant was a fiduciary person though this section, neither contains nor refers to the words "fiduciary person," since the trial court was not restricted to using the exact words of the statute in giving instructions and the use of "fiduciary person" to define that statutory phrasing of this section has been specifically approved by the North Carolina Supreme Court. The use of the words was not an expression of trial judge's opinion contrary to the mandate of § 15A-1222. State v. Barbour, 43 N.C. App. 143, 258 S.E.2d 475 (1979).

Same — Reference to Crime of Larceny. — The trial court in an embezzlement case did not err in referring in the instructions to the crime of larceny where the court was simply explaining the crime of embezzlement by contrasting it with the crime of larceny. State v. Thompson, 50 N.C. App. 484, — S.E.2d — (1981).

Cited in State v. Hill, 91 N.C. 561 (1884); New York Indm. Co. v. Corporation Comm'n, 197 N.C. 562, 150 S.E. 16 (1929); State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980).

§ 14-93. Embezzlement by treasurers of charitable and religious organizations.

If any treasurer or other financial officer of any benevolent or religious institution, society or congregation shall lend any of the moneys coming into his hands to any other person or association without the consent of the institution, association or congregation to whom such moneys belong; or, if he shall fail to account for such moneys when called on, he shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court. (1879, c. 105; Code, s. 1017; Rev., s. 3409; C. S., s. 4271.)

CASE NOTES

Two Offenses Created. — Under this section two offenses are created which apply to certain officers of benevolent or religious institutions. One offense is the lending of their moneys without consent; the other is the failure to account for such moneys. State v. Dunn, 138 N.C. 672, 50 S.E. 772 (1905).

Association for Members Solely. — An association organized for the benefit of its members solely is not a benevolent or religious association and in indictment under this section cannot be sustained against an officer who misappropriates funds of the association. State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904).

Cited in State v. Hill, 91 N.C. 561 (1884).

§ 14-94. Embezzlement by officers of railroad companies.

If any president, secretary, treasurer, director, engineer, agent or other officer of any railroad company shall embezzle any moneys, bonds or other valuable funds or securities, with which such president, secretary, treasurer, director, engineer, agent or other officer shall be charged by virtue of his office or agency, or shall in any way, directly or indirectly, apply or appropriate the same for the use or benefit of himself or any other person, state or corporation, other than the company of which he is president, secretary, treasurer, director, engineer, agent or other officer, for every such offense the person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of any county through which the railroad of such company shall pass, shall be punished as a Class H felon. (1870-1, c. 103, s. 1; Code, s. 1018; Rev., s. 3403; C. S., s. 4272; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "imprisoned in the State's prison not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-95. Conspiring with officers of railroad companies to embezzle.

If any person shall agree, combine, collude or conspire with the president, secretary, treasurer, director, engineer or agent of any railroad company to commit any offense specified in G.S. 14-94, such person so offending shall be guilty of a felony, and on conviction in the superior or criminal court of a county

through which the railroad of any company against which such offense may be perpetrated passes, shall be punished as a Class H felon. (1870-1, c. 103, s. 2; Code, s. 1019; Rev., s. 3404; C. S., s. 4273; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "imprisoned in the State's prison for not less than three nor more than ten years, and fined not less than one thousand nor more than ten thousand dollars" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Cited in State v. Hill, 91 N.C. 561 (1884); State v. Lewis, 142 N.C. 626, 633, 55 S.E. 600 (1906).

§ 14-96. Embezzlement by insurance agents and brokers.

If any insurance agent or broker who acts in negotiating a contract of insurance by an insurance company, association or fraternal order or society, lawfully doing business in this State, embezzles or fraudulently converts to his own use, or, with intent to use or embezzle, takes, secretes or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, he shall be deemed guilty of larceny. (1889, c. 54, s. 103; Rev., s. 3489; 1911, c. 196, s. 8; C. S., s. 4274.)

§ 14-96.1. Report to Commissioner.

Whenever any insurance company, its manager, general agent or other representative knows or has reasonable cause to believe that any agent, broker or other representative of such company is guilty under the preceding section [G.S. 14-96], it shall be the duty of such company, its manager, general agent or other representative, within thirty days after acquiring such knowledge to file with the Commissioner a complete statement of all the relevant facts and circumstances. All such reports shall be privileged communications, and when filed in good faith shall in nowise subject the company or individuals making the same to any liability whatsoever. The Commissioner may suspend the license to do business in this State of any insurance company, its general manager, agent or other representative who willfully fails to comply with this section. (1945, c. 382.)

§ 14-97. Appropriation of partnership funds by partner to personal use.

Any person engaged in a partnership business in the State of North Carolina who shall, without the knowledge and consent of his copartner or copartners, take funds belonging to the partnership business and appropriate the same to

his own personal use with the fraudulent intent of depriving his copartners of the use thereof, shall be guilty of a misdemeanor. Any person or persons violating the provisions of this section, upon conviction, shall be punished as is now done in cases of misdemeanor. (1921, c. 127; C. S., s. 4274(a).)

CASE NOTES

Fraudulent intent is an essential element of this crime and must be proved by the State, and in a prosecution under this section an instruction that the jury should return a verdict of guilty if they found beyond a reasonable doubt the facts to be as the evidence tended to show, is error, the question of fraudulent intent being a question for the jury to determine from the evidence. State v. Rawls, 202 N.C. 397, 162 S.E. 899 (1932).

§ 14-98. Embezzlement by surviving partner.

If any surviving partner shall willfully and intentionally convert any of the property, money or effects belonging to the partnership to his own use, and refuse to account for the same on settlement, he shall be punished as a Class H felon. (1901, c. 640, s. 9; Rev., s. 3405; C. S., s. 4275; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and upon conviction shall be punished by fine or imprisonment in the State's prison in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-99. Embezzlement of taxes by officers.

If any officer appropriates to his own use the State, county, school, city or town taxes, he shall be guilty of embezzlement, and shall be punished as a Class I felon. (1883, c. 136, s. 49; Code, s. 3705; Rev., s. 3410; C. S., s. 4276; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class I felon" for "may be punished by confinement in the State's prison not exceeding five years, at the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Inference of Fraudulent Intent. — While the intent to commit the offense of embezzlement is an essential ingredient of the crime, the fraudulent intent may be inferred by the jury under evidence sufficient to show it, and where under such evidence the trial court correctly defines such intent, and places the burden of proof throughout the trial on the State to show the intent beyond a reasonable doubt, an exception that the court failed to instruct the jury upon the element of felonious intent is untenable. State v. Lancaster, 202 N.C. 204, 162 S.E. 367 (1932).

Cited in State v. Connelly, 104 N.C. 794, 10 S.E. 469 (1889).

ARTICLE 19.

False Pretenses and Cheats.

§ 14-100. Obtaining property by false pretenses.

(a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, and shall be punished as a Class H felon: Provided, that if, on the trial of anyone indicted for such crime, it shall be proved that he obtained the property in such manner as to amount to larceny or embezzlement, the jury shall have submitted to them such other felony proved; and no person tried for such felony shall be liable to be afterwards prosecuted for larceny or embezzlement upon the same facts: Provided, further, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such money, goods, property, services, chose in action, or other thing of value by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the money, goods, property, services, chose in action or other thing of value; and upon the trial of any such indictment, it shall not be necessary to prove either an intent to defraud any particular person or that the person to whom the false pretense was made was the person defrauded, but it shall be sufficient to allege and prove that the party accused made the false pretense charged with an intent to defraud.

(b) Evidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud.

(c) For purposes of this section, "person" means person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (33 Hen. VIII, c. 1, ss. 1, 2; 30 Geo. II, c. 24, s. 1; 1811, c. 814, s. 2, P. R.; R. C., c. 34, s. 67; Code, s. 1025; Rev., s. 3432; C. S., s. 4277; 1975, c. 783; 1979, c. 760, s. 5.)

Cross References. — As to alleging intent in the indictment, see § 15-151. As to obtaining property or services by false or fraudulent use of credit cards or other means, see §§ 14-113.1 through 14-113.7a. For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "imprisoned in the State's prison not less than four months nor more than ten years, and fined, in the discretion of the court" in subsection (a) immediately preceding the first proviso. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47;

1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. Elements of The Offense.
III. Indictment.
IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Origin of Section. — This section was derived from the English statutes, 33 Henry VIII, and 30 George II. State v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927).

Purpose. — The simple purpose of this section is to prevent persons from using false pretenses to obtain property. The ultimate loss to the victim, therefore, is an issue which is irrelevant to the purpose of the criminal statute and is an issue properly within the province of the civil courts. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

The gist of the offense described in this section is obtaining something of value from the owner thereof by false pretense. State v. Wilson, 34 N.C. App. 474, 238 S.E.2d 632, cert. denied, 294 N.C. 188, 241 S.E.2d 72 (1977).

The essence of the crime is the intentional false pretense — not the resulting economic harm to the victim. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

Scope of Proscribed Activity Broadened by 1975 Amendment. — The legislature, by the unambiguous language of the 1975 amendment of this section, clearly intended to broaden the scope of the proscribed activity so as to make a false representation "of a past or subsisting fact or of a future fulfillment or event" punishable under the statute, and to include in the definition of the crime an attempt to obtain something of value with an intent to defraud. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Corporations Liable. — See State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910).

Applied in State v. Simpson, 25 N.C. App. 176, 212 S.E.2d 566 (1975); State v. Grier, 35 N.C. App. 119, 239 S.E.2d 870 (1978).

Cited in State v. Page, 32 N.C. App. 478, 232 S.E.2d 460 (1977); State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

II. ELEMENTS OF THE OFFENSE.

Elements Generally. — The crime of obtaining property by false pretenses pursuant to this section should be defined as a false representation: (1) of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another. State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980). State v. Davis, 48 N.C. App. 526, 269 S.E.2d 291 (1980).

The constituent elements of the offense of false pretense are: (1) that the representation was made as alleged; (2) that property or something of value was obtained by reason of the representation; (3) that the representation was false; (4) that it was made with intent to defraud; (5) that it actually did deceive and defraud the person to whom it was made. State v. Carlson, 171 N.C. 818, 89 S.E. 30 (1916); State v. Johnson, 195 N.C. 506, 142 S.E. 775 (1928).

Victim's Failure to Receive Compensation Not an Element. — The Supreme Court never intended the victim's failure to receive compensation to be an element of the offense. Beginning with the statute codified as Potter's Revisal of 1819, Laws 1811, c. 814, s. 2, through the present § 14-100, there is and has been no statutory requirement that the State must prove that the defendant obtained the goods, property, things of value, services, etc., without compensation to the victims. Research discloses no case in which the question of the victim's compensation was before the court, although in some cases the victim received nothing at all, and in some the victim did receive some compensation of a sort. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

The phrase "without compensation" has constituted obiter dictum in the cases where it has been used, and it it not an element of the offense of false pretense, State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

A defendant can be convicted of obtaining goods by false pretenses in violation of this section even though some compensation is paid if the compensation actually paid is less than the amount represented. State v. Hines, 36 N.C. App. 33, 243 S.E.2d, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

An essential element of the offense proscribed by this section is that accused "obtain or attempt to obtain" something of value by means of any kind of false pretense. State v. Hadlock, 34 N.C. App. 226, 237 S.E.2d 748 (1977).

The intent to cheat and defraud the prosecutor is an essential ingredient in the crime of false pretense. State v. Blue, 84 N.C. 807 (1881); State v. Oakley, 103 N.C. 408, 9 S.E. 575 (1889).

An element of the offense is that the party to whom the false representation was made was deceived by it. State v. Whedbee, 152 N.C. 770, 67 S.E. 60 (1910). If he is so deceived it matters not whether he parted with goods for the sake of gain or for a charitable purpose. State v. Matthews, 91 N.C. 635 (1884).

The false pretense may be by act or conduct without spoken words. State v. Matthews, 121 N.C. 604, 28 S.E. 469 (1897).

Caveat Emptor Inapplicable. — The doctrine of caveat emptor "let the buyer beware" does not apply to actual fraud or obtaining property by false representation. By this doctrine the purchaser is forewarned of tricks of the trade, bluster, puffs and empty boasts on the part of the person putting his property on the market; but the seller cannot escape the penalty by reason of the doctrine where the facts constituting the crime are made to appear. State v. Jones, 70 N.C. 75 (1874); State v. Young, 76 N.C. 258 (1877); State v. Burke, 108 N.C. 750, 12 S.E. 1000 (1891).

Representation to Agent of Owner of Goods. — It is not necessary that the false representations be made to the owner of the goods directly, but it is sufficient if they were made to his agent. State v. Taylor, 131 N.C. 711, 42 S.E. 539 (1902).

Intent to Repay Is No Defense. — The crime under this section is committed even though the borrower who obtained a loan by means of a false representation may have intended to repay and may even have honestly believed that he would be able to repay. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

Instruction as to "Intent to Deceive" Proper. — In the context of the provisions of this section, when a person obtains something of value by means of misrepresentations with intent to deceive the victim, the requisite intent to cheat or defraud exists. Therefore, an instruction to the jury that in order to find defendant guilty it must find that defendant "intended to deceive" meets the statutory requirement that there be an "intent to cheat or defraud." State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

III. INDICTMENT.

Indictment Generally. — The indictment must allege all of the essential elements of the offense. State v. Claudius, 164 N.C. 521, 80 S.E. 261 (1913).

Necessary Allegations — Accused "Obtained or Attempted to Obtain". — An indictment was insufficient to charge an offense under this section where the indictment failed to allege that defendant obtained or attempted to obtain anything. State v. Hadlock, 34 N.C. App. 226, 237 S.E.2d 748 (1977).

Same — "Feloniously". — The offense is a felony and a bill of indictment charging such offense and which omits the word "feloniously" is defective, and judgment will be arrested on a verdict of guilty. State v. Caldwell, 112 N.C. 854, 16 S.E. 1010 (1893).

Indictment failing to include the word "feloniously" was held insufficient in State v. Fowler, 266 N.C. 528, 146 S.E.2d 418 (1966).

Same — Intent to Defraud. — Where the indictment upon which the defendant was charged failed to allege that the defendant acted with the intent to defraud, the omission of an essential element of this section was fatal to the indictment. State v. Moore, 38 N.C. App. 239, 247 S.E.2d 670, cert. denied, 295 N.C. 736, 248 S.E.2d 866 (1978).

Same — Causal Connection. — The indictment must show a causal connection between the false representation and the parting with the property (State v. Whedbee, 152 N.C. 770, 67 S.E. 60 (1910)) but no particular form of words is necessary; an allegation that "by means of the false pretense" or "relying on the false pretense," or the like, is sufficient, where it is apparent that the delivery of the property was the natural result of the pretense alleged. State v. Claudius, 164 N.C. 521, 80 S.E. 261 (1913).

Same — Property Obtained. — The indictment must describe the thing alleged to have been obtained with reasonable certainty, and by the name or term usually employed to describe it. State v. Gibson, 169 N.C. 318, 85 S.E. 7 (1915).

Unnecessary Allegations — Person Intended to be Cheated. — The charge as to the persons intended to be cheated is surplusage and immaterial, all that is necessary is a charge of intent. State v. Ridge, 125 N.C. 655, 34 S.E. 439 (1899); State v. Salisbury Ice & Fuel Co., 166 N.C. 366, 81 S.E. 737 (1914).

Same — Actual Deceit. — The specific allegation in the bill of indictment that the victim was in fact deceived is unnecessary when the facts alleged suggest that the false pretense was the probable motivation for the victim's conduct. State v. Hines, 36 N.C. App. 33, 243 S.E.2d 782, appeal dismissed, 295 N.C. 262, 245 S.E.2d 779 (1978).

Same — "Without compensation." — The phrase "without compensation" is not an essential element of the offense of false pretenses, and, therefore, it is not necessary to allege in a bill of indictment charging false pretenses that the accused obtained property from the victim "without compensation." State v. Cronin, 299 N.C. 229, 262 S.E.2d 277 (1980).

Same — Value of Property. — No averment of the value of the property obtained is necessary. State v. Gillespie, 80 N.C. 396 (1879).

Same — Present Form of Property. — It is not legally significant whether the thing gained by the party perpetrating the criminal act under this section is in the same form as it was when taken by false pretense from the owner. Thus, there was no variance in cases where the bills of indictment charged that the defendant obtained money from his employer and the evidence disclosed that he received a color television set and a clothes dryer from another party in exchange for the money pursuant to a prior agreement. State v. Wilson, 34 N.C. App. 474, 238 S.E.2d 632, cert. denied, 294 N.C. 188, 241 S.E.2d 72 (1977).

IV. ILLUSTRATIVE CASES.

False Representations as to Deed of Trust. — A representation that a deed of trust covered certain land, which was not in fact included, on the faith of which defendant obtained money is a false pretense within this section. State v. Roberts, 189 N.C. 93, 126 S.E. 161 (1925).

False representation that land is free from encumbrances, when knowingly made in order to effect a sale, or to obtain a loan, may be the subject matter of this offense. State v. Banks, 24 N.C. App. 604, 211 S.E.2d 860 (1975); State v. Wallace, 25 N.C. App. 360, 213 S.E.2d 420, cert. denied, 287 N.C. 468, 215 S.E.2d 628 (1975).

One who obtains money as the purchase price of land sold by him to another upon the representation that the land is unencumbered when it is encumbered by a mortgage, is liable in a prosecution for obtaining goods under false pretenses. State v. Munday, 78 N.C. 460 (1878).

False Representations as to Standing Timber. — A conviction under this section for false and fraudulent representations as to the quantity of standing timber on land sold to the prosecutor cannot be sustained where the amount of the purchase price for land is to be determined by the number of feet of timber cut therefrom, the prosecutor not being damaged thereby; nor can the conviction be sustained for misrepresentations as to the quality of the trees when the prosecutor had ample opportunity to inspect them and had been urged to do so by the defendant. State v. Corey, 199 N.C. 209, 153 S.E. 923 (1930).

Misrepresentation of Personal Identity. — The crime of obtaining property by means of a false pretense may be committed when one obtains goods on credit by a willful misrepresentation of his identity, quite apart from any intention of the defendant ultimately to pay or not to pay. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

False Representation as to Security for Loan. — The crime of obtaining property for means of a false pretense is committed when one obtains a loan of money by falsely representing the nature of the security given, or by falsely representing that the property pledged as security is free from liens. State v. Tesenair, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

The falsification of expense records cannot in itself constitute the crime of false pretenses, since it is essential that the false pretense must have included the transfer of money or property, i.e., there must be a casual relationship between the representation alleged to have been made and the obtaining of the money or property. State v. Davis, 48 N.C. App. 526, 269 S.E.2d 291 (1980).

§ 14-101. Obtaining signatures by false pretenses.

If any person, with intent to defraud or cheat another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, the false making of which would be punishable as forgery, he shall be punished as a Class I felon. (1871-2, c. 92; Code, s. 1026; Rev., s. 3433; C. S., s. 4278; 1945, c. 635; 1979, c. 760, s. 5.)

Cross References. — As to forger, see § 14-119 et seq. As to uttering a false bill of lading, see § 21-42. For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "punishable by fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the State's prison for a term of not less than one year nor more than five years, or both, at the discretion of the court" at the end of the section. The 1979 amendatory act was

originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Signing or Endorsing Note. — It is an indictable offense under this section, to procure a person to sign or endorse a note by means of false representation and with intent to cheat and defraud. State v. Johnson, 195 N.C. 506, 142 S.E. 775 (1928).

Indictment Must Allege Offense with Certainty. — An indictment should state with reasonable certainty the offense charged, and an indictment charging the defendant with obtaining money when he obtained a note, is defective. State v. Gibson, 169 N.C. 318, 85 S.E. 7 (1915).

§ 14-102. Obtaining property by false representation of pedigree of animals.

If any person shall, with intent to defraud or cheat, knowingly represent any animal for breeding purposes as being of greater degree of any particular strain of blood than such animal actually possesses, and by such representation obtain from any other person money or other thing of value, he shall be guilty of a misdemeanor, and upon conviction thereof shall for each offense be punished by a fine of not less than sixty dollars ($60.00) nor more than three hundred dollars ($300.00), or by imprisonment for a term not exceeding six months. (1891, c. 94, s. 2; Rev., s. 3307; C. S., s. 4279.)

§ 14-103. Obtaining certificate of registration of animals by false representation.

If any person shall, by any false representation or pretense, with intent to defraud or cheat, obtain from any club, association, society or company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal in the herd register of any such association, society or company, or a transfer of any such registration, upon conviction thereof he shall be punished by imprisonment for a term not exceeding three months or a fine not exceeding one hundred dollars ($100.00), or by both such fine and imprisonment. (1891, c. 94, s. 1; Rev. s. 3308; C. S., s. 4280.)

§ 14-104. Obtaining advances under promise to work and pay for same.

If any person, with intent to cheat or defraud another, shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation upon and by color of any promise or agreement that the person making the same will begin any work or labor of any description for such person or corporation from whom the advances are obtained, and the person making the promise or agreement shall willfully fail, without a lawful excuse, to commence or complete such work according to contract, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding thirty days. (1889, c. 444; 1891, c. 106; 1905, c. 411; Rev., s. 3431; C. S., s. 4281.)

Cross References. — As to tenant or croper willfully abandoning landlord after advances have been made, see § 14-358.

CASE NOTES

Constitutionality. — The gist of the offense of procuring advances "with intent to cheat and defraud" is not the obtaining of the advances, and afterwards refusing to perform the labor, but in the fraudulent intent at the time of obtaining the advances, and making the promise. This section is constitutional. State v. Norman, 110 N.C. 484, 14 S.E. 968 (1892).

Intent Must Be Shown. — To convict under this section it is necessary to show the fraudulent intent on the part of the promisor; and merely the facts of obtaining the advances, the promise to do the work, and a breach of that promise, are insufficient to sustain a conviction. State v. Griffin, 154 N.C. 611, 70 S.E. 292 (1911); State v. Islay, 164 N.C. 491, 79 S.E. 1105 (1913).

And Must Be Alleged in Warrant. — A warrant charging defendant with obtaining a money advance under promise to do certain work, and with failure to perform the work, without alleging that the advance was obtained with intent to cheat or defraud, if fatally defective. State v. Phillips, 228 N.C. 446, 45 S.E.2d 535 (1947).

No Day of Grace. — Where, upon a promise to begin work on the following Monday, the prosecutor made advances to the defendant, and the latter failed, without proper excuse, to begin work at the time stipulated, and was arrested on complaint of prosecutor on Tuesday, defendant's failure was held to be a failure to begin work within the meaning of the statute. State v. Norman, 110 N.C. 484, 14 S.E. 968 (1892).

Cited in State v. Moore, 38 N.C. App. 239, 247 S.E.2d 670 (1978).

§ 14-105. Obtaining advances under written promise to pay therefor out of designated property.

If any person shall obtain any advances in money, provisions, goods, wares or merchandise of any description from any other person or corporation, upon any written representation that the person making the same is the owner of any article of produce, or of any other specific chattel or personal property, which property, or the proceeds of which the owner in such representation thereby agrees to apply to the discharge of the debt so created, and the owner shall fail to apply such produce or other property, or the proceeds thereof, in accordance with such agreement, or shall dispose of the same in any other manner than is so agreed upon by the parties to the transaction, the person so offending shall be guilty of a misdemeanor, whether he shall or shall not have been the owner of any such property at the time such representation was made. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1879, cc. 185, 186; Code, s. 1027; 1905, c. 104; Rev., s. 3434; C. S., s. 4282; 1969, c. 1224, s. 9.)

CASE NOTES

Constitutionality. — It is not the failure to pay the debt which is made indictable, but the failure to apply certain property, which, in writing, has been pledged for its payment, and advances made on the faith of such pledge; on this ground it is declared constitutional. State v. Torrence, 127 N.C. 550, 37 S.E. 268 (1900); State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

Representations Must Be of Existing Facts. — An indictment for obtaining goods under a false pretense, must be founded on a false representation by the defendant of an existing fact, and the pledging of a check to be received at a subsequent date does not come within the meaning of the section. State v. Whidbee, 124 N.C. 796, 32 S.E. 318 (1899).

Indictment Should Charge Exact Terms. — The indictment should charge in the exact

terms of the statute, and on failure to follow the statute it is subject to being quashed. State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

Section 14-114 Compared. — This section is on the same footing as § 14-114 for disposing of mortgaged property. It is not the failure to pay the debt which is made indictable, but the fraud in disposing of or withholding property which the owner has in writing agreed shall be applied in payment of advances made on the faith of such quasi mortgage, to one who has thus pro tanto become the owner thereof, and the subsequent conversion of said property, and diversion of the proceeds to the detriment of the equitable owner and in fraud of his rights. State v. Mooney, 173 N.C. 798, 92 S.E. 610 (1917).

§ 14-106. Obtaining property in return for worthless check, draft or order.

Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check, draft or order of any kind upon any bank, person, firm or corporation, not indebted to the drawer, or where he has not provided for the payment or acceptance of the same, and the same be not paid upon presentation, shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both, at the discretion of the court. The giving of the aforesaid worthless check, draft, or order shall be prima facie evidence of an intent to cheat and defraud. (1907, c. 975; 1909, c. 647; C. S., s. 4283.)

Local Modification. New Hanover: Pub. Loc. 1927, c. 636.

Cross References. — As to false warehouse receipts, see § 27-54 et seq.

CASE NOTES

It is a misdemeanor for any person knowingly to utter a worthless check in this State and such act involves moral turpitude under this section if done with intent to defraud. Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933).

Intent to Cheat or Defraud. — In order to convict a defendant under the provisions of this section for obtaining property in return for a worthless check, the indictment must sufficiently charge an intent to cheat or defraud or that the defendant obtained a thing of value. State v. Horton, 199 N.C. 771, 155 S.E. 866 (1930).

Signing in Name of Company. — Upon the trial under indictment for violating this section, the evidence tended to show that the check in question was signed in the name of a certain company by the defendant, and was conflicting as to whether the defendant was a member of the concern. It was held, that the question as to whether the defendant was a member of the company when he drew the check in question was not necessarily decisive of his guilt, and an instruction to find him guilty if the jury should find from the evidence he was not a partner, was reversible error. State v. Anderson, 194 N.C. 377, 139 S.E. 701 (1927).

Same — Burden of Proof. — The burden of proving the guilt of defendant in violating this section, the worthless check statute, is on the State, and where the check in question has been signed by him in the name of a certain firm and there is evidence tending to show that other checks similarly signed had been paid, with further evidence that defendant's authority to sign such checks had been revoked, the burden of proving defendant's guilt is on the State, and raises the question as to the defendant's good faith for the jury to determine. State v. Anderson, 194 N.C. 377, 139 S.E. 701 (1927).

Reference to § 14-107 in Judgment Is Harmless Surplusage. — The reference to § 14-107 in a judgment for violation of this section prior to amendment of judgment did not vitiate that judgment or render the sentence imposed a sentence in excess of that provided by law for the violation of this section, which the defendant was found to have committed. The reference to § 14-107 in the judgment was harmless surplusage. State v. McKinnon, 35 N.C. App. 741, 242 S.E.2d 545 (1978).

Applied in Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Cited in Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966); Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276, 162 A.L.R. 793 (1945).

§ 14-107. Worthless checks.

It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

It shall be unlawful for any person, firm or corporation to solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, such bank or depository with which to pay the same upon presentation.

The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of any such check or draft.

Any person, firm or corporation violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished as follows:

(1) If the amount of such check or draft is not over fifty dollars ($50.00), the punishment shall be by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.

(2) If the amount of such check or draft is over fifty dollars ($50.00), the punishment shall be by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months, or both. Provided, however, if such person has been convicted three times of violating G.S. 14-107, he shall on the fourth and all subsequent convictions be punished in the discretion of the district or superior court as for a general misdemeanor.

(3) If such check or draft is drawn upon a nonexistent account, the punishment shall be by a fine not to exceed one thousand dollars ($1,000) or imprisonment for not more than two years, or both.

(4) If such check or draft is drawn upon an account that has been closed by the drawer prior to time the check is drawn, the punishment shall be a fine not to exceed four hundred dollars ($400.00) or imprisonment for not more than five months or both.

(5) In deciding to impose any sentence other than an active prison sentence, the sentencing judge may require, in accordance with the provisions of G.S. 15A-1343, restitution to the victim for the amount of the check or draft and each prosecuting witness (whether or not under subpoena) shall be entitled to a witness fee as provided by G.S. 7A-314 which shall be taxed as part of the cost and assessed to the defendant. (1925, c. 14; 1927, c. 62; 1929, c. 273, ss. 1, 2; 1931, cc. 63, 138; 1933, cc. 43, 64, 93, 170, 265, 362, 458; 1939, c. 346; 1949, cc. 183, 332; 1951, c. 356; 1961, c. 89; 1963, cc. 73, 547, 870; 1967, c. 49, s. 1; c. 661, s. 1; 1969, c. 157; c. 876, s. 1; cc. 909, 1014, 1224, s. 10; 1971, c. 243, s. 1; 1977, c. 885; 1979, c. 837.)

CASE NOTES

This Section Is Constitutional. — See Mathis v. North Carolina, 266 F. Supp. 841 (M.D.N.C. 1967).

In General. — The gravamen of the offense proscribed by this section is the putting into circulation worthless commercial paper to the public detriment, and not that of the individual payee. State v. Levy, 220 N.C. 812, 18 S.E.2d 355 (1942).

It is not the attempted payment of a debt that is condemned by the statute, but the giving of a worthless check and its consequent disturbance of business integrity. State v. White, 230 N.C. 513, 53 S.E.2d 436 (1949); State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

The offense condemned by this section is the giving of a worthless check and its consequent disturbance of business integrity. State v. Ivey, 248 N.C. 316, 103 S.E.2d 398 (1958).

The act made criminal by this section is knowingly putting worthless commercial paper in circulation. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Section Not Applicable to Person Signing Check under Direction as a Clerical Task. — A person authorized to sign his name under the printed name of his employer on the employer's checks, who does so under direction merely as a clerical task to authenticate the checks, cannot be found guilty of violating this section upon the nonpayment of the checks for insufficient funds. State v. Cruse, 253 N.C. 456, 117 S.E.2d 49 (1960).

But Employer Is Liable. — Persons directing their employee to issue checks on the firm's account, knowing at the time that the firm did not have sufficient funds or credits with the drawee bank to pay the checks on presentation, are guilty of knowingly putting worthless commercial paper in circulation. State v. Cruse, 253 N.C. 456, 117 S.E.2d 49 (1960).

Use of Wrong Check Form Not A Violation of This Section. — Where the evidence disclosed that the check issued by defendant was returned by the bank, not on account of insufficient funds, but because it was written on the wrong kind of check form, the court should enter a judgment of not guilty in a prosecution for issuing a worthless check. State v. Coppley, 260 N.C. 542, 133 S.E.2d 147 (1963).

Instrument Signed by Defendant Held Not a Check. — If the instrument defendant signed did not contain a promise or order to pay any sum in any amount nor state to whom it was payable and he did not authorize anyone to fill it out in any amount and he did not know by whom or when it was filled out, what he signed was not a check, and he was not guilty of the offense charged against him in the warrant under this section. State v. Ivey, 248 N.C. 316, 103 S.E.2d 398 (1958).

Representation Constituting False Pretense. — The drawing and delivery of a check to a third person, without more, is a representation that drawer has funds sufficient to insure payment upon presentation, and if known to be untrue, is a false pretense. Nunn v. Smith, 270 N.C. 374, 154 S.E.2d 497 (1967).

Same — Postdated Check. — A postdated check given for a past-due account and so accepted is not a representation importing a criminal liability if untrue that comes within the intent and meaning of the "bad check law," making it a misdemeanor for a person to issue and deliver to another any check on any bank or depository for the payment of money or its equivalent knowing at the time that he has not sufficient funds on deposit or credit with the bank or depository for its payment. State v. Crawford, 198 N.C. 522, 152 S.E. 504 (1930).

Consent Not A Defense. — Regardless of the consent of anyone, the giving of a worthless check in contravention of this section is a crime. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1957).

If at the time of delivering a check to the payee the maker knows that he has neither funds nor credit to pay the check upon presentation, the fact that the payee agrees that the check would not be presented for collection, would not constitute a defense. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Entrapment Not A Defense. — Defense of entrapment on a charge of giving a worthless check cannot be maintained where the inducement to give the worthless check came from a person unconnected with the State. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Indictment. — In order to charge a statutory offense (the giving of a bad check), the indictment should set forth all the essential requisites therein prescribed, and no element should be left to inference or implication, and where the indictment is defective a demurrer is good. State v. Edwards, 190 N.C. 322, 130 S.E. 10 (1925).

Warrant. — A warrant charging that defendant, trading under a trade name, did, on a specified date, unlawfully and willfully issue a check knowing at the time that the named defendant, or the named defendant trading under the designated trade name, or the designated firm, did not have sufficient funds or credit to pay the check upon presentation, is sufficient and is not objectionable on the ground that the offense was charged disjunctively or alternately. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Prior Convictions Must Be Alleged in Warrant or Indictment. — Where a statute prescribes a higher penalty in case of repeated convictions for similar offenses, an indictment for a subsequent offense must allege facts showing that the offense charged is a second or subsequent crime within the contemplation of the statute in order to subject the accused to the higher penalty. State v. Williams, 21 N.C. App. 70, 203 S.E.2d 399 (1974).

Where there is no allegation in the warrant that defendant had been convicted three prior times of that offense, nor is there any other evidence in the record of that circumstance, a 90-day sentence exceeds the permissible statutory limit. State v. McCotter, 18 N.C. App. 411, 197 S.E.2d 50 (1973).

Fatal Variance. — An indictment charging the defendant with obtaining money on a day named by the issuance of a worthless check in violation of the statute, and evidence that it was given for the hire of an automobile, ten days later, are at fatal variance, and will not support a conviction. State v. Corpening, 191 N.C. 751, 133 S.E. 14 (1926).

The indictment charged that defendant issued a worthless check knowing at the time that he did not have sufficient funds or credit for its payment. The proof was that defendant issued a check of a corporation of which he was an executive officer, and that the corporation did not have sufficient funds or credit for its payment. There is a fatal variance between allegation and proof, and defendant's motion to nonsuit should have been allowed. State v. Dowless, 217 N.C. 589, 9 S.E.2d 18 (1940).

What State Must Prove. — In a prosecution under this statute the State must prove that the maker of the check had neither sufficient funds on deposit in, nor credit with, the bank on which the check was drawn to pay it on presentation. State v. Jackson, 243 N.C. 216, 90 S.E.2d 507 (1955).

Right to Trial by Jury May Not Be Waived. — Where the defendant in a criminal action enters the plea of "not guilty," the requirement of N.C. Const., Art. I, § 13, (now Art. I, § 24) of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law. State v. Crawford, 197 N.C. 513, 149 S.E. 729 (1929).

Instruction held proper. State v. Levy, 220 N.C. 812, 18 S.E.2d 355 (1942).

Applied in State v. Oates, 262 N.C. 532, 138 S.E.2d 139 (1964); State v. Beaver, 266 N.C. 115, 145 S.E.2d 330 (1965); State v. Hart, 266 N.C. 671, 146 S.E.2d 816 (1966); State v. Cleaves, 4 N.C. App. 506, 166 S.E.2d 861 (1969); State v. McClam, 7 N.C. App. 477, 173 S.E.2d 53 (1970); Lawrence v. State, 18 N.C. App. 260, 196 S.E.2d 623 (1973).

Cited in State v. Byrd, 204 N.C. 162, 167 S.E. 626 (1933); Oates v. Wachovia Bank & Trust Co., 205 N.C. 14, 169 S.E. 869 (1933); Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966); State v. McKinnon, 35 N.C. App. 741, 242 S.E.2d 545 (1978); State v. Dickens, 41 N.C. App. 388, 255 S.E.2d 212 (1979).

§ 14-107.1. Prima facie evidence in worthless check cases.

(a) Unless the context otherwise requires, the following definitions apply in this section:

(1) Check Passer. — A natural person who draws, makes, utters, or issues and delivers, or causes to be delivered to another any check or draft on any bank or depository for the payment of money or its equivalent.

(2) Acceptor. — A person, firm, corporation or any authorized employee thereof accepting a check or draft from a check passer.

(3) Check Taker. — A natural person who is an acceptor, or an employee or agent of an acceptor, of a check or draft in a face-to-face transaction.

(b) In prosecutions under G.S. 14-107 the prima facie evidence provisions of subsections (d) and (e) apply if all the conditions of subdivisions (1) through (7) below are met. The prima facie evidence provisions of subsection (e) apply if only conditions (5) through (7) are met. The conditions are:

(1) The check or draft is delivered to a check taker.

(2) The name and mailing address of the check passer are written or printed on the check or draft.

(3) The check taker identifies the check passer at the time of accepting the check by means of a North Carolina driver's license, a special identification card issued pursuant to G.S. 20-37.7, or other reliable serially

numbered identification card containing a photograph and mailing address of the person in question.

(4) The license or identification card number of the check passer appears on the check or draft.

(5) After dishonor of the check or draft by the bank or depository, the acceptor sends the check passer a letter by certified mail, to the address recorded on the check, identifying the check or draft, setting forth the circumstances of dishonor, and requesting rectification of any bank error or other error in connection with the transaction within 10 days.

(6) The acceptor files the affidavit described in subdivision (7) with a judicial official, as defined in G.S. 15A-101(5), before issuance of the first process or pleading in the prosecution under G.S. 14-107. The affidavit must be kept in the case file (attached to the criminal pleading in the case).

(7) The affidavit of the acceptor, sworn to before a person authorized to administer oaths, must:

a. State the facts surrounding acceptance of the check or draft. If the conditions set forth in subdivisions (1) through (5) have been met, the specific facts demonstrating observance of those conditions must be stated.

b. Indicate that at least 15 days have elapsed since the mailing of the letter required under subdivision (5) and that the check passer has failed to rectify any error that may have occurred with respect to the dishonored check or draft.

c. Have attached a copy of the letter sent to the check passer pursuant to subdivision (5).

d. Have attached the receipt, or a copy of it, from the United States Postal Service certifying the mailing of the letter described in subdivision (5).

e. Have attached the check or draft or a copy thereof, including any stamp, marking or attachment indicating the reason for dishonor.

(c) In prosecutions under G.S. 14-107, where the check or draft is delivered to the acceptor by mail, or delivered other than in person, the prima facie evidence rule in subsections (d) and (e) shall apply if all the conditions below are met. The prima facie evidence rule in subsection (e) shall apply if conditions (5) through (7) below are met. The conditions are:

(1) The check or draft is delivered to the acceptor by United States mail, or by some person or instrumentality other than a check passer.

(2) The name and mailing address of the check passer are recorded on the check or draft.

(3) The acceptor has previously identified the check passer, at the time of opening the account, establishing the course of dealing, or initiating the lease or contract, by means of a North Carolina driver's license, a special identification card issued pursuant to G.S. 20-37.7, or other reliable serially numbered identification card containing a photograph and mailing address of the person in question, and obtained the signature of the person or persons who will be making payments on the account, course of dealing, lease or contract, and such signature is retained in the account file.

(4) The acceptor compares the name, address, and signature on the check with the name, address, and signature on file in the account, course of dealing, lease, or contract, and notes that the information contained on the check corresponds with the information contained in the file, and the signature on the check appears genuine when compared to the signature in the file.

(5) After dishonor of the check or draft by the bank or depository, the acceptor sends the check passer a letter by certified mail to the address recorded on the check or draft identifying the check or draft, setting forth the circumstances of dishonor and requesting rectification of any bank error or other error in connection with the transaction within 10 days.

(6) The acceptor files the affidavits described in subdivision (7) of this subsection with a judicial official, as defined in G.S. 15A-101(5), before issuance of the first process or pleading in the prosecution under G.S. 14-107. The affidavit must be kept in the case file (attached to the criminal pleading in the case).

(7) The affidavit of the acceptor, sworn to before a person authorized to administer oaths, must:

a. State the facts surrounding acceptance of the check or draft. If the conditions set forth in subdivisions (1) through (5) have been met, the specific facts demonstrating observance of those conditions must be stated.

b. Indicate that at least 15 days have elapsed since the mailing of the letter required under subdivision (5) and that the check passer has failed to rectify any error that may have occurred with respect to the dishonored check or draft.

c. Have attached a copy of the letter sent to the check passer pursuant to subdivision (5).

d. Have attached the receipt, or a copy of it, from the United States Postal Service certifying the mailing of the letter described in subdivision (5).

e. Have attached the check or draft or a copy thereof, including any stamp, marking or attachment indicating the reason for dishonor.

(d) If the conditions of subsection (b) or (c) have been met, proof of meeting them is prima facie evidence that the person charged was in fact the identified check passer.

(e) If the bank or depository dishonoring a check or draft has returned it in the regular course of business stamped or marked or with an attachment indicating the reason for dishonor ("insufficient funds," "no account," "account closed" or words of like meaning), the check or draft and any attachment may be introduced in evidence and constitute prima facie evidence of the facts of dishonor if the conditions of subdivisions (5) through (7) of subsection (b) or subdivisions (5) through (7) of subsection (c) have been met. The fact that the check or draft was returned dishonored may be received as evidence that the check passer had no credit with the bank or depository for payment of the check or draft. (1979, c. 615, s. 1.)

OPINIONS OF ATTORNEY GENERAL

This section does not provide the exclusive method of proving a violation of § 14-107. See opinion of Attorney General to Ed McClearen, Assistant District Attorney, 10th Judicial District, 49 N.C.A.G. 168 (1980).

§ 14-108. Obtaining property or services from slot machines, etc., by false coins or tokens.

Any person who shall operate, or cause to be operated, or who shall attempt to operate, or attempt to cause to be operated any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or

enjoyment of property or service, by means of a slug or any false, counterfeited, mutilated, sweated or foreign coin, or by any means, method, trick or device whatsoever not lawfully authorized by the owner, lessee or licensee, of such machine, coin-box telephone or receptable, or who shall take, obtain or receive from or in connection with any automatic vending machine, slot machine, coin-box telephone or other receptacle designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, any goods, wares, merchandise, gas, electric current, article of value, or the use or enjoyment of any telephone or telegraph facilities or service, or of any musical instrument, phonograph or other property, without depositing in and surrendering to such machine, coin-box telephone or receptacle lawful coin of the United States of America to the amount required therefor by the owner, lessee or licensee of such machine, coin-box telephone or receptacle, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 68, s. 1; 1969, c. 1224, s. 3.)

§ 14-109. Manufacture, sale, or gift of devices for cheating slot machines, etc.

Any person who, with intent to cheat or defraud the owner, lessee, licensee or other person entitled to the contents of any automatic vending machine, slot machine, coin-box telephone or other receptacle, depository or contrivance designed to receive lawful coin of the United States of America in connection with the sale, use or enjoyment of property or service, or who, knowing that the same is intended for unlawful use, shall manufacture for sale, or sell or give away any slug, device or substance whatsoever intended or calculated to be placed or deposited in any such automatic vending machine, slot machine, coin-box telephone or other such receptacle, depository or contrivance, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 68, s. 2; 1969, c. 1224, s. 3.)

§ 14-110. Defrauding innkeeper.

No person shall, with intent to defraud, obtain food, lodging, or other accommodations at a hotel, inn, boardinghouse or eating house. Whoever violates this section shall be guilty of a misdemeanor, punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Obtaining such lodging, food, or other accommodation by false pretense, or by false or fictitious show of pretense of baggage or other property, or absconding without paying or offering to pay therefor, or surreptitiously removing or attempting to remove such baggage, shall be prima facie evidence of such fraudulent intent, but this section shall not apply where there has been an agreement in writing for delay in such payment. (1907, c. 816; C. S., s. 4284; 1969, c. 947; c. 1224, s. 3.)

Local Modification. — Buncombe, Franklin, Jackson: 1933, c. 531; Lee: 1937, c. 168; Martin: 1931, c. 9; Pitt: 1929, c. 103; Rockingham: 1939, c. 53; Wake, Watauga: 1931, c. 9.

CASE NOTES

Constitutionality. — The misdemeanor prescribed by this section expressly applies, when the contract has been made with a fraudulent intent, and this intent also exists in surreptitiously absconding and removing baggage without having paid the bill, and this statute is not inhibited by N.C. Const., Art. I, § 16 (now Art. I, § 28) as to imprisonment for the mere nonpayment of a debt, either in a civil action or by indictment. State v. Barbee, 187 N.C. 703, 122 S.E. 753 (1924).

Boardinghouse Defined. — One who has not been licensed to keep a boardinghouse, and who does not hold his place out as such, but who has received a boarder in his home, for pay, is not the keeper of a boardinghouse. State v. McRae, 170 N.C. 712, 86 S.E. 1039 (1915).

Prosecution of Guest for Refusing to Pay without Deduction for Unwarranted Charges. — Evidence tending to show that the general manager of a motel in complete charge of its operations had a car towed from its premises under the mistaken belief that the owner of the car was not a guest, and that when the guest refused to pay his bill without deducting the unwarranted towing charges, instituted a prosecution of the guest under this section, is held sufficient to be submitted to the jury on the issue of respondeat superior in an action against the motel for malicious prosecution, the acts of the manager having been performed in furtherance of the motel's business. Ross v. Dellinger, 262 N.C. 589, 138 S.E.2d 226 (1964).

Evidence Sufficient to Convict. — Where there is evidence that one having received accommodation at a hotel left with his baggage without notice to the proprietor, and without having paid his bill, it is sufficient to convict under this section, the question of intent being for the jury. State v. Hill, 166 N.C. 298, 81 S.E. 408 (1914).

Evidence Insufficient for Conviction. — In order to convict under the provisions of this section, it is necessary for the State to show the fraudulent intent of the one who has failed or refused to pay for his lodging or food at an inn, boardinghouse, etc., or the like intent as to his surreptitiously leaving with his baggage without having paid his bill; and evidence tending only to show his inability to pay, under the circumstances, but his arrangement with the keeper of the inn or boardinghouse to pay in a certain way and within a fixed period after leaving, and his payment in part, and that his wife, remaining longer than he, thereafter took away his baggage without his knowledge or participation therein, and in the separation following he received no benefit therefrom, is insufficient for a conviction of the statutory offense. State v. Barbee, 187 N.C. 703, 122 S.E. 753 (1924).

§ 14-111. Fraudulently obtaining credit at hospitals and sanatoriums.

Any person who obtains accommodation at any public or private hospital or sanatorium without paying therefor, with intent to defraud the said hospital or sanatorium, or who obtains credit at such hospital or sanatorium by the use of any false pretense, or who, after obtaining credit or accommodation at a hospital or sanatorium, absconds and surreptitiously removes his baggage therefrom without paying for the accommodation or credit, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1931, c. 214; 1969, c. 1224, s. 3.)

§ 14-111.1. Obtaining ambulance services without intending to pay therefor — Buncombe, Haywood and Madison Counties.

Any person who with the intent to defraud shall obtain ambulance services for himself or other persons without intending at the time of obtaining such services to pay a reasonable charge therefor, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. If a person or persons obtaining such services willfully fails to pay for the services within a period of 90 days after request for payment, such failure shall raise a presumption that the

services were obtained with the intention to defraud, and with the intention not to pay therefor.

This section shall apply only to the Counties of Buncombe, Haywood and Madison. (1965, c. 976, s. 1; 1969, c. 1224, s. 4.)

§ 14-111.2. Obtaining ambulance services without intending to pay therefor — certain named counties.

Any person who with intent to defraud shall obtain ambulance services without intending at the time of obtaining such services to pay, if financially able, any reasonable charges therefor shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. A determination by the court that the recipient of such services has willfully failed to pay for the services rendered for a period of 90 days after request for payment, and that the recipient is financially able to do so, shall raise a presumption that the recipient at the time of obtaining the services intended to defraud the provider of the services and did not intend to pay for the services.

The section shall apply to Anson, Ashe, Beaufort, Caldwell, Caswell, Catawba, Chatham, Cleveland, Cumberland, Davie, Duplin, Forsyth, Gaston, Guilford, Haywood, Henderson, Hyde, Iredell, Mecklenburg, Montgomery, Orange, Pasquotank, Person, Randolph, Rockingham, Scotland, Stanly, Surry, Transylvania, Union, Vance, Wilkes and Yadkin Counties only. (1967, c. 964; 1969, cc. 292, 753, 1224, s. 4; 1971, cc. 125, 203, 300, 496; 1973, c. 880, s. 2; 1977, cc. 63, 144.)

§ 14-111.3. Making false ambulance request in Ashe, Buncombe, Duplin, Haywood and Madison Counties.

It shall be unlawful for any person or persons to willfully obtain or attempt to obtain ambulance service that is not needed, or to make a false request or report that an ambulance is needed. Every person convicted of violating this section shall upon conviction be punished by a fine of fifty dollars ($50.00) or imprisonment not to exceed 30 days or both such fine and imprisonment.

This section shall apply only to the Counties of Ashe, Buncombe, Duplin, Haywood and Madison. (1965, c. 976, s. 2; 1971, c. 496; 1977, c. 96.)

§ 14-112. Obtaining merchandise on approval.

If any person, with intent to cheat and defraud, shall solicit and obtain from any merchant any article of merchandise on approval, and shall thereafter, upon demand, refuse or fail to return the same to such merchant in an unused and undamaged condition, or to pay for the same, such person so offending shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Evidence that a person has solicited a merchant to deliver to him any article of merchandise for examination or approval and has obtained the same upon such solicitation, and thereafter, upon demand, has refused or failed to return the same to such merchant in an unused and undamaged condition, or to pay for the same, shall constitute prima facie evidence of the intent of such person to cheat and defraud, within the meaning of this section: Provided, this section shall not apply to merchandise sold upon a written contract which is signed by the purchaser. (1911, c. 185; C. S., s. 4285; 1941, c. 242; 1969, c. 1224, s. 2.)

§ 14-112.1: Repealed by Session Laws 1967, c. 1088, s. 2.

§ 14-113. Obtaining money by false representation of physical defect.

It shall be unlawful for any person to falsely represent himself or herself in any manner whatsoever as blind, deaf, dumb, or crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or of making sales of any character of personal property. Any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective, and securing aid or assistance on account of such representation, shall be deemed guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1919, c. 104; C. S., s. 4286; 1969, c. 1224, s. 1.)

Cross References. — As to defrauding the North Carolina governmental employees' retirement system for counties, cities, and towns, see § 128-32.

ARTICLE 19A.

Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means.

§ 14-113.1. Use of false or counterfeit credit device; unauthorized use of another's credit device; use after notice of revocation.

It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goods, property or service, by the use of any false, fictitious, or counterfeit telephone number, credit number or other credit device, or by the use of any telephone number, credit number or other credit device of another without the authority of the person to whom such number or device was issued, or by the use of any telephone number, credit number or other credit device in any case where such number or device has been revoked and notice of revocation has been given to the person to whom issued or he has knowledge or reason to believe that such revocation has occurred. (1961, c. 223, s. 1; 1965, c. 1147; 1967, c. 1244, s. 1; 1971, c. 1213, s. 1.)

CASE NOTES

Applied in State v. Franks, 20 N.C. App. 160, 200 S.E.2d 828 (1973).

§ 14-113.2. Notice defined; prima facie evidence of receipt of notice.

The word "notice" as used in G.S. 14-113.1 shall be construed to include either notice given in person or notice given in writing to the person to whom the number or device was issued. The sending of a notice in writing by registered or certified mail in the United States mail, duly stamped and addressed to such person at his last address known to the issuer, shall be prima facie

evidence that such notice was duly received after five days from the date of the deposit in the mail. (1961, c. 223, s. 3; 1965, c. 1147; 1967, c. 1244, s. 1.)

§ 14-113.3. Use of credit device as prima facie evidence of knowledge.

The presentation or use of a revoked, false, fictitious or counterfeit telephone number, credit number, or other credit device for the purpose of obtaining credit or the privilege of making a deferred payment for the article or service purchased shall be prima facie evidence of knowledge that the said credit device is revoked, false, fictitious or counterfeit; and the unauthorized use of any telephone number, credit number or other credit device of another shall be prima facie evidence of knowledge that such use was without the authority of the person to whom such number or device was issued. (1961, c. 223, s. 4; 1965, c. 1147; 1967, c. 1244, s. 1.)

§ 14-113.4. Avoiding or attempting to avoid payment for telecommunication services.

It shall be unlawful for any person to avoid or attempt to avoid, or to cause another to avoid, the lawful charges, in whole or in part, for any telephone or telegraph service or for the transmission of a message, signal or other communication by telephone or telegraph, or over telephone or telegraph facilities by the use of any fraudulent scheme, device, means or method. (1961, c. 223, s. 2; 1965, c. 1147.)

§ 14-113.5. Making, possessing or transferring device for theft of telecommunication service; publication of information regarding schemes, devices, means, or methods for such theft; concealment of existence, origin or destination of any telecommunication.

It shall be unlawful for any person knowingly to:

(1) Make or possess any instrument, apparatus, equipment, or device designed, adapted, or which is used

a. For commission of a theft of telecommunication service in violation of this Article, or

b. To conceal, or assist another to conceal, from any supplier of telecommunication service or from any lawful authority the existence or place of origin or of destination of any telecommunication, or

(2) Sell, give, transport, or otherwise transfer to another or offer or advertise for sale, any instrument, apparatus, equipment, or device described in (1) above, or plans or instructions for making or assembling the same under circumstances evincing an intent to use or employ such apparatus, equipment, or device, or to allow the same to be used or employed, for a purpose described in (1)a or (1)b above, or knowing or having reason to believe that the same is intended to be so used, or that the aforesaid plans or instructions are intended to be used for making or assembling such apparatus, equipment or device.

(3) Publish plans or instructions for making or assembling or using any apparatus, equipment or device described in (1) above, or

(4) Publish the number or code of an existing, cancelled, revoked or nonexistent telephone number, credit number or other credit device, or method of numbering or coding which is employed in the issuance of telephone numbers, credit numbers or other credit devices with knowledge or reason to believe that it may be used to avoid the payment of any lawful telephone or telegraph toll charge under circumstances evincing an intent to have such telephone number, credit number, credit device or method of numbering or coding so used. As used in this section, "publish" means the communication or dissemination of information to any one or more persons, either orally, in person or by telephone, radio or television, or in a writing of any kind, including without limitation a letter or memorandum, circular or handbill, newspaper or magazine article, or book.

(5) Any instrument, apparatus, device, plans or instructions or publications described in this section may be seized under warrant or incident to a lawful arrest for a violation of this section, and, upon the conviction of a person for a violation of this section, such instrument, apparatus, device, plans, instructions or publication may be destroyed as contraband by the sheriff of the county in which such person was convicted or turned over to the person providing telephone or telegraph service in the territory in which the same was seized. (1965, c. 1147; 1971, c. 1213, s. 2.)

§ 14-113.6. Violation made misdemeanor.

Any person violating any of the provisions of this Article shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1961, c. 223, s. 5; 1965, c. 1147; 1969, c. 1224, s. 6.)

§ 14-113.6A. Venue of offenses.

(a) Any of the offenses described in Article 19A which involve the placement of telephone calls may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

(b) An offense under G.S. 14-113.5(3) or 14-113.5(4) may be deemed to have been committed at either the place at which the publication was initiated or at which the publication was received or at which the information so published was utilized to avoid or attempt to avoid the payment of any lawful telephone or telegraph toll charge. (1971, c. 1213, s. 3.)

§ 14-113.7. Article not construed as repealing § 14-100.

This Article shall not be construed as repealing G.S. 14-100. (1961, c. 223, s. 6; 1065, c. 1147.)

§ 14-113.7A. Application of Article to credit cards.

This Article shall not be construed as being applicable to any credit card as the term is defined in G.S. 14-113.8. (1967, c. 1244, s. 1.)

ARTICLE 19B.

Financial Transaction Card Crime Act.

§ 14-113.8. Definitions.

The following words and phrases as used in this Chapter, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) Automated Banking Device. — "Automated banking device" means any machine which when properly activated by a financial transaction card and/or personal identification code may be used for any of the purposes for which a financial transaction card may be used.

(2) Cardholder. — "Cardholder" means the person or organization named on the face of a financial transaction card to whom or for whose benefit the financial transaction card is issued by an issuer.

(3) Expired Financial Transaction Card. — "Expired financial transaction card" means a financial transaction card which is no longer valid because the term shown on it has elapsed.

(4) Financial Transaction Card. — "Financial transaction card" or "FTC" means any instrument or device whether known as a credit card, credit plate, bank services card, banking card, check guarantee card, debit card, or by any other name, issued with or without fee by an issuer for the use of the cardholder:

a. In obtaining money, goods, services, or anything else of value on credit; or

b. In certifying or guaranteeing to a person or business the availability to the cardholder of funds on deposit that are equal to or greater than the amount necessary to honor a draft or check payable to the order of such person or business; or

c. In providing the cardholder access to a demand deposit account or time deposit account for the purpose of:

1. Making deposits of money or checks therein; or
2. Withdrawing funds in the form of money, money orders, or traveler's checks therefrom; or
3. Transferring funds from any demand deposit account or time deposit account to any other demand deposit account or time deposit account; or
4. Transferring funds from any demand deposit account or time deposit account to any credit card accounts, overdraft privilege accounts, loan accounts, or any other credit accounts in full or partial satisfaction of any outstanding balance owed existing therein; or
5. For the purchase of goods, services or anything else of value; or
6. Obtaining information pertaining to any demand deposit account or time deposit account;

d. But shall not include a telephone number, credit number, or other credit device which is covered by the provisions of Article 19A of this Chapter.

(5) Issuer. — "Issuer" means the business organization or financial institution or its duly authorized agent which issues a financial transaction card.

(6) Personal Identification Code. — "Personal identification code" means a numeric and/or alphabetical code assigned to the cardholder of a financial transaction card by the issuer to permit authorized electronic use of that FTC.

(7) Presenting. — "Presenting" means, as used herein, those actions taken by a cardholder or any person to introduce a financial transaction card into an automated banking device, including utilization of a personal identification code, or merely displaying or showing a financial transaction card to the issuer, or to any person or organization providing money, goods, services, or anything else of value, or any other entity with intent to defraud.

(8) Receives. — "Receives" or "receiving" means acquiring possession or control or accepting a financial transaction card as security for a loan.

(9) Revoked Financial Transaction Card. — "Revoked financial transaction card" means a financial transaction card which is no longer valid because permission to use it has been suspended or terminated by the issuer. (1967, c. 1244, s. 2; 1971, c. 1213, s. 4; 1979, c. 741, s. 1.)

Legal Periodicals. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

CASE NOTES

Cited in State v. Trollinger, 11 N.C. App. 400, 181 S.E.2d 212 (1971).

§ 14-113.9. Financial transaction card theft.

(a) A person is guilty of financial transaction card theft when:

(1) He takes, obtains or withholds a financial transaction card from the person, possession, custody or control of another without the cardholder's consent and with the intent to use it; or who, with knowledge that it has been so taken, obtained or withheld, receives the financial transaction card with intent to use it or to sell it, or to transfer it to a person other than the issuer or the cardholder; or

(2) He receives a financial transaction card that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use it or to sell it or to transfer it to a person other than the issuer or the cardholder; or

(3) He, not being the issuer, sells a financial transaction card or buys a financial transaction card from a person other than the issuer; or

(4) He, not being the issuer, during any 12-month period, receives financial transaction cards issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of G.S. 14-113.13(a)(3) and subdivision (3) of subsection (a) of this section.

(b) Credit card theft is punishable as provided by G.S. 14-113.17(b). (1967, c. 1244, s. 2; 1979, c. 741, s. 1; c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The second 1979 amendment, effective July 1, 1981, rewrote subsection (b) to read as set out above. Subsection (b) as amended by the first 1979 amendment read as follows:

"(b) Taking, obtaining or withholding a financial transaction card without consent is included in conduct defined in G.S. 14-75 as larceny.

"Conviction of financial transaction card theft is punishable as provided in G.S. 14-113.17(b)."

The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

CASE NOTES

Sufficiency of Description of Credit Card. — No defect appears on the face of an indictment for violation of this section where the credit card allegedly withheld is sufficiently described to inform the accused with certainty as to the crime he allegedly committed. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

The date upon which an allegedly stolen credit card was issued is not necessary to describe the card, is not an essential element of the offense charged, and therefore is not a material fact which the State must allege and prove. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 14-113.10. Prima facie evidence of theft.

When a person has in his possession or under his control financial transaction cards issued in the names of two or more other persons other than members of his immediate family, such possession shall be prima facie evidence that such financial transaction cards have been obtained in violation of G.S. 14-113.9(a). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

CASE NOTES

Evidence of Possession of Other Credit Cards. — The admission of evidence, over objection, that defendant had three other credit cards in his possession which had been issued in the names of persons other than defendant or members of his immediate family was competent (1) to make out a prima facie case as provided in this section that defendant had obtained all credit cards in his possession in violation of § 14-113.9(a); (2) to establish a common plan or scheme to commit credit-card crimes so related to each other that proof of one or more tends to prove the crime charged and to connect defendant with its commission; and (3) to show criminal intent and guilty knowledge. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

Necessity for Instruction. — In light of the provisions of this section, it is the duty of the court to instruct the jury regarding the legal significance of the State's evidence tending to show that defendant had in his possession or under his control credit cards issued in the name of two or more persons other than defendant and members of his immediate family. State v. Springer, 283 N.C. 627, 197 S.E.2d 530 (1973).

§ 14-113.11. Forgery of financial transaction card.

(a) A person is guilty of financial transaction card forgery when:

(1) With intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely makes or falsely embosses a purported financial transaction card or utters such a financial transaction card; or

(2) With intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely encodes, duplicates or alters existing encoded information on a financial transaction card or utters such a financial transaction card; or

(3) He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, signs a financial transaction card.

(b) A person falsely makes a financial transaction card when he makes or draws, in whole or in part, a device or instrument which purports to be the financial transaction card of a named issuer but which is not such a financial transaction card because the issuer did not authorize the making or drawing, or alters a financial transaction card which was validly issued.

(c) A person falsely embosses a financial transaction card when, without authorization of the named issuer, he completes a financial transaction card by adding any of the matter, other than the signature of the cardholder, which an issuer requires to appear on the financial transaction card before it can be used by a cardholder.

(d) A person falsely encodes a financial transaction card when, without authorization of the purported issuer, he records magnetically, electronically, electro-magnetically or by any other means whatsoever, information on a financial transaction card which will permit acceptance of that card by any automated banking device. Conviction of financial transaction card forgery shall be punishable as provided in G.S. 14-113.17(b). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

Legal Periodicals. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

CASE NOTES

Applied in State v. Hudson, 11 N.C. App. 712, 182 S.E.2d 198 (1971).

§ 14-113.12. Prima facie evidence of forgery.

(a) When a person, other than the purported issuer, possesses two or more financial transaction cards which are falsely made or falsely embossed, such possession shall be prima facie evidence that said cards were obtained in violation of G.S. 14-113.11(a)(1) or 14-113.11(a)(2).

(b) When a person, other than the cardholder or a person authorized by him possesses two or more financial transaction cards which are signed, such possession shall be prima facie evidence that said cards were obtained in violation of G.S. 14-113.11(a)(3). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

§ 14-113.13. Financial transaction card fraud.

(a) A person is guilty of financial transaction card fraud when, with intent to defraud the issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he

(1) Uses for the purpose of obtaining money, goods, services or anything else of value a financial transaction card obtained or retained, or which was received with knowledge that it was obtained or retained, in violation of G.S. 14-113.9 or 14-113.11 or a financial transaction card which he knows is forged, altered, expired, revoked or was obtained as a result of a fraudulent application in violation of G.S. 14-113.13(c); or

(2) Obtains money, goods, services, or anything else of value by:

a. Representing without the consent of the cardholder that he is the holder of a specified card; or
b. Presenting the financial transaction card without the authorization or permission of the cardholder; or
c. Representing that he is the holder of a card and such card has not in fact been issued; or
d. Using a financial transaction card to knowingly and willfully exceed:
1. The actual balance of a demand deposit account or time deposit account; or
2. An authorized credit line in an amount which exceeds such authorized credit line in the amount of five hundred dollars ($500.00), or fifty percent (50%) of such authorized credit line, whichever is greater; or

(3) Obtains control over a financial transaction card as security for debt; or

(4) Deposits into his account or any account, by means of an automated banking device, a false, fictitious, forged, altered or counterfeit check, draft, money order, or any other such document not his lawful or legal property; or

(5) Receives money, goods, services or anything else of value as a result of a false, fictitious, forged, altered, or counterfeit check, draft, money order or any other such document having been deposited into an account via an automated banking device, knowing at the time of receipt of the money, goods, services, or item of value that the document so deposited was false, fictitious, forged, altered or counterfeit or that the above deposited item was not his lawful or legal property.

(b) A person who is authorized by an issuer to furnish money, goods, services or anything else of value upon presentation of a financial transaction card by the cardholder, or any agent or employee of such person is guilty of a financial transaction card fraud when, with intent to defraud the issuer or the cardholder, he

(1) Furnishes money, goods, services or anything else of value upon presentation of a financial transaction card obtained or retained in violation of G.S. 14-113.9, or a financial transaction card which he knows is forged, expired or revoked; or

(2) Fails to furnish money, goods, services or anything else of value which he represents in writing to the issuer that he has furnished.

Conviction of financial transaction card fraud as provided in subsection (a) or (b) of this section is punishable as provided in G.S. 14-113.17(a) if the value of all money, goods, services and other things of value furnished in violation of this section, or if the difference between the value actually furnished and the value represented to the issuer to have been furnished in violation of this section, does not exceed five hundred dollars ($500.00) in any six-month period. Conviction of financial transaction card fraud as provided in subsection (a) or (b) of this section is punishable as provided in G.S. 14-113.17(b) if such value exceeds five hundred dollars ($500.00) in any six-month period.

(c) A person is guilty of financial transaction card fraud when, upon application for a financial transaction card to an issuer, he knowingly makes or causes to be made a false statement or report relative to his name, occupation, financial condition, assets, or liabilities; or willfully and substantially overvalues any assets, or willfully omits or substantially undervalues any indebtedness for the purpose of influencing the issuer to issue a financial transaction card.

Conviction of financial transaction card fraud as provided in this subsection is punishable as provided in G.S. 14-113.17(a).

(d) A cardholder is guilty of financial transaction card fraud when he willfully, knowingly, and with an intent to defraud the issuer, a person or

organization providing money, goods, services, or anything else of value, or any other person, submits, verbally or in writing, to the issuer or any other person, any false notice or report of the theft, loss, disappearance, or nonreceipt of his financial transaction card.

Conviction of financial transaction card fraud as provided in this subsection is punishable as provided in G.S. 14-113.17(a).

(e) In any prosecution for violation of G.S. 14-113.13, the State is not required to establish and it is no defense that some of the acts constituting the crime did not occur in this State or within one city, county, or local jurisdiction.

(f) For purposes of this section, revocation shall be construed to include either notice given in person or notice given in writing to the person to whom the financial transaction card and/or personal identification code was issued. Notice of revocation shall be immediate when notice is given in person. The sending of a notice in writing by registered or certified mail in the United States mail, duly stamped and addressed to such person at his last address known to the issuer, shall be prima facie evidence that such notice was duly received after seven days from the date of the deposit in the mail. If the address is located outside the United States, Puerto Rico, the Virgin Islands, the Canal Zone and Canada, notice shall be presumed to have been received 10 days after mailing by registered or certified mail. (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

Legal Periodicals. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

CASE NOTES

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

§ 14-113.14. Criminal possession of financial transaction card forgery devices.

(a) A person is guilty of criminal possession of financial transaction card forgery devices when:

(1) He is a person other than the cardholder and possesses two or more incomplete financial transaction cards, with intent to complete them without the consent of the issuer; or

(2) He possesses, with knowledge of its character, machinery, plates, or any other contrivance designed to reproduce instruments purporting to be financial transaction cards of an issuer who has not consented to the preparation of such financial transaction cards.

(b) A financial transaction card is incomplete if part of the matter other than the signature of the cardholder, which an issuer requires to appear on the financial transaction card before it can be used by a cardholder, has not yet been stamped, embossed, imprinted, encoded or written upon it.

Conviction of criminal possession of financial transaction card forgery devices is punishable as provided in G.S. 14-113.17(b). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

§ 14-113.15. Criminal receipt of goods and services fraudulently obtained.

A person is guilty of criminally receiving goods and services fraudulently obtained when he receives money, goods, services or anything else of value obtained in violation of G.S. 14-113.13(a) with the knowledge or belief that the same were obtained in violation of G.S. 14-113.13(a). Conviction of criminal receipt of goods and services fraudulently obtained is punishable as provided in G.S. 14-113.17(a) if the value of all the money, goods, services and anything else of value, obtained in violation of this section, does not exceed five hundred dollars ($500.00) in any six-month period; conviction of criminal receipt of goods and services fraudulently obtained is punishable as provided in G.S. 14-113.17(b) if such value exceeds five hundred dollars ($500.00) in any six-month period. (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

Legal Periodicals. — For an article on the civil aspects of credit card law, see 2 N.C. Cent. L.J. 43 (1970).

§ 14-113.16. Presumption of criminal receipt of goods and services fraudulently obtained.

A person who obtains at a discount price a ticket issued by an airline, railroad, steamship or other transportation company from other than an authorized agent of such company which was acquired in violation of G.S. 14-113.13(a) without reasonable inquiry to ascertain that the person from whom it was obtained had a legal right to possess it shall be presumed to know that such ticket was acquired under circumstances constituting a violation of G.S. 14-113.13(a). (1967, c. 1244, s. 2; 1979, c. 741, s. 1.)

§ 14-113.17. Punishment and penalties.

(a) A person who is subject to the punishment and penalties of this subsection [Article] shall be fined not more than one thousand dollars ($1,000) or imprisoned not more than one year, or both.

(b) A crime punishable under this subsection [Article] is punishable as a Class J felony. (1967, c. 1244, s. 2; 1979, c. 741, s. 1; c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The second 1979 amendment, effective July 1, 1981, substituted "punishable as a Class J felony" for "a felony and shall be punishable by a fine of not more than three thousand dollars ($3,000) or imprisonment for not more than three years, or both" at the end of subsection (b). The second 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Applied in State v. Caudle, 276 N.C. 550, 173 S.E.2d 778 (1970).

ARTICLE 20.

Frauds.

§ 14-114. Fraudulent disposal of personal property on which there is a security interest.

If any person, after executing a security agreement on personal property for a lawful purpose, shall make any disposition of any property embraced in such security agreement, with intent to hinder, delay or defeat the rights of the secured party, every person so offending and every person with a knowledge of the security interest buying any property embraced in which security agreement, and every person assisting, aiding or abetting the unlawful disposition of such property, with intent to hinder, delay or defeat the rights of any secured party in such security agreement, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. In all indictments for violations of the provisions of this section it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made, but proof of the possession of the property embraced in such security agreement by the grantor thereof, after the execution of said security agreement, and while it is in force, the further proof of the fact that the sheriff or other officer charged with the execution of process cannot after due diligence find such property under process directed to him for its seizure, for the satisfaction of such security agreement, or that the secured party demanded the possession thereof of the grantor for the purpose of sale to foreclose said security agreement, after the right to such foreclosure had accrued, and that the grantor failed to produce, deliver or surrender the same to the secured party for that purpose, shall be prima facie proof of the fact of the disposition or sale of such property, by the grantor, with the intent to hinder, delay or defeat the rights of the secured party. (1873-4, c. 31; 1874-5, c. 215; 1883, c. 61; Code, s. 1089; 1887, c. 14; Rev., s. 3435; C.S., s. 4287; 1969, c. 984, s. 2; c. 1224, s. 4.)

Cross References. — As to fraudulent conveyances, see § 39-15 et seq.

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under this section as it stood prior to the 1969 amendments when it referred to chattel mortgages, deeds of trust or other liens rather than to security agreements.

Three Classes of Offenders. — The statute is directed against three classes of offenders: (1) The maker of the lien who shall dispose of the property with the unlawful intent; (2) those who buy with a knowledge of the lien, and (3) those who aid or abet either the maker or purchaser in the unlawful acts. State v. Woods, 104 N.C. 898, 10 S.E. 555 (1889).

Intent Necessary. — Under this section the forbidden act must, in order to be indictable, be accomplished with a specific intent, and the courts cannot disregard this clearly expressed purpose of the legislature. State v. Manning, 107 N.C. 910, 12 S.E. 248 (1890). The actual sale of mortgaged crops raises a presumption of fraudulent intent. State v. Holmes, 120 N.C. 573, 26 S.E. 692 (1897). In a trial under this section the burden is upon the defendant to disprove the criminal intent. State v. Surles, 117 N.C. 720, 23 S.E. 324 (1895); State v. Holmes, 120 N.C. 573, 26 S.E. 692 (1897).

Result of Sale Must Injure. — If the prop-

erty included in the mortgage (other than that disposed of), was abundantly sufficient and available to pay the indebtedness, there could be no such prejudical result as is contemplated by the statute. State v. Manning, 107 N.C. 910, 12 S.E. 248 (1890).

Infant's Liability. — An indictment under this section for disposing of crops under mortgage could not be sustained, where it appeared that the defendant was an infant. The alleged disposition was a disaffirmance of the contract and rendered it void. State v. Howard, 88 N.C. 651 (1883).

Indictment Must Charge Maker, Buyer or Assistant. — If the indictment does not charge the defendant as the maker of the lien nor the buyer of the property with knowledge of it, nor as assisting, aiding or abetting in the unlawful disposition of the property no offense is charged. State v. Woods, 104 N.C. 898, 10 S.E. 555 (1889).

Indictment Must Charge Lien and Manner of Sale. — An indictment for disposing of mortgaged property is fatally defective, if it fails to set forth that the lien was in force at the time of sale, the party to whom sold, and the manner of disposition. State v. Pickens, 79 N.C. 652 (1878); State v. Burns, 80 N.C. 376 (1879).

Indictment Must Identify Transaction and Point to Offense Charged. — In a prosecution under this section, the bill of indictment must allege the facts and circumstances so as to identify the transaction and point with reasonable certainty to the offense charged. State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958).

Indictment in Two Counts. — Where an indictment for disposing of mortgaged property contained two counts, one alleging a disposal with intent to defraud G., "business manager" of an association, and the other a disposal with intent to defraud G., "business manager and agent" of such association, the counts are not repugnant to each other, since they relate to one transaction, varied only to meet the probable proof, and the court will neither quash the bill nor force the State to elect on which count it will proceed. State v. Surles, 117 N.C. 720, 23 S.E. 324 (1895).

Prior Lien as Defense. — It is competent for the defendant, in an indictment for unlawfully disposing of mortgaged property — a crop of tobacco — to show that he, in good faith, applied the entire crop to the discharge of his landlord's lien. State v. Ellington, 98 N.C. 749, 4 S.E. 534 (1887).

Evidence of Other Sales Inadmissable. — On a trial of one charged with unlawfully disposing of an article of personal property covered by a chattel mortgage, with intent to defeat the right of the mortgagee, evidence that, five months after the offense was committed, the defendant offered to dispose of another article covered by the same mortgage is inadmissible to prove the intent with which the offense was committed. State v. Jeffries, 117 N.C. 727, 23 S.E. 163 (1895).

Applied in State v. Dunn, 264 N.C. 391, 141 S.E.2d 630 (1965).

Cited in State v. Torrence, 127 N.C. 550, 37 S.E. 268 (1900); State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905).

§ 14-115. Secreting property to hinder enforcement of lien or security interest.

Any person removing, exchanging or secreting any personal property on which a lien or security interest exists, with intent to prevent or hinder the enforcement of the lien or security interest, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1887, c. 14; Rev., s. 3436; C. S., s. 4288; 1969, c. 984, s. 3; c. 1224, s. 1.)

Local Modification. — Pitt: 1941, c. 284.

§ 14-116. Fraudulent entry of horses at fairs.

If any person shall knowingly enter or cause to be entered in competition for any purse, prize, premium, stake or sweepstake offered or given by any agricultural or other society, association or person in this State, any horse, mare, gelding, colt or filly under an assumed name or out of its proper class, he shall be punished by a fine not less than one hundred ($100.00) nor more than one thousand dollars ($1,000), or by imprisonment in the State's prison for not less than one nor more than five years, or by both fine and imprisonment, at the discretion of the court. (1893, c. 387; Rev., s. 3429; C. S., s. 4289.)

§ 14-117. Fraudulent and deceptive advertising.

It shall be unlawful for any person, firm, corporation or association, with intent to sell or in anywise to dispose of merchandise, securities, service or any other thing offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make public, disseminate, circulate or place before the public or cause directly or indirectly to be made, published, disseminated, circulated or placed before the public in this State, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service or any other thing so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading: Provided, that such advertising shall be done willfully and with intent to mislead. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. (1915, c. 218; C. S., s. 4290.)

CASE NOTES

Cited in State v. Pelley, 221 N.C. 487, 20 S.E.2d 850 (1942).

§ 14-117.1. Use of words "army" or "navy" in name of mercantile establishment.

It shall be unlawful for any person, firm, or corporation, to use the words "army" or "navy" or either, or both, in the name or as a part of the name of any mercantile establishment in this State which is not in fact operated by the United States government or a duly authorized agency thereof.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not less than twenty-five dollars ($25.00) nor more than five hundred dollars ($500.00) for the first offense, and not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000) for each subsequent such offense. (1945, c. 879.)

Local Modification. — Beaufort: 1949, c. 857.

§ 14-117.2. Gasoline price advertisements.

(a) Advertisements by any person or firm of the price of any grade of motor fuel must clearly so indicate if such price is dependent upon purchaser himself drawing or pumping the fuel.

(b) Any person or firm violating the provisions of this section shall be guilty of a separate misdemeanor, punishable by a fine of not more than fifty dollars ($50.00) or imprisonment of not more than 30 days or both such fine and imprisonment, for each day that such violation continues. (1971, c. 324, ss. 1, 2.)

§ 14-118. Blackmailing.

If any person shall knowingly send or deliver any letter or writing demanding of any other person, with menaces and without any reasonable or probable cause, any chattel, money or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing accusing or threatening to accuse any other person of any crime punishable by law with death or by imprisonment in the State's prison, with the intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of a misdemeanor. (R. C., c. 34, s. 110; Code, s. 989; Rev., s. 3428; C. S., s. 4291.)

CASE NOTES

Indictment Sufficient. — Where the offense charged was the sending of a letter, under this section, and the letter was set out in the indictment, from which it is deducible by necessary implication that the defendant threatened to indict the prosecutor for an offense punishable by imprisonment in the penitentiary, with a view and intent to extort money a criminal offense is sufficiently charged. State v. Harper, 94 N.C. 936 (1886).

Circumstantial Evidence Sufficient to Sustain Conviction. — Letters demanding a sum of money from the prosecutor, the first requiring that he drop the amount along the road at a certain place at a designated time and at a certain signal, followed by the burning of the prosecutor's barn on his failing to comply; and the second one referring to this fact and making the same demand, and the apprehension of the defendant at the place at the time appointed, as he appeared after the signals were given, though circumstantial evidence, is adjudged sufficient under an indictment for blackmailing to sustain a conviction. State v. Frady, 172 N.C. 978, 90 S.E. 802 (1916).

Circumstantial evidence held to sustain conviction of blackmail. State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948).

§ 14-118.1. Simulation of court process in connection with collection of claim, demand or account.

It shall be unlawful for any person, firm, corporation, association, agent or employee in any manner to coerce, intimidate, or attempt to coerce or intimidate any person in connection with any claim, demand or account, by the issuance, utterance or delivery of any matter, printed, typed or written, which (i) simulates or resembles a summons, warrant, writ or other court process or pleading; or (ii) by its form, wording, use of the name of North Carolina or any officer, agency or subdivision thereof, use of seals or insignia, or general appearance has a tendency to create in the mind of the ordinary person the false impression that it has judicial or other official authorization, sanction or approval. Any violation of the provisions of this section shall be a misdemeanor and shall be punishable by a fine of not more than two hundred dollars ($200.00) or by imprisonment of not more than six months, or both such fine and imprisonment, in the discretion of the court. (1961, c. 1188; 1979, c. 263.)

CASE NOTES

Applied in State v. Watts, 38 N.C. App. 561, 248 S.E.2d 354 (1978).

Cited in State v. Howell, 16 N.C. App. 707, 193 S.E.2d 418 (1972).

§ 14-118.2. Assisting, etc., in obtaining academic credit by fraudulent means.

(a) It shall be unlawful for any person, firm, corporation or association to assist any student, or advertise, offer or attempt to assist any student, in obtaining or in attempting to obtain, by fraudulent means, any academic credit, or any diploma, certificate or other instrument purporting to confer any literary, scientific, professional, technical or other degree in any course of study in any university, college, academy or other educational institution. The activity prohibited by this subsection includes, but is not limited to, preparing or advertising, offering, or attempting to prepare a term paper, thesis, or dissertation for another and impersonating or advertising, offering or attempting to impersonate another in taking or attempting to take an examination.

(b) Any person, firm, corporation or association violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Provided, however, the provisions of this section shall not apply to the acts of one student in assisting another student as herein defined if the former is duly registered in an educational institution and is subject to the disciplinary authority thereof. (1963, c. 781; 1969, c. 1224, s. 7.)

Legal Periodicals. — For note on avoidance of releases in personal injury cases in North Carolina, see 5 Wake Forest Intra L. Rev. 359 (1969).

§ 14-118.3. Acquisition and use of information obtained from patients in hospitals for fraudulent purposes.

It shall be unlawful for any person, firm or corporation, or any officer, agent or other representative of any person, firm or corporation to obtain or seek to obtain from any person while a patient in any hospital information concerning any illness, injury or disease of such patient, other than information concerning the illness, injury or disease for which such patient is then hospitalized and being treated, for a fraudulent purpose, or to use any information so obtained in regard to such other illness, injury or disease for a fraudulent purpose.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1967, c. 974; 1969, c. 1224, s. 5.)

§ 14-118.4. Extortion.

Any person who threatens or communicates a threat or threats to another with the intention thereby wrongfully to obtain anything of value or any acquittance, advantage, or immunity is guilty of extortion and such person shall be punished as a Class H felon. (1973, c. 1032; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "be punished as a Class H felon" for "upon conviction be guilty of a felony" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by

Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-118.5. Theft of cable television service.

(a) It shall be unlawful for any person, firm, or corporation to intentionally defraud or to aid and abet another to defraud any person or corporation of the lawful charge, in whole or in part, for any cable television service.

(b) It shall be unlawful for any person, firm, or corporation to intentionally avoid or attempt to avoid or cause or assist another to avoid or attempt to avoid any charge for such service by rearranging, tampering with, or making connection with any facilities or equipment of a cable television company, whether physically, inductively, acoustically, or electrically.

(c) It shall be unlawful for any person, firm, or corporation to advertise or promote the sale of any instrument, apparatus, equipment, or device, or plans or instruction for making or assembling the same, which instrument, apparatus, equipment, or device is designed or adapted to fraudulently avoid the lawful charge for any cable television service in violation of subsection (a) or (b) of this section.

(d) Any person, firm, or corporation that violates the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed three hundred dollars ($300.00) or by imprisonment for not more than 60 days, or both, in the discretion of the court.

(e) Provided, however, subsections (a) and (b) of this section shall not apply to natural persons receiving cable television service pursuant to contract. (1977, 2nd Sess., c. 1185, s. 1.)

Article 21.

Forgery.

§ 14-119. Forgery of bank notes, checks and other securities.

If any person shall falsely make, forge or counterfeit, or cause or procure the same to be done, or willingly aid or assist therein, any bill or note in imitation of, or purporting to be, a bill or note of any incorporated bank in this State, or in any of the United States, or in any of the territories of the United States; or any order or check on any such bank or corporation, or on the cashier thereof; or any of the securities purporting to be issued by or on behalf of the State, or by or on behalf of any corporation, with intent to injure or defraud any person, bank or corporation, or the State, the person so offending shall be punished as a Class I felon. (1819, c. 994, s. 1, P. R.; R. C., c. 34, s. 60; Code, s. 1030; Rev., s. 3419; C. S., s. 4293; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1; as to alleging intent in the indictment, see § 15-151.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony and shall be punished by imprisonment in the State's prison or county jail for not less than four months nor more than ten years, or by a fine in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by

Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For survey of 1976 case law on criminal law, see 55 N.C.L. Rev. 976 (1977).

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided prior to the effective date (July 1, 1981) of the 1979 amendment.

Definitions. — The common-law definition of forgery obtains in this State, the statute not attempting to define it. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Forgery, at common law, denotes a false making, a making malo animo, of any written instrument for the purpose of fraud and deceit. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Forgery may generally be defined as the false making or materially altering, with intent to defraud, of any writing, which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Uttering Distinct from Forgery. — By virtue of § 14-120, uttering is an offense distinct from that of forgery which is defined in this section. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Forgery of Money Order and Forgery of Endorsement Are Separate Offenses. — To convict of the felony of forging endorsements under the second sentence of § 14-120, it was not necessary to allege or to prove forgery of the face of money orders, which would have been separate felonies under this section. State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

Elements of Offense. — To constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false; it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendancy to defraud. Barnes v. Crawford, 115 N.C. 76, 20 S.E.2d 386 (1894). While an intent to defraud is an essential element of forgery, it is not essential that any person be actually defrauded, or that any act be done other than the fraudulent making or altering of the instrument. State v. White, 101 N.C. 770, 7 S.E. 715 (1888), aff'd, 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287 (1889); State v. Hall, 108 N.C. 776, 13 S.E. 189 (1891).

The essentials to the completion of the offense of forgery are: (a) The falsification of a paper, or the making of a false paper, of legal efficacy "apparently capable of effecting a fraud;" (b) the fraudulent intent. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Three elements are necessary to constitute the offense of forgery: (1) There must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962); State v. Bauguess, 13 N.C. App. 457, 186 S.E.2d 185 (1972); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

The three essential elements necessary to constitute the crime of forgery are: (1) a false making of a check, (2) a fraudulent intent on the part of the person who knowingly participated in the false making of the check, and (3) the check was apparently capable of effecting a fraud. State v. Keller, 268 N.C. 522, 151 S.E.2d 56 (1968).

The three essential elements necessary to constitute the crime of forgery are (1) a false writing of the check; (2) an intent to defraud on the part of defendant who falsely made the said check; and (3) the check as made was apparently capable of defrauding. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

Evidence sufficient to permit a jury to find (1) a false writing of the checks described; (2) an intent to defraud on the part of defendant who falsely made the checks; and (3) an apparent capability of the checks to defraud constitutes the three essential elements necessary to constitute the crime of forgery. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

Two essential elements of forgery are the false making of an instrument and the appearance of the instrument as genuine. State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

Same — Intent to defraud is an essential element of the crime of forgery. State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971), appeal dismissed, 280 N.C. 303, 186 S.E.2d 177 (1972).

An intent to defraud is an essential element of forgery. However, it is not essential that any person be actually defrauded or that any act be done other than the fraudulent making or altering of the instrument. State v. Williams, 291 N.C. 442, 230 S.E.2d 515 (1976).

Time is not of the essence in the crimes of forgery and uttering a forged check. State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

Same — The word "falsely" as applied to the making of a check, in order to constitute forgery, implies that the check is not genuine, that in itself it is false. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975).

The fact that the drawer of a check lacks authority is one characteristic which renders an instrument false. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

Forging Signature of Another. — An instrument may be a forgery even though in itself it is not false in any particular, if there is a fraudulent intent that the signature should pass or be received as the genuine act of another person whose signing, only, could make the paper valid and effectual. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

A person without a bank account who signs his name to checks and presents them to the bank with intent that the signature should be taken as that of another of the same or similar name who has funds on deposit, and cashes the checks fraudulently and with knowledge that he was withdrawing from the bank the funds of such other person, is guilty of forgery. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Same — Real and Forged Signatures Need Not Be Identical. — An instrument is nonetheless a forgery because the signature is not identical with that of the person whose signature it is intended to simulate if they are sufficiently similar for the doctrine of idem sonans to apply, and the insertion of a middle initial not in the signature simulated is not a fatal variance. Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809, 15 A.L.R.2d 996 (1950).

Same — Presumption of Authority. — Where defendant signs the name of another person to an instrument, there is no presumption of want of authority; on the contrary, where it appears that accused signed the name of another to an instrument, it is presumed that he did so with authority. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962).

Same — State Must Show Want of Authority. — If the purported maker is a real person and actually exists, the State is required to show not only that the signature in question is not genuine, but was made by defendant without authority. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

Signing Fictitious Name. — If the name signed to a negotiable instrument, or other instrument requiring a signature is fictitious, of necessity, the name must have been affixed by one without authority, and if a person signs a fictitious name to such instrument with the purpose and intent to defraud — the instrument being sufficient in form to import legal liability — an indictable forgery is committed. State v. Phillips, 256 N.C. 445, 124 S.E.2d 146 (1962); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

Proof of Fictitious Name. — In a prosecution for forgery it was not necessary for the State to prove that the name "B. Hansely" signed by defendant to three checks was that of a fictitious person or a real person, since the evidence showed that the instrument was executed without authority, as neither "B. Hansely" nor the name of defendant appeared on the signature card of the S & M Paint Company account, upon which the checks in question were written; moreover, proof that no person bearing the name signed to a check has any right to draw on the party to whom it is directed is prima facie evidence that the name is fictitious. State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

Indictment. — Even though the offense of forgery is charged in statutory language in the bill of indictment, in order to be a valid bill of indictment, it is necessary that the statutory words be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. State v. Cross, 5 N.C. App. 217, 167 S.E.2d 868 (1969).

Where the alteration of a genuine instrument is charged, an indictment for forgery must clearly set forth the alteration alleged, with the proper allegations showing alteration of a material part of the instrument. Thus, in an indictment for forgery effected by interpolating words in a genuine instrument, as by raising the amount of a note, the added words should be quoted and their position in the instrument shown, so that it may appear how they affect its meaning. State v. Cross, 5 N.C. App. 217, 167 S.E.2d 868 (1969).

The false instrument must be such as does, or may, tend to prejudice the right of another, and such tendency must be apparent to the court, either from the face of the writing itself, or from it, accompanied by the averment of extraneous facts, that show the tendency to injure. If the forged writing itself shows such tendency, then it will be sufficient to set it forth in the indictment, alleging the false and fraudulent intent; but where such tendency does not so appear, the extraneous facts, necessary to make it apparent, must be averred. This is essential, so as to enable the court to see in the record, that the indictment charges a complete offense. State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Same — Must Allege Existence of Bank. — In an indictment under this section to punish the making, passing, etc., of counterfeit bank notes, if the note alleged to have been passed be of a bank not within the State, the indictment should aver that such a bank exists as that by which the counterfeit note purports to have been issued. State v. Twitty, 9 N.C. 248 (1822).

Evidence of Former Acts Admissible. — Upon an indictment for uttering forged money, knowing it to be forged, evidence may be received of former acts and transactions which tend to bring home the scienter to the defendant, notwithstanding such evidence may fix upon him other charges beside that on which he is tried. State v. Twitty, 9 N.C. 248 (1822).

In a prosecution for forgery and issuing a forged instrument under this section and § 14-120, evidence that defendant had theretofore forged checks other than those specified in the indictment may be competent on the question of intent. State v. Painter, 265 N.C. 277, 144 S.E.2d 6 (1965).

Identification of Defendant Admissible. — In a prosecution of defendant for uttering a forged check, the trial court properly admitted a bank teller's identification of defendant from a photographic display, since the procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification. State v. McCullough, 50 N.C. App. 184, 272 S.E.2d 613 (1980).

Evidence of Related Offenses Admissible. — In a prosecution of defendant for conspiracy to commit forgery, and conspiracy to utter forged instruments, the trial court did not err in admitting testimony by a State's witness that defendant had been involved in the commission of an offense other than the ones for which he was being tried, since the other offense was a break-in during which a check writer and checks were taken from a cabinet shop, and this was a part of the overall scheme which embraced the related offenses for which defendant was being tried and tended to connect him with those offenses; therefore, defendant himself opened the door to such testimony by inquiring further into charges pending against the State's witness. State v. Pruitt, 301 N.C. 683, 273 S.E.2d 264 (1981).

Evidence Held Sufficient. — Evidence that defendant signed the name of another in endorsing a check payable to such other person, and negotiating it, that such other person had not authorized anyone to sign his name on the check, and that such person was not owed the amount of the check, is held sufficient to overrule nonsuit in a prosecution for violation of this section and § 14-120. State v. Coleman, 253 N.C. 799, 117 S.E.2d 742 (1961).

Evidence that two checks had been forged and that defendant cashed them was sufficient circumstantial evidence for the jury to find that defendant forged the checks, even without eyewitness testimony that defendant wrote the checks and without expert testimony that it was his handwriting on the checks. State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

An instruction including the requirement that there be a false making encompasses the requirement that the instrument be drawn by one who lacks authority. State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

An instruction to the jury that executing a check on a bank account by signing a name not authorized by the signature card would be a false making of a check is a proper charge on the element that the instrument be false. State v. Dunbar, 47 N.C. App. 623, 267 S.E.2d 577 (1980).

The sentence "the check appeared to be genuine" in a jury instruction adequately states the third element of forgery that the check as made was apparently capable of defrauding." State v. Monds, 36 N.C. App. 510, 245 S.E.2d 369, cert. denied, 295 N.C. 556, 248 S.E.2d 733 (1978).

Punishment. — Where the sentences imposed on defendant's plea of guilty, understandingly and voluntarily made, are within the limits prescribed by this section and § 14-120, such sentences cannot be considered cruel or unusual in the constitutional sense. State v. Newell, 268 N.C. 300, 150 S.E.2d 405 (1966).

A contention that the punishment for forging and uttering a check in violation of this section and § 14-120, by analogy to § 14-72, should be limited to the punishment imposed for a misdemeanor is untenable since a violation of each section is a felony and the court has no power to amend an act of the General Assembly. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

A sentence of five years' imprisonment imposed upon defendant's plea of guilty to the charge of forging a check in the amount of $45.00 is within the maximum authorized by this section. State v. Bolder, 8 N.C. App. 343, 174 S.E.2d 139 (1970).

Applied in State v. Cranfield, 238 N.C. 110, 76 S.E.2d 353 (1953); State v. Ayscue, 240 N.C. 196, 81 S.E.2d 403 (1954); State v. Shepard, 261 N.C. 402, 134 S.E.2d 696 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Gibbs, 266 N.C. 647, 146 S.E.2d 676 (1966); State v. Miller, 271 N.C. 611, 157 S.E.2d 211 (1967); Singletary v. United States, 514 F.2d 617 (4th Cir. 1975); State v. Edwards, 24 N.C. App. 393, 210 S.E.2d 458, cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975); State v. Freeman, 28 N.C. App. 346, 220 S.E.2d 844 (1976).

Stated in State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972).

Cited in State v. Peter, 53 N.C. 19 (1860); Peoples Bank & Trust Co. v. Fidelity & Cas. Co., 231 N.C. 510, 57 S.E.2d 809 (1950); State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970).

§ 14-120. Uttering forged paper or instrument containing a forged endorsement.

If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall utter or publish any such false, forged or counterfeited bill, note, order, check or security as is mentioned in the preceding section [G.S. 14-119], or shall pass or deliver, or attempt to pass or deliver, any of them to another person (knowing the same to be falsely forged or counterfeited) the person so offending shall be punished as a Class I felon. If any person, directly or indirectly, whether for the sake of gain or with intent to defraud or injure any other person, shall falsely make, forge or counterfeit any endorsement on any instrument described in the preceding section, whether such instrument be genuine or false, or shall knowingly utter or publish any such instrument containing a false, forged or counterfeited endorsement or, knowing the same to be falsely endorsed, shall pass or deliver or attempt to pass or deliver any such instrument containing a forged endorsement to another person, the person so offending shall be guilty of a felony and punishable by the same punishment provided in the preceding sentence. (1819, c. 994, s. 2, P. R.; R. C., c. 34, s. 61; Code, s. 1031; Rev., s. 3427; 1909, c. 666; C. S., s. 4294; 1961, c. 94; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1; as to payment of a forged check, see § 53-52.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class I felon" for "by imprisonment in the county jail or State's prison not less than four months nor more than ten years" at the end of the first sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific langauage of the act indicates otherwise."

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided prior to the effective date (July 1, 1981) of the 1979 amendment.

Elements of the Offense. — The mere offer of the false instrument with fraudulent intent constitutes an uttering or publishing, the essence of the offense being, as in the case of forgery, the fraudulent intent regardless of its successful consummation. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968).

Uttering a forged instrument consists in offering to another the forged instrument with the knowledge of the falsity of the writing and with intent to defraud. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Jackson, 19 N.C. App. 749, 200 S.E.2d 199 (1973).

The essential elements of the crime of uttering a forged check are (1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another. State v. Hill, 31 N.C. App. 248, 229 S.E.2d 810 (1976).

Time is not of the essence in the crimes of forgery and uttering a forged check. State v. Prince, 49 N.C. App. 145, 270 S.E.2d 521 (1980).

"Directly or Indirectly." — A check filled out by the payee at the direction of the drawer falls within the meaning of the words "directly or indirectly" as used in this section. State v. Cranfield, 238 N.C. 110, 76 S.E.2d 353 (1953).

Delivering to Agent. — It is putting spurious paper into circulation, and not defrauding the individual who takes it, that the state has in view. Hence, upon a similar statute, it was held that delivering a forged note to an agent, that he might dispose of it in buying goods, was a passing within the act. State v. Harris, 27 N.C. 287 (1844).

Uttering Distinct from Forgery. — By virtue of this section, uttering is an offense distinct from that of forgery which is defined in § 14-119. State v. Greenlee, 272 N.C. 651, 159 S.E.2d 22 (1968); State v. Treadway, 27 N.C. App. 78, 217 S.E.2d 743 (1975).

Forgery of Money Order and Forgery of Endorsement Are Separate Offenses. — To convict of the felony of forging endorsements under the second sentence of this section, it was not necessary to allege or prove forgery of the face of money orders, which would have been separate felonies under § 14-119. State v. Sutton, 14 N.C. App. 422, 188 S.E.2d 596 (1972).

Evidence of Former Acts. — In a prosecution for forgery and issuing a forged instrument under this section and § 14-119, evidence that defendant had theretofore forged checks other than those specified in the indictment may be competent on the question of intent. State v. Painter, 265 N.C. 277, 144 S.E.2d 6 (1965).

Evidence of Related Offenses. — In a prosecution of defendant for conspiracy to commit forgery, and conspiracy to utter forged instruments, the trial court did not err in admitting testimony by a State's witness that defendant had been involved in the commission of an offense other than the ones for which he was being tried, since the other offense was a break-in during which a check writer and checks were taken from a cabinet shop, and this was a part of the overall scheme which embraced the related offenses for which defendant was being tried and tended to connect him with those offenses; therefore, defendant himself opened the door to such testimony by inquiring further into charges pending against the State's witness. State v. Pruitt, 301 N.C. 683, 273 S.E.2d 264 (1981).

Evidence Held Sufficient. — See note under § 14-119.

Punishment. — Where the sentences imposed on defendant's plea of guilty, understandingly and voluntarily made, are within the limits prescribed by this section and § 14-119, such sentences cannot be considered cruel or unusual in the constitutional sense. State v. Newell, 268 N.C. 300, 150 S.E.2d 405 (1966).

A contention that the punishment for forging and uttering a check in violation of this section and § 14-119, by analogy to § 14-72, should be limited to the punishment imposed for a misdemeanor is untenable since a violation of each section is a felony and the court has no power to amend an act of the General Assembly. State v. Davis, 267 N.C. 126, 147 S.E.2d 570 (1966).

Applied in State v. Ayscue, 240 N.C. 196, 81 S.E.2d 403 (1954); State v. Shepard, 261 N.C. 402, 134 S.E.2d 696 (1964); State v. Bailey, 261 N.C. 783, 136 S.E.2d 37 (1964); State v. Gibbs, 266 N.C. 647, 146 S.E.2d 676 (1966); State v. Keller, 268 N.C. 422, 151 S.E.2d 56 (1966); State v. Miller, 271 N.C. 611, 157 S.E.2d 211 (1967); State v. Mosteller, 3 N.C. App. 67, 164 S.E.2d 27 (1968); State v. Hall, 8 N.C. App. 101, 173 S.E.2d 627 (1970); State v. Russell, 282 N.C. 240, 192 S.E.2d 294 (1972); State v. Cradle, 281 N.C. 198, 188 S.E.2d 296 (1972); State v. Cruse, 14 N.C. App. 295, 187 S.E.2d 883 (1972); State v. Gibson, 14 N.C. App. 409, 188 S.E.2d 683 (1972); State v. Sutton, 14 N.C. App. 612, 188 S.E.2d 599 (1972); State v. Thompson, 16 N.C. App. 62, 190 S.E.2d 877 (1972); State v. Wallace, 16 N.C. App. 645, 192 S.E.2d 585 (1972); State v. Faulkner, 18 N.C. App. 296, 196 S.E.2d 566 (1973); Singletary v. United States, 514 F.2d 617 (4th Cir. 1975); State v. McAllister, 287 N.C. 178, 214 S.E.2d 75 (1975); State v. Edwards, 24 N.C. App. 393, 210 S.E.2d 458, cert. denied, 286 N.C. 546, 212 S.E.2d 168 (1975).

Cited in State v. Moffitt, 9 N.C. App. 694, 177 S.E.2d 324 (1970); State v. Greene, 12 N.C. App. 687, 184 S.E.2d 523 (1971).

§ 14-121. Selling of certain forged securities.

If any person shall sell, by delivery, endorsement or otherwise, to any other person, any judgment for the recovery of money purporting to have been rendered by a magistrate, or any bond, promissory note, bill of exchange, order, draft or liquidated account purporting to be signed by the debtor (knowing the same to be forged), the person so offending shall be punished as a Class I felon. (R. C., c. 34, s. 63; Code, s. 1033; Rev., s. 3425; C. S., s. 4295; 1973, c. 108, s. 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class I felon" for "by imprisonment in the State's prison or county jail for not less than four months nor more than 10 years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific langauge of the act indicates otherwise."

§ 14-122. Forgery of deeds, wills and certain other instruments.

If any person, of his own head and imagination, or by false conspiracy or fraud with others, shall wittingly and falsely forge and make, or shall cause or wittingly assent to the forging or making of, or shall show forth in evidence, knowing the same to be forged, any deed, lease or will, or any bond, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof; or any acquittance or receipt for money or goods; or any receipt or release for any bond, note, bill or any other security for the payment of money; or any order for the payment of money or delivery of goods, with intent, in any of said instances, to defraud any person or corporation, and thereof shall be duly convicted, the person so offending shall be punished as a Class I felon. (5 Eliz., c. 14, ss. 2, 3; 21 James I, c. 26; 1801, c. 572, P. R.; R. C., c. 34, s. 59; Code, s. 1029; Rev., s. 3424; C. S., s. 4296; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to uttering a false bill of lading, see § 21-42; as to forgery of certificate of discharge from the armed forces of the United States, see § 47-112.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "as a Class I felon" for "by imprisonment in the State's prison or county jail not less than four months nor more than ten years, or fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

General Consideration. — Differing from false pretenses, it is not an element of this offense that the forgery was "calculated to deceive and did deceive"; intent alone suffices to constitute the crime. State v. Hall, 108 N.C. 776, 13 S.E. 189 (1891); State v. Collins, 115 N.C. 716, 20 S.E. 452 (1894). It is immaterial to whom the advantages of the forgery would accrue. State v. White, 101 N.C. 770, 7 S.E. 715 (1888), aff'd, 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287 (1889).

An instrument in writing on which forgery can be predicated is one which, if genuine, could operate as the foundation of another man's liability, or the evidence of his rights, such as a letter of recommendation of a person as a man of property and pecuniary responsibility, an order for the delivery of goods, a receipt, or a railroad pass, as well as a bill of exchange, or other express contract. Barnes v. Crawford, 115 N.C. 76, 20 S.E. 386 (1894).

To constitute an "order for the delivery of goods," a forgery within the meaning of this section, there must appear to be a drawer, a person drawn upon, who is under obligation to obey, and there must appear to be a person to whom the goods are to be delivered, and if the paper writing set forth in the indictment as a forgery does not contain these requisites, there cannot be a conviction for forgery under this section, State v. Lamb, 65 N.C. 419 (1871); but in such case a conviction will be sustained for the offense at common law. State v. Leak, 80 N.C. 403 (1879).

Falsely putting a witness' name to a bond not required to be attested by a subscribing witness does not affect the validity of the bond, and is not forgery. State v. Gherkin, 29 N.C. 206 (1847).

Erasure of Obliteration Not a Forgery. — Obliterating by erasure, or otherwise, a release or acquittance on the back of a bond or elsewhere, with the intent to defraud any person thereby, is not according to the law of North Carolina, a forgery. State v. Thornburg, 28 N.C. 79 (1845).

Forgery of One of Two Names. — Where the alleged forged instrument has the names of two or more persons affixed, it is sufficient if one of them is proved to have been forged. State v. White, 101 N.C. 770, 7 S.E. 715 (1888), aff'd on other grounds, 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287 (1889).

Misspelled Signature. — An indictment lies for forgery of an order for the payment of money, although the signature is misspelled, State v. Covington, 94 N.C. 913 (1886), or the names of a firm are in reverse order if it is clear who the parties intended to be designated are. State v. Lane, 80 N.C. 407 (1879).

Possession Raises Presumption of Guilt. — In State v. Britt, 14 N.C. 122 (1831), Ruffin, J., says: "That the order was not in the handwriting of the defendant did not rebut the legal presumption of his guilt. Being in possession of the forged order, drawn in his own favor, were facts constituting complete proof that, either by himself or by false conspiracy with others, he forged or assented to the forgery of the instrument; that he either did the act or caused it to be done until he showed the actual perpetrator and that he himself was not privy." To the same effect is State v. Morgan, 19 N.C. 348 (1837). It is wholly immaterial whether the defendant himself forged the order or procured and caused it to be done. In either case his guilt is the same. State v. Lane, 80 N.C. 407 (1879).

One possessing a forged instrument is presumed to have either forged it or consented to the forgery, and nothing else appearing such holder will be presumed guilty. State v. Peterson, 129 N.C. 556, 40 S.E. 9 (1901).

Where defendant signs the name of another person to an instrument, there is no presumption of want of authority. State v. Martin, 30 N.C. App. 512, 227 S.E.2d 172 (1976).

Proof of Signature of Another Name to Instrument without Authority Required. — To show that the defendant signed the name of some other person to an instrument, and that he passed such instrument as genuine, is not sufficient to establish the commission of a crime. It must still be shown that it was a false instrument, and this is not established until it is shown that the person who signed another's name did so without authority. State v. Martin, 30 N.C. App. 512, 227 S.E.2d 172 (1976).

Indictment — Lost Instruments. — If the forged instrument is lost it is not necessary to set it out in the indictment, and the substance of the forged instrument is all that need be charged, though in such case it would be better practice to aver the loss. State v. Peterson, 129 N.C. 556, 40 S.E. 9 (1901).

Same — Instrument Partly Printed and Partly in Writing. — An indictment for forging "a certain instrument in writing" is supported by proof of the forgery of an instrument partly printed and party in writing. State v. Ridge, 125 N.C. 655, 34 S.E. 439 (1899).

Same — Description Insufficient. — A description of the forged instrument as a "railroad pass" merely, is insufficient. The circumstances showing authority of the officer whose name is forged, and the obligation of the company to honor it, must be set out in the indictment. State v. Weaver, 94 N.C. 836 (1886).

§ 14-122.1. Forgery of transcripts and diplomas.

It is a misdemeanor for any person either to:

(1) Make a false or altered transcript or diploma from any secondary school, technical or community college, State Board of Community Colleges, college or university; or

(2) Use such a document with intent to defraud. (1981, c. 146, s. 1.)

Editor's Note. — Session Laws 1981, c. 146, s. 2, makes the act effective Oct. 1, 1981.

§ 14-123. Forging names to petitions and uttering forged petitions.

If any person shall willfully sign, or cause to be signed, or willfully assent to the signing of the name of any person without his consent, or of any deceased or fictitious person, to any petition or recommendation with the intent of procuring any commutation of sentence, pardon or reprieve of any person convicted of any crime or offense, or for the purpose of procuring such pardon, reprieve or commutation to be refused or delayed by any public officer, or with

the intent of procuring from any person whatsoever, either for himself or another, any appointment to office, or to any position of honor or trust, or with the intent to influence the official action of any public officer in the management, conduct or decision of any matter affecting the public, he shall be punished as a Class I felon; and if any person shall willfully use any such paper for any of the purposes or intents above recited, knowing that any part of the signatures to such petition or recommendation has been signed thereto without the consent of the alleged signers, or that names of any dead or fictitious persons are signed thereto, he shall be guilty of a felony, and shall be punished in like manner. (1883, c. 275; Code, s. 1034; Rev., s. 3426; C. S., s. 4297; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony, and shall be fined not exceeding one thousand dollars, or imprisoned in the county jail or State's prison not exceeding five years, or both, at the discretion of the court" near the middle of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-124. Forging certificate of corporate stock and uttering forged certificates.

If any officer or agent of a corporation shall, falsely and with a fraudulent purpose, make, with the intent that the same shall be issued and delivered to any other person by name or as holder or bearer thereof, any certificate or other writing, whereby it is certified or declared that such person, holder or bearer is entitled to or has an interest in the stock of such corporation, when in fact such person, holder or bearer is not so entitled, or is not entitled to the amount of stock in such certificate or writing specified; or if any officer or agent of such corporation, or other person, knowing such certificate or other writing to be false or untrue, shall transfer, assign or deliver the same to another person, for the sake of gain, or with the intent to defraud the corporation, or any member thereof, or such person to whom the same shall be transferred, assigned or delivered, the person so offending shall be punished as a Class I felon. (R. C., c. 34, s. 62; Code, s. 1032; Rev., s. 3421; C. S., s. 4298; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "imprisoned in the county jail or State's prison not less than four months nor more than ten years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-125. Forgery of bank notes and other instruments by connecting genuine parts.

If any person shall fraudulently connect together different parts of two or more bank notes, or other genuine instruments, in such a manner as to produce another note or instrument, with intent to pass all of them as genuine, the same shall be deemed a forgery, and the instrument so produced a forged note, or forged instrument, in like manner as if each of them had been falsely made or forged. (R. C., c. 34, s. 66; Code, s. 1037; Rev., s. 3420; C. S., s. 4299.)

SUBCHAPTER VI. CRIMINAL TRESPASS.

ARTICLE 22.

Trespasses to Land and Fixtures.

§ 14-126. Forcible entry and detainer.

No one shall make entry into any lands and tenements, or term for years, but in case where entry is given by law; and in such case, not with strong hand nor with multitude of people, but only in a peaceable and easy manner; and if any man do the contrary, he shall be guilty of a misdemeanor. (5 Ric. II, c. 8; R. C., c. 49, s. 1; Code, s. 1028; Rev., s. 3670; C. S., s. 4300.)

Cross References. — As to trespass after being forbidden, see § 14-134.

Legal Periodicals. — For discussion of the distinctions between the common-law crime of forcible trespass to real property and forcible entry and detainer, see 39 N.C.L. Rev. 121 (1961).

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Constitutionality. — See note to § 14-134.

Construed with § 14-134. — This section and § 14-134 place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

The word "entry" as used in this section and § 14-134, is synonymous with the word "trespass." It means an occupancy or possession contrary to the wishes and in derogation of the rights of the person having actual or constructive possession. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

Elements of the Offense Generally. — The gist of the offense of forcible trespass is the high-handed invasion of the actual possession of another, he being present forbidding, and the other need not be put in fear; it is only necessary that the force be such that the party in possession must yield to avoid a breach of the peace. State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

Force. Actual force or appearances tending to inspire a just apprehension of violence is necessary to constitute the offense. A forcible entry is not proved by evidence of a mere trespass; there must be proof of such force, or at least such show of force, as is calculated to prevent resistance. State v. Leary, 136 N.C. 578, 48 S.E. 570 (1904); State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911). So riding into the yard of a house occupied by a woman and remaining there cursing her constitutes force. State v. Davenport, supra. But where a person, in the absence of the prosecutor, merely unlocked and took off the lock put on by the prosecutor and put his own lock on, without breaking anything or doing any violence, and committed no violence upon the return of the prosecutor, he is not guilty of forcible entry and detainer. State v. Leary, 136 N.C. 578, 48 S.E. 570 (1904).

To convict one of the crime of forcible trespass, it is essential for the State to establish an entry with such force as to be "apt to strike

terror" to the prosecutor whose possession was disturbed. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

The fact that there had been an altercation between the occupant and the defendant earlier in the evening together with all the circumstances including the fact that the occupant was frightened enough to have his shotgun ready, was evidence from which the jury could conclude the entry was likely to cause a breach of the peace which would make it with force and violence. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

To constitute the offense of forcible trespass, there must be a demonstration of force, as with weapons or multitude of people, so as to make a breach of the peace or directly tend to it, or be calculated to intimidate or put in fear. State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

Same — Assault on Occupant Not Required. — Forcible trespass requires an assault on the occupant of the premises while forcible entry and detainer does not require an assault on a person, but only an entry with a "strong hand," that is, something that could cause a breach of the peace. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

Actual Possession Necessary. — The essential element of the offense of forcible entry is that the lands, etc., must be in the actual possession of him whose possession is charged to have been interferred with. To constitute actual possession, there must be an actual exercise of authority and control over the land, either in person or by the family or servants of the person alleged to be in possession. He need not at all times be personally present on the premises. State v. Bryant, 103 N.C. 436, 9 S.E. 1 (1889).

This section is designed to protect actual possession only, and it is no defense that the accused has title to the locus in quo if the prosecutor be in actual possession of it. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

It is necessary to allege and establish actual possession in the prosecutor. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

Same — Indictment. — The element of actual possession must be charged in the indictment. State v. Bryant, 103 N.C. 436, 9 S.E. 1 (1889). It is a sufficient compliance with this rule to allege that the owner was "then and there in peaceable possession." State v. Eason, 70 N.C. 88 (1874).

Same — Right of Tenant as Sufferance. — Where the possession of the prosecutor in forcible entry and detainer is only by sufferance, the prosecution cannot be sustained. State v. Leary, 136 N.C. 578, 48 S.E. 570 (1904).

Same — Title Not Involved. — The right or title to land cannot be vindicated with the bludgeon, but the party who claims the better title must, if it be denied or the actual possession of the land be refused, upon a lawful demand made for the same, resort to the peaceful methods and processes of the law for his redress and the recovery of his property. If, instead of pursuing this course, he elects to use violence, the law holds him criminally responsible for his act. State v. Webster, 121 N.C. 586, 28 S.E. 254 (1897), where it is said: "As forcible trespass is essentially an offense against the possession of another and does not depend upon the title, it is proper to exclude evidence of title in defendants on trial under an indictment for such offense." State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911).

The offense of forcible trespass under this section, does not involve title to the premises, but is directed against the possession, and when the possession is in the prosecuting witness, and the entry is made in such a manner with such show of force, after being prohibited by the prosecuting witness, as tends to a breach of the peace, it is sufficient for conviction. State v. Earp, 196 N.C. 164, 145 S.E. 23 (1928).

Same — Extent of Liability of Title Holder. — The court quoting from Reeder v. Purdy, 41 Ill. 279, says: "The reasoning upon which we rest our conclusion lies in the briefest compass, and is hardly more than a simple syllogism. The statute of forcible entry and detainer, not in terms, but by necessary construction, forbids a forcible entry, even by the owner, upon the actual possession of another. Such entry is, therefore, unlawful. If unlawful, it is a trespass, and an action for the trespass must necessarily lie . . . . Although the occupant may maintain trespass against the owner for a forcible entry, yet he can only recover such damages as have directly accrued to him from injuries done to his person or property through the wrongful invasion of his possession, and such exemplary damages as the jury may (under proper instructions) think proper to give. But a person having no title to the premises clearly cannot recover damages for any injury done to them by him who has the title." Mosseller v. Deaver, 106 N.C. 494, 11 S.E. 529 (1890).

The principal distinctions between forcible trespass and forcible entry and detainer are that forcible trespass requires that the complaining party be an occupant of the premises while forcible entry and detainer requires occupancy plus some type of estate in the land. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

Entry after being forbidden does not involve an assault or entry with a strong hand as does forcible entry and detainer, and it does not require actual occupancy of the land by the complaining party, but it does require the complaining party to have legal title to the land.

State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

A peaceful entry negatives liability under this section. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

But One Who Remains after Being Directed to Leave Is Guilty of Wrongful Entry. — In applying this section, one who remains after being directed to leave is guilty of a wrongful entry even though the original entrance was peaceful and authorized. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958). But see State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

Where persons of the negro race entered that part of the premises of a private enterprise reserved for white clientele, and refused to leave upon order of the proprietor, they were guilty of a wrongful entry within the meaning of this section, even though their original entrance was peaceful. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

One who remains in a home after being directed to leave is guilty of a wrongful entry and becomes a trespasser, even though the original entry was peaceful and authorized, and a householder may use such force as is reasonably necessary to eject him. State v. Kelly, 24 N.C. App. 670, 211 S.E.2d 854 (1975).

The Supreme Court's statement in State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958), intimating that a mere refusal to leave by a single individual would sustain a conviction under this section was mere dictum, since the court was faced with convictions under § 14-134, and the case law requires a greater demonstration of force than the technical trespass. State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

As Are Those Who Abuse Possessor.—In order to convict of a misdemeanor under the provisions of this section it is not necessary that the act of going on the lands be unlawful, if the accused thereafter have in overpowering numbers cursed and abused the one in lawful possession, using threatening and abusive language. State v. Fleming, 194 N.C. 42, 138 S.E. 342 (1927).

The unlatching and opening of the screen and the attempt to open the door as shown by the State's evidence is enough to constitute entry. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

Staging Sit-In. — Where defendants acted in concert with approximately 20 other persons in staging a sit-in, their number was of such a magnitude that only by yielding to their continued presence could a breach of the peace be avoided, once they have refused to leave as requested. In such a situation, the original entry, though peaceful, becomes unlawful, though no other force is used. State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

In a prosecution of defendants under this section for forcible entry, the multitude of persons entering the property would be sufficient to constitute the required force and the only force required was the force ncessary to remain on the premises after having been requested to leave, where defendants acted in concert with approximately 20 other persons in staging a sit-in at the premises of a utility company. State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

Entry under Void Warrant. — Where four or more men enter upon premises in the actual possession of another by virtue of a warrant and proceedings before a magistrate, which are a nullity, and eject such person and his family from the house they were occupying, they are guilty of a forcible trespass. State v. Yarborough, 70 N.C. 250 (1874); Atlantic T. & O.R.R. v. Johnston, 70 N.C. 348 (1874).

No Accessories. — In misdemeanors there are no accessories, and those who were present in numbers, some armed with axes and others with guns, while one of their number caused the prosecutor's agents to abandon the locus in quo, were his aiders and abettors and equally guilty of forcible trespass. State v. Davenport, 156 N.C. 596, 72 S.E. 7 (1911).

Alleging Expulsion of Possession. — While expulsion of possession must be alleged where actual ouster has occurred, such an allegation is not essential when the basis for charging defendants with violation of this section is because of a refusal to leave, thus distinguishing the decision in State v. Bryant, 103 N.C. 436, 9 S.E. 1 (1889). State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

Sufficiency of Warrant. — A warrant charging an offense under this section was sufficient even though it did not charge occupany at the time of entry where the warrant cited the section and charged that with "force and violence" the defendant trespassed upon the property of the occupant. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

Applied in State v. Dove, 261 N.C. 366, 134 S.E.2d 683 (1964).

Cited in State v. Cooke, 248 N.C. 485, 103 S.E.2d 846 (1958); State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976).

§ 14-127. Willful and wanton injury to real property.

If any person shall willfully and wantonly damage, injure or destroy any real property whatsoever, either of a public or private nature, he shall be guilty of a misdemeanor and shall be punished by fine or imprisonment or both, in the discretion of the court. (R. C., c. 34, s. 111; 1873-4, c. 176, s. 5; Code, s. 1081; Rev., s. 3677; C. S., s. 4301; 1967, c. 1083.)

CASE NOTES

This section was designed to avoid the element of malicious ill will required by the common-law crime of malicious mischief. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973).

Count Charging Violation of § 14-49 as Embracing a Charge under This Section. — See State v. Bindyke, 288 N.C. 608, 220 S.E.2d 521 (1975).

Applied in State v. Candler, 25 N.C. App. 318, 212 S.E.2d 901 (1975); State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

§ 14-128. Injury to trees, crops, lands, etc., of another.

Any person, not being on his own lands, who shall without the consent of the owner thereof, willfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower, shall be guilty of a misdemeanor and, upon conviction, shall be fined not exceeding five hundred dollars ($500.00) or imprisoned not exceeding six months, or both in the discretion of the court: Provided, however, that this section shall not apply to the officers, agents, and employees of the Department of Transportation while in the discharge of their duties within the right-of-way or easement of the Department of Transportation. (Ex. Sess. 1924, c. 54; 1957, c. 65, s. 11; c. 754; 1965, c. 300, s. 1; 1969, c. 22, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Legal Periodicals. — For discussion of legislative intent in enacting this section, see 3 N.C.L. Rev. 25.

§ 14-128.1: Repealed by Session Laws 1979, c. 964, s. 2, effective July 1, 1980.

§ 14-129. Taking, etc., of certain wild plants from land of another.

No person, firm or corporation shall dig up, pull up or take from the land of another or from any public domain, the whole or any part of any Venus flytrap (Dionaea muscipula), trailing arbutus, Aaron's Rod (Thermopsis caroliniana), Bird-foot Violet (Viola pedata), Bloodroot (Sanguinaria canadensis), Blue Dogbane (Amsonia tabernaemontana), Cardinal-flower (Lobelia cardinalis), Columbine (Aquilegia canadenis), Dutchman's Breeches (Dicentra cucullaria), Maidenhair Fern (Adiantum pedatum), Walking Fern (Camptosorus rhizophyllus), Gentians (Gentiana), Ginseng (Panax quinquefolium), Ground Cedar, Running Cedar, Hepatica (Hepatica americana and acutiloba), Jack-in-the-Pulpit (Arisaema triphyllum), Lily (Lilium), Lupine (Lupinus), Monkshood (Aconitum uncinatum and reclinatum), May Apple (Podophyllum peltatum), Orchids (all species), Pitcher Plant (Sarracenia), Sea Oats (Uniola paniculata), Shooting Star (Dodecantheon meadia), Oconee Bells (Shortia

galacifolia), Solomon's Seal (Polygonatum), Trailing Christmas (Greens-Lycopodium), Trillium (Trillium), Virginia Bluebells (Mertensia virginica), and Fringe Tree (Chionanthus virginicus), American holly, white pine, red cedar, hemlock or other coniferous trees, or any flowering dogwood, any mountain laurel, any rhododendron, or any ground pine, or any Christmas greens, or any Judas tree, or any leucothea, or any azalea, without having in his possession a permit to dig up, pull up or take such plants, signed by the owner of such land, or by his duly authorized agent. Any person convicted of violating the provisions of this section shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense. The provisions of this section shall not apply to the Counties of Cabarrus, Carteret, Catawba, Cherokee, Chowan, Cumberland, Currituck, Dare, Duplin, Edgecombe, Franklin, Gaston, Granville, Hertford, McDowell, Pamlico, Pender, Person, Richmond, Rockingham, Rowan and Swain. (1941, c. 253; 1951, c. 367, s. 1; 1955, cc. 251, 962; 1961, c. 1021; 1967, c. 355; 1971, c. 951.)

Local Modification. — Avery, Mitchell and Watauga: 1867, c. 355.

§ 14-129.1: Repealed by Session Laws 1979, c. 964, s. 2, effective July 1, 1980.

§ 14-130. Trespass on public lands.

If any person shall erect a building on any state-owned lands, or cultivate or remove timber from any such lands, without the permission of the State, he shall be guilty of a misdemeanor. Moreover, the State can recover from any person cutting timber on its land three times the value of the timber which is cut. (1823, c. 1190, P. R.; 1842, c. 36, s. 4; R. C., c. 34, s. 42; Code, s. 1121; Rev., s. 3746; 1909, c. 891; C. S., s. 4302; 1979, c. 15.)

CASE NOTES

Cited in Eastern Carolina Land, Lumber & Mfg. Co. v. State Board of Educ., 101 N.C. 35, 7 S.E. 573 (1888); Worth v. Commissioners of Craven County, 118 N.C. 112, 24 S.E. 778 (1896).

§ 14-131. Trespass on land under option by the federal government.

On lands under option which have formally or informally been offered to and accepted by the North Carolina Department of Natural Resources and Community Development by the acquiring federal agency and tentatively accepted by said Department for administration as State forests, State parks, State game refuges or for other public purposes, it shall be unlawful to cut, dig, break, injure or remove any timber, lumber, firewood, trees, shrubs or other plants; or any fence, house, barn or other structure; or to pursue, trap, hunt or kill any bird or other wild animals or take fish from streams or lakes within the boundaries of such areas without the written consent of the local official of the United States having charge of the acquisition of such lands.

Any person, firm or corporation convicted of the violation of this section shall be guilty of a misdemeanor and shall be subject to a fine of not more than fifty dollars ($50.00) or to imprisonment for not to exceed 30 days, or to both such fine and imprisonment.

The Department of Natural Resources and Community Development through its legally appointed forestry, fish and game wardens is hereby authorized and empowered to assist the county law-enforcement officers in the enforcement of this section. (1935, c. 317; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

§ 14-132. Disorderly conduct in and injuries to public buildings and facilities.

(a) It is a misdemeanor if any person shall:

(1) Make any rude or riotous noise, or be guilty of any disorderly conduct, in or near any public building or facility; or

(2) Unlawfully write or scribble on, mark, deface, besmear, or injure the walls of any public building or facility, or any statue or monument situated in any public place; or

(3) Commit any nuisance in or near any public building or facility.

(b) Any person in charge of any public building or facility owned or controlled by the State, any subdivision of the State, or any other public agency shall have authority to arrest summarily and without warrant for a violation of this section.

(c) The term "public building or facility" as used in this section includes any building or facility which is:

(1) One to which the public or a portion of the public has access and is owned or controlled by the State, any subdivision of the State, any other public agency, or any private institution or agency of a charitable, educational, or eleemosynary nature; or

(2) Dedicated to the use of the general public for a purpose which is primarily concerned with public recreation, cultural activities, and other events of a public nature or character.

(3) Designated by the Attorney General in accordance with G.S. 114-20.1.

The term "building or facility" as used in this section also includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(d) Any person who violates any provision of this section is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1829, c. 29, ss. 1, 2; 1842, c. 47; R. C., c. 103, ss. 7, 8; Code, s. 2308; Rev., s. 3742; 1915, c. 269; C. S., s. 4303; 1969, c. 869, s. 7½; c. 1224, s. 2; 1981, c. 499, s. 2.)

Cross References. — As to regulations promulgated by the Secretary of Human Resources concerning the suppression of nuisances and disorder at State-owned institutions, see § 143-116.6.

Effect of Amendments. — The 1981 amendment added subdivision (3) to subsection (c).

CASE NOTES

Applied in In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

Cited in State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970); McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

§ 14-132.1. Demonstrations or assemblies of persons kneeling or lying down in public buildings.

If any person, persons, group or assembly of persons, after being forbidden to do so by the supervisor, keeper, custodian or person in charge of any public

building of the State or of any county or municipality shall go or enter into such public building so owned by the State, county or municipality or shall enter upon the lands in or near any such public building and shall engage in sitting, kneeling, lying down or inclining so as to obstruct the ingress or egress of members of the public in the use of said building for normal business affairs or who shall congregate, assemble or by groups or formations, whether organized or unorganized, or by any method or manner whatsoever, so as to block or interfere with the customary, normal use of said building or the land or grounds in, around and adjacent to said building, such person or persons shall be guilty of a misdemeanor, and upon conviction, plea of guilty or nolo contendere, shall be punished by a fine of not more than five hundred dollars ($500.00) or imprisonment of not more than six months, or both, in the discretion of the court. (1965, c. 1183; 1969, c. 740.)

§ 14-132.2. Willfully trespassing upon or damaging a public school bus.

(a) Any person who shall unlawfully and willfully demolish, destroy, deface, injure, burn or damage any public school bus or public school activity bus shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than two years, or both.

(b) Any person who shall enter a public school bus or public school activity bus after being forbidden to do so by the authorized school bus driver in charge thereof, or the school principal to whom the public school bus or public school activity bus is assigned, shall be guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100.00), imprisonment for not more than 30 days, or both.

(c) Any occupant of a public school bus or public school activity bus who shall refuse to leave said bus upon demand of the authorized driver in charge thereof, or upon demand of the principal of the school to which said bus is assigned, shall be guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100.00), imprisonment for not more than 30 days, or both.

(d) Subsections (b) and (c) of this section shall not apply to a child less than 12 years of age, or authorized professional school personnel. (1975, c. 191, s. 1.)

§ 14-133. Erecting artificial islands and lumps in public waters.

If any person shall erect artificial islands or lumps in any of the waters of the State east of the Atlantic Coast Line Railroad running from Wilmington to Weldon by way of Burgaw, Warsaw, Goldsboro, Wilson, Rocky Mount, and Halifax (formerly the Wilmington and Weldon Railroad) and running from Weldon to the North Carolina-Virginia State boundary by way of Garysburg and Pleasant Hill (formerly the Petersburg and Weldon Railroad), he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1883, c. 109; Code, s. 986; Rev., s. 3543; C. S., s. 4304; 1969, c. 1224, s. 1.)

CASE NOTES

Applied in State v. Murry, 277 N.C. 197, 176 S.E.2d 738 (1970).

Quoted in Gaither v. Albemarle Hosp., 235 N.C. 431, 70 S.E.2d 680 (1952).

§ 14-134. Trespass on land after being forbidden; license to look for estrays.

If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor, and on conviction, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both: Provided, that if any person shall make a written affidavit before a magistrate of the county that any of his cattle or other livestock (which shall be specially described in such affidavit) have strayed away, and that he has good reason to believe that they are on the lands of a certain other person, then the magistrate may, in his discretion, allow the affiant to enter on the premises of such person with one or more servants, without firearms, in the daytime (Sunday excepted), between the hours of sunrise and sunset, and make search for his estrays for such limited time as to the magistrate shall appear reasonable. The only effect of such license shall be to protect the persons entering from indictment therefor, and the license shall have this effect only where it is made bona fide and the entry is effected without any damage except such as may be necessary to conduct the search. (1866, c. 60; Code, s. 1120; Rev., s. 3688; C. S., s. 4305; 1963, c. 1106; 1969, c. 1224, s. 12; 1973, c. 108, s. 3.)

Cross References. — As to forcible trespass, see § 14-126.

Legal Periodicals. — For note as to trespass prosecution not being discrimination by State, see 37 N.C.L. Rev. 73 (1958).

For discussion of the distinctions between the common-law crime of forcible trespass to real property and entry after being forbidden, see 39 N.C.L. Rev. 121 (1961).

For article dealing with the legal problems in southern desegregation, see 43 N.C.L. Rev. 689 (1965).

Purpose. — This section is designed to protect possession regardless whether it be actual or constructive. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

The law does not look to the motive of a proprietor but to the wrongful invasion of his property and to the disturbance of his right to undisputed possession. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

Essential Ingredients of Offense. — To constitute trespass on the land of another after notice or warning under this section, three essential ingredients must coexist: (1) The land must be the land of the prosecutor in the sense that it is in either his actual or constructive possession; (2) the accused must enter upon the land intentionally; and (3) the accused must do this after being forbidden to do so by the prosecutor. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

To constitute the offense forbidden by this section and with which defendants are charged there must be an entry on land after being forbidden; and such entry must be wilful, and not from ignorance, accident, or under a bona fide claim of right or license. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

Entering the property "without a license therefor" is not a necessary element of this crime. State v. Edgerton, 25 N.C. App. 45, 212 S.E.2d 398 (1975).

Possession is an essential element of the crime. If the State fails to establish that prosecutor has possession (actual or constructive) no crime has been established. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

The principal distinctions between forcible trespass and forcible entry and detainer are that forcible trespass requires that the complaining party be an occupant of the premises while forcible entry and detainer requires occupancy plus some type of estate in the land. State v. Blackmon, 36 N.C. App. 207, 243 S.E.2d 417 (1978).

Entry under Claim of Right. — One who enters upon the land of another under a bona fide claim of right is guilty of no criminal offense. State v. Crosset, 81 N.C. 579 (1879). Mere belief of the claim is not sufficient, there must be proof of title or evidence of a reasonable belief of the existence of the right of entry. State v. Fisher, 109 N.C. 817, 13 S.E. 878 (1891); State v. Durham, 121 N.C. 546, 28 S.E. 22 (1897). This bona fide claim of right must be passed on by a jury before defendant can be convicted. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906). But the question will not be submitted as a mere abstraction; there must be evidence of a claim or of facts giving rise to a reasonable and bona fide claim. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915).

It must be noted that entry under a claim of right is a defense only in a criminal action, as ignorance of a trespasser will not exonerate him from civil liability. State v. Whitener, 93 N.C. 590 (1885).

In a prosecution under this section, even though the State establishes that defendant intentionally entered upon land in the actual or constructive possession of prosecutor after being forbidden to do so by the prosecutor, and thus establishes as an ultimate fact that defendant entered the locus in quo without legal right, defendant may still escape conviction by showing as an affirmative defense that he entered under a bona fide claim of right, i.e., that he believed he had a right to enter, and that he had reasonable grounds for such belief. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Good faith in making the entry is a defense. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

An entry under a bona fide claim of right avoids criminal responsibility under this section though civil liability may remain. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

As a defense to a charge under this section, it is sufficient for defendants to establish that they entered under a bona fide belief of a right to so enter, which belief had a reasonable foundation in fact, but the burden is on the defendant to establish facts sufficient to excuse his wrongful conduct. State v. Cooke, 248 N.C. 485, 103 S.E.2d 846 (1958), appeal dismissed, 359 U.S. 951, 79 S. Ct. 737, 3 L. Ed. 2d 759 (1959), 364 U.S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650 (1960).

A mere belief on the part of a trespasser that he had a claim of right or license will not protect him; he must satisfy the jury that he had reasonable grounds for such belief. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

Land Sought to Be Condemned. — An indictment for willful trespass under this section will lie against an employee of a railroad company for an entry after being forbidden on land which the company is seeking to condemn, the entry being for the purpose of constructing the road and before an appraisement has been made, although a restraining order against such a trespass would be refused. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).

Entry by Husband on Wife's Property. — A husband is not subject to the rule of this section, in regard to property of his wife, and although she may forbid him to enter he may enter nevertheless. State v. Jones, 132 N.C. 1043, 43 S.E. 939 (1903).

Entry As Servant. — One who enters upon the land of another, after being forbidden, as the servant, and at the command of a bona fide claimant, is not guilty of any criminal offense. State v. Winslow, 95 N.C. 649 (1886).

Upon the trial under an indictment for trespass on lands after being forbidden, it is no defense to show that defendant acted under the instructions of his superior officer of a railroad company in entering upon the lands to construct a railroad. Evidence that such superior officer therein acted by the advice of counsel learned in the law is incompetent. State v. Mallard, 143 N.C. 666, 57 S.E. 351 (1907).

Entry by Former Tenant to Gather Crops. — For a conviction under the provisions of this section for unlawful trespass on lands after being forbidden, it is not alone sufficient to show that the trespass had been forbidden, when there is evidence tending to show that the trespasser peacefully entered upon a claim of title, founded upon a reasonable belief that he had the right to go upon the lands; and a peremptory instruction to find the prisoner guilty upon the evidence is held as error, there being evidence that the trespasser had been a tenant upon the lands of the prosecutor, and had entered upon the lands to gather the crops he had sown and cultivated, after he had moved to another place with the intention to return for this purpose, believing he had the right, though forbidden to do so by the prosecutor. State v. Faggart, 170 N.C. 737, 87 S.E. 31 (1915).

Entry as Guest of Tenant. — One forbidden by the landlord to enter his land is not guilty under this section if he enters a part of the land in the possession of a tenant and as a guest of the tenant. State v. Lawson, 101 N.C. 717, 7 S.E. 905 (1888).

Entry When Sober after Entry While Intoxicated Forbidden. — Where defendant's evidence in a prosecution for trespass was to the effect that the prosecutrix had forbidden him the premises only when he was intoxicated and that on the occasion in question he was sober, his testimony, if the jury found it to be true, would entitle him to an acquittal, and he is entitled to an instruction on the legal effect of his evidence. State v. Keziah, 269 N.C. 681, 153 S.E.2d 365 (1967).

Abatement of Pending Convictions by Civil Rights Act. — Since the Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities, pending convictions for violation of this section are abated by passage of the act, even though the conduct involved occurred prior to its enactment. Blow v. North Carolina, 379 U.S. 684, 85 S. Ct. 635, 13 L. Ed. 2d 603 (1965).

What Constitutes State Action Preventing Owner From Practicing Discrimination. — The removal of a trespasser, whether he be white or negro, from an owner's premises by the police does not constitute State action to enforce segregation and is not prohibited by the Fourteenth Amendment to

the federal Constitution. State v. Cobb, 262 N.C. 262, 136 S.E.2d 674 (1964).

An inspection report form, promulgated by the State Board of Health under §§ 72-46 through 72-49, making provisions for toilet facilities "for each sex and race" was held sufficient to constitute State action depriving the operator of a restaurant of a freedom of choice with respect to the patrons he could serve. State v. Fox, 263 N.C. 233, 139 S.E.2d 233 (1964), reversing trespass convictions of "sit-in" demonstrators.

In accordance with mandate of the Supreme Court of the United States, conviction of the defendant of trespass in wilfully refusing to leave a restaurant after being requested to do so by the management, was reversed on the ground that the inspection form of the State Board of Health providing for toilet facilities separate for each race constituted State action depriving the operator of the restaurant of freedom of choice as to patrons he could serve. State v. Fox, 263 N.C. 233, 139 S.E.2d 233 (1964).

Evidence Not Establishing Prosecutor's Possession. — Where, in a prosecution under this section the only evidence offered by the State as to title of prosecutor is oral testimony that prosecutor had purchased the property, and the only evidence of possession was that prosecutor had warned defendant to stay off the land and had entered upon the land temporarily on a single occasion to erect a barbed wire fence thereon, held, defendant's motion to nonsuit should have been granted, since the evidence is insufficient to establish prosecutor's possession of the land within the meaning of this section. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Indictment — License to Enter Must Be Negatived. — In an indictment for entering on the land of another and taking therefrom turpentine, etc., it is necessary that a "license so to enter" should be distinctly negatived as an essential part of the description of the offense. State v. Bullard, 72 N.C. 445 (1875).

An indictment is fatally defective if it does not charge that the entry was "without a license therefor." State v. Smith, 263 N.C. 788, 140 S.E.2d 404 (1965).

Same — Same — Indictment Sufficient. — An indictment in which it is charged that the defendant did unlawfully enter upon the premises of the prosecutors, he, the said defendant, having been forbidden to enter on said premises, and not having a license so to enter, etc., is sufficient. State v. Whitehurst, 70 N.C. 85 (1874).

Same — Ownership or Possession Must Be Alleged and the Proof Must Correspond. — It is necessary to allege in the warrant or bill of indictment the rightful owner or possessor of the property, and the proof must correspond with the charge. If the rightful possession is in one other than the person named in the warrant or bill, there is a fatal variance. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

Same — Amendment as to Possession Constitutes Fatal Variance. — On appeal to the superior court from conviction on a warrant charging trespass on the property of one person after being forbidden, the allowance of an amendment to charge the property was in the possesison of a different person results in the charge of an entirely different crime and constitutes a fatal variance. State v. Cooke, 246 N.C. 518, 98 S.E.2d 885 (1957).

Warrant May Be Amended. — The superior court has power to amend, after verdict, a warrant brought by appeal of defendant charging defendant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "willful and unlawful," and to make the charge conclude, "against the peace and dignity of the State." State v. Smith, 103 N.C. 410, 9 S.E. 200 (1889).

Warrant with Affidavit Attached. — A warrant for trespass will not be quashed because it does not contain the necessary descriptive words of the illegal offense, when it refers to an "annexed affidavit" in which all the essential averments are made, as the reference to the affidavit makes it a part of the warrant. State v. Winslow, 95 N.C. 649 (1886).

Applied in State v. Marsh, 225 N.C. 648, 36 S.E.2d 244 (1945); State v. Dove, 261 N.C. 366, 134 S.E.2d 683 (1964).

Cited in State v. Holmes, 120 N.C. 573, 26 S.E. 692 (1897); State v. Connor, 142 N.C. 700, 55 S.E. 787 (1906); State v. Francis, 261 N.C. 358, 134 S.E.2d 681 (1964); State v. Felmet, 47 N.C. App. 201, 266 S.E.2d 721 (1980); State v. Birkhead, 48 N.C. App. 575, 269 S.E.2d 314 (1980).

§ 14-134.1: Repealed by Session Laws 1977, c. 887, s. 2.

Cross References. — For present provisions as to littering, see § 14-399.

§ 14-134.2. Operating motor vehicle upon utility easements after being forbidden to do so.

If any person, without permission, shall ride, drive or operate a minibike, motorbike, motorcycle, jeep, dune buggy, automobile, truck or any other motor vehicle upon a utility easement upon which the owner or holder of the easement or agent of the owner or holder of the easement has posted on the easement a "no trespassing" sign or has otherwise given oral or written notice to the person not to so ride, drive or operate such a vehicle upon the said easement, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months or both, provided, however, neither the owner of the property nor the holder of the easement or their agents, employees, guests, invitees or permittees shall be guilty of a violation under this section. (1975, c. 636, s. 1.)

§ 14-134.3. Domestic criminal trespass.

Any person who enters after being forbidden to do so or remains after being ordered to leave by the lawful occupant, upon the premises occupied by a present or former spouse or by a person with whom the person charged has lived as if married, shall be guilty of a misdemeanor if the complainant and the person charged are living apart; provided, however, that no person shall be guilty if said person enters upon the premises pursuant to a judicial order or written separation agreement which gives the person the right to enter upon said premises for the purpose of visiting with minor children. Evidence that the parties are living apart shall include but is not necessarily limited to:

(1) A judicial order of separation;
(2) A court order directing the person charged to stay away from the premises occupied by the complainant;
(3) An agreement, whether verbal or written, between the complainant and the person charged that they shall live separate and apart, and such parties are in fact living separate and apart; or
(4) Separate places of residence for the complainant and the person charged.

On conviction, said person may be punished by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1979, c. 561, s. 2.)

Legal Periodicals. — For survey of 1979 family law, see 58 N.C.L. Rev. 1471 (1980).

§ 14-135. Cutting, injuring, or removing another's timber.

If any person not being the bona fide owner thereof, shall knowingly and willfully cut down, injure or remove any standing, growing or fallen tree or log, the property of another, he shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or both, in the discretion of the court. (1889, c. 168; Rev., s. 3687; C. S., s. 4306; 1957, c. 1437, s. 1.)

Local Modification. — Burke, Caldwell, Cherokee: C.S. 4307, 4308; Duplin: 1929, c. 174; Granville: 1965, c. 570; McDowell, Mitchell, Watauga, Wilkes, Yadkin: C.S. 4307, 4308.

Cross References. — As to larceny of wood from land, see § 14-80.

CASE NOTES

Prosecutor's Ownership of Land Essential. — The crime of unlawfully cutting, injuring or removing another's timber as defined by this section is an offense against the freehold rather than the possession, and ownership of the property by the prosecutor is a sine qua non to conviction. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Cited in State v. Edgerton, 25 N.C. App. 45, 212 S.E.2d 398 (1975).

§ 14-136. Setting fire to grass and brushlands and woodlands.

If any person shall intentionally set fire to any grassland, brushland or woodland, except it be his own property, or in that case without first giving notice to all persons owning or in charge of lands adjoining the land intended to be fired, and without also taking care to watch such fire while burning and to extinguish it before it shall reach any lands near to or adjoining the lands so fired, he shall for every such offense be guilty of a misdemeanor and shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or imprisoned for a period of not less than 60 days nor more than four months for the first offense, and for a second or any subsequent similar offense shall be imprisoned not less than four months nor more than one year. If intent to damage the property of another shall be shown, said person shall, for a first offense, be punished as a Class I felon; and for a second and subsequent offenses said person shall be punished as a Class H felon. This section shall not prevent an action for the damages sustained by the owner of any property from such fires. For the purposes of this section, the term "woodland" is to be taken to include all forest areas, both timber and cutover land, and all second-growth stands on areas that have at one time been cultivated. Any person who shall furnish to the State, evidence sufficient for the conviction of a violation of this section shall receive the sum of five hundred dollars ($500.00) to be paid from the State Fire Suppression Fund. (1777, c. 123, ss. 1, 2, P. R.; R. C., c. 16, ss. 1, 2; Code, ss. 52, 53; Rev., s. 3346; 1915, c. 243, ss. 8, 11; 1919, c. 318; C. S., s. 4309; 1925, c. 61, s. 1; 1943, c. 661; 1979, c. 760, s. 5; 1981, c. 892.)

Local Modification. — Graham: Pub. Loc. 1933, c. 301; Onslow: 1929, c. 185; 1939, c. 160.

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony, and shall, upon conviction, be punished by imprisonment in the State's prison for not less than one nor more than five years" in the second sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1981 amendment, effective Oct. 1, 1981, deleted "willful or malicious" preceding "intent" near the beginning of the second sentence, and inserted "for a first offense," and added "and for a second and subsequent offenses said person shall be punished as a Class H felon" in that sentence. In the last sentence, the amendment substituted "five hundred dollars ($500.00) to be paid from the State Fire Suppression Fund" for "$50.00, to be taxed as part of the court costs."

CASE NOTES

The primary purpose of this section is to protect property from fire damage. But the enactment is broad enough to include setting fire to a grass-covered field. Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961).

The primary purpose of this section is to protect property. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

This section defines the standard of care imposed upon a person who undertakes to burn brush, grass, etc., and a violation of its provisions constitutes negligence. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

Care No Defense Where Notice Not Given. — If one firing woods fails to give the statutory notice to adjoining owners and damages ensue, the cause of action is complete, no matter what degree of care may have been shown. Lamb v. Sloan, 94 N.C. 534 (1886); Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961).

Waiver of Notice Bars Damages. — A waiver of notice is a sufficient answer to an action for damages caused to woodland by fire. Roberson v. Kirby, 52 N.C. 477 (1860); Lamb v. Sloan, 94 N.C. 534 (1886). Waiver when made by a tenant in common while in possession is also a sufficient defense. See Stanland v. Rourk, 168 N.C. 568, 84 S.E. 845 (1915).

Waiver by Adjoining Owner No Bar to Penalty. — When an adjoining owner waives notice of the intended fire such waiver does not waive the penalty of this section, but is only a waiver of the landowner's right of action for damages to his land caused by the spreading of the fire. Lamb v. Sloan, 94 N.C. 534 (1886).

Liability to One Not an Adjoining Owner. — The notice required by this section applies only to adjoining owners and one is not subject to the penalty for failure to give notice to one who is not an adjoining owner, but by the express terms of the statute there is a liability in damages for damages to "any property." See Roberson v. Morgan, 118 N.C. 991, 24 S.E. 667 (1896).

No Evidence to Show Fire Started by Defendant. — Where the evidence tended only to show that the fire started on defendant's land and spread to the plaintiff's land, but that the defendant had ordered his employees not to set out a fire on account of the dry conditions, and there was neither direct nor circumstantial evidence tending to show the fire had been started either by the defendant or his employees under his authority, a judgment of nonsuit was proper. Sutton v. Herrin, 202 N.C. 599, 163 S.E. 578 (1932).

Burning Off Railroad Rights-of-Way. — In case of Mizzell v. Branning Mfg. Co., 158 N.C. 265, 73 S.E. 802 (1912), it was held under a prior statute, similar in some respects to this except that it did not provide against burning grassland and brushland, that the statute did not apply to railroads burning off their rights-of-way that were covered with grass and tree tops.

§ 14-137. Willfully or negligently setting fire to woods and fields.

If any person, firm or corporation shall willfully or negligently set on fire, or cause to be set on fire, any woods, lands or fields, whatsoever, every such offender, upon conviction, shall be fined or imprisoned in the discretion of the court. This section shall apply only in those counties under the protection of the Department of Natural Resources and Community Development in its work of forest fire control. It shall not apply in the case of a landowner firing, or causing to be fired, his own open, nonwooded lands, or fields in connection with farming or building operations at the time and in the manner now provided by law: Provided, he shall have confined the fire at his own expense to said open lands or fields. (1907, c. 320, ss. 4, 5; C. S., s. 4310; 1925, c. 61, s. 2; 1941, c. 258; 1973, c. 1262, s. 86; 1977, c. 771, s. 4.)

CASE NOTES

Evidence that the county in which defendant negligently or willfully started forest fires was in charge of the State forest service and that this section was applicable to the county, defendant having offered no evidence to the contrary, was sufficient to show a violation of the section. State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942).

Cited in Caldwell Land & Lumber Co. v. Hayes, 157 N.C. 333, 72 S.E. 1078 (1911); Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

§ 14-138. Setting fire to woodlands and grasslands with campfires.

Any wagoner, hunter, camper or other person who shall kindle a campfire or shall authorize another to kindle such fire, unless all combustible material for the space of ten feet surrounding the place where such fire is kindled has been removed, or shall leave a campfire without fully extinguishing it, or who shall accidentally or negligently by the use of any torch, gun, match or other instrumentality, or in any manner whatever, start any fire upon any grassland, brushland or woodland without fully extinguishing the same, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), or by imprisonment not exceeding 30 days. For the purposes of this section the term "woodland" is to be taken to include all forest areas, both timber and cutover land, and all second-growth stands on areas that have at one time been cultivated. (Code, s. 54; 1885, c. 126; Rev., s. 3347; 1913, c. 8; 1915, c. 243, ss. 9, 11; C. S., s. 4311.)

Local Modification. — Graham: Pub. Loc. 1933, c. 301.

CASE NOTES

Applied in State v. Powell, 254 N.C. 231, 118 S.E.2d 617 (1961).

§ 14-139. Setting fires in certain areas.

repealed 10/10/81 by 1981, c. 1100

(a) Statement of Purpose. — It is the intent and purpose of this section to enact fire control provisions that are adopted to the needs and circumstances of the respective areas of North Carolina. The General Assembly hereby finds that, in certain counties designated in subsection (b) of this section and which have organic soils associated with large expanses of forests with highly flammable fuel types, forest fires are likely to result from the unusual hazard which exists during land clearance operations, and the General Assembly hereby classifies said counties as subject to the provisions of subsection (b). The General Assembly further finds that, in the remaining counties designated in subsection (c) of this section, forest fires are not as likely to result from unusual hazards that exist during land clearance operations, and the General Assembly hereby classifies said counties as subject to the provisions of subsection (c).

(b) It shall be unlawful for any person, firm or corporation to willfully start, or cause to be started, any fire, in any of the areas of woodlands under the protection of the Department of Natural Resources and Community Development or within 500 feet of any such protected area without first having obtained from the Secretary of the Department of Natural Resources and Community Development, or his duly authorized agent, a permit to start and burn such fire in the above mentioned protected areas.

It shall be unlawful for any person, firm or corporation to willfully burn any debris, stumps, brush or other inflammable material accumulated as a result of ground clearance activities without having first received a special burning

permit from the Secretary of the Department of Natural Resources and Community Development, or his duly authorized agent, and such special permit shall be granted by the Secretary or his duly authorized agent, only if he has personally inspected the site of the proposed burning, and has assessed the conditions which might endanger protected woodlands as a result of such burning. The Secretary, or his duly authorized agent, shall be empowered to prohibit all brush burning and burning of other debris capable of spreading fire to protected woodlands regardless of the distance such burning operation may be from the said woodlands, when it is determined that hazardous fire conditions exist.

If a fire is discovered burning in any area subject to this subsection under any conditions which are considered by the Secretary of the Department of Natural Resources and Community Development, or his duly authorized agent, to be hazardous to the protected forest in the vicinity, the Secretary, or any duly authorized agent, is hereby empowered to enter upon the lands where such burning is occurring and, at their option, to extinguish such fires constituting a danger to adjoining woodlands.

The provisions of this subsection shall apply only to the Counties of Dare, Hyde, Tyrrell and Washington.

(c) It shall be unlawful for any person, firm or corporation to start or cause to be started any fire or ignite any material in any of the areas of woodland under the protection of the Department of Natural Resources and Community Development or within 500 feet of any such protected area, during the hours starting at midnight and ending at 4:00 P.M. without first obtaining from the Secretary of the Department of Natural Resources and Community Development, or his duly authorized agent, a permit to start or cause to be started any fire or ignite any material in such above mentioned protected areas.

The provisions of this subsection shall not apply to the Counties of Dare, Hyde, Tyrrell and Washington.

(d) During periods of hazardous forest fire conditions or during air pollution episodes declared by competent authority pursuant to Article 21B of Chapter 143 of the General Statutes of North Carolina, the Secretary of the Department of Natural Resources and Community Development is authorized to cancel all permits and special burning permits covered by this section and to prohibit all brush pile burning, the burning of other debris and the starting of any fires in any of the woodlands under the protection of the Department of Natural Resources and Community Development or capable of spreading to any such protected area, without regard to the distance from such fires to such woodlands.

The Secretary, or his duly authorized agent, may refuse to issue a permit when the burning to be conducted under this section is in violation of rules and regulations governing the control of air pollution adopted by competent authority under Article 21B of Chapter 143 of the General Statutes of North Carolina. If a fire is discovered burning in any area subject to this section under any conditions which are considered by the Secretary of the Department of Natural Resources and Community Development, or his duly authorized agent, to be in violation of rules and regulations governing the control of air pollution adopted by competent authority under Article 21B of Chapter 143 of the General Statutes of North Carolina, the Secretary, or any duly authorized agent, is hereby empowered to enter upon the lands where such burning is occurring and, at their option, to extinguish such fires which are in violation of said rules and regulations.

This section shall not apply to any fires started, or caused to be started, within 100 feet of an occupied dwelling house, if such fire shall be confined within an enclosure from which burning material may not escape, or within a protected area upon which a watch is being maintained and which is provided with adequate fire protection equipment.

No charge shall be made for the granting of any permit or special burning permit required by this section.

(e) Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned for a period of not more than 30 days, or both, in the discretion of the court. The penalties imposed by this section shall be separate and apart and not in lieu of any civil or criminal penalties which may be imposed by G.S. 143-215.114 of Article 21B of Chapter 143 of the General Statutes. Compliance with this section does not relieve permittee from the need to comply with rules and regulations adopted pursuant to Article 21B of Chapter 143 of the General Statutes of North Carolina. (1937, c. 207; 1939, c. 120; 1953, c. 915; 1973, c. 1262, s. 86; 1975, c. 493; 1977, c. 771, s. 4.)

CASE NOTES

Cited in Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

§ 14-140. Certain fires to be guarded by watchman.

All persons, firms or corporations who shall burn any tar kiln or pit of charcoal, or set fire to or burn any brush, grass or other material, whereby any property may be endangered or destroyed, shall keep and maintain a careful and competent watchman in charge of such kiln, pit, brush or other material while burning. Any person, firm or corporation violating the provisions of this section shall be punishable by a fine of not less than ten dollars ($10.00) nor more than fifty dollars ($50.00), or by imprisonment for not exceeding 30 days. Fire escaping from such kiln, pit, brush or other material while burning shall be prima facie evidence of neglect of these provisions. (1915, c. 243, s. 10; C. S., s. 4312.)

Local Modification. — Graham: Pub. Loc. 1933, c. 301.

CASE NOTES

The primary purpose of this section is to protect property. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

This section defines the standard of care imposed upon a person who undertakes to burn brush, grass, etc., and a violation of its provisions constitutes negligence. Pickard v. Burlington Belt Corp., 2 N.C. App. 97, 162 S.E.2d 601 (1968).

Cited in State v. Swanson, 233 N.C. 442, 27 S.E.2d 122 (1943).

§ 14-141. Burning or otherwise destroying crops in the field.

If any person shall willfully burn or destroy any other person's corn, cotton, wheat, barley, rye, oats, buckwheat, rice, tobacco, hay, straw, fodder, shucks or other provender in a stack, hill, rick or pen, or secured in any other way out of doors, or grass or sedge standing on the land, he shall be punished as a Class I felon. (1874-5, c. 133; Code, s. 985, subsec. 2; 1885, c. 42; Rev., s. 3339; C. S., s. 4313; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1; as to arson, see § 14-58 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony, and shall be punished by imprisonment in the county jail or State's prison for not less than four months nor more than five years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Out of Doors Defined. — One who burns cotton in a railroad car cannot be convicted under this section as the cotton is not out of doors. State v. Avery, 109 N.C. 798, 13 S.E. 931 (1891).

Indictment. — An indictment should charge a statutory crime in the words of the statute. Therefore an indictment charging setting fire to a lot of fodder without charging the burning, is defective. State v. Hall, 93 N.C. 571 (1885).

It is not necessary under this section to aver in the indictment that the stack burned was "out of doors." State v Huskins, 126 N.C. 1070, 35 S.E. 608 (1900).

§ 14-142. Injuries to dams and water channels of mills and factories.

If any person shall cut away, destroy or otherwise injure any dam, or part thereof, or shall obstruct or damage any race, canal or other water channel erected, opened, used or constructed for the purpose of furnishing water for the operation of any mill, factory or machine works, or for the escape of water therefrom, he shall, upon conviction, be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1866, c. 48; Code, s. 1087; Rev., s. 3678; C. S., s. 4315; 1969, c. 1224, s. 13.)

CASE NOTES

Obstruction below Dam or Channel. — This section only applies to obstructions and damages to the dam or channel and an indictment cannot be had for obstructions below the dam or channel. State v. Tomlinson, 77 N.C. 528 (1877).

Cited in State v. Suttle, 115 N.C. 784, 20 S.E. 725 (1894).

§ 14-143. Taking unlawful possession of another's house.

If any person shall enter upon the lands of another and take possession of any house or other building thereon, without permission of the owner or his agent and without a bona fide claim of right or title so to enter and take possession, and shall fail or refuse to vacate such premises within ten days after being notified personally in writing to do so, he shall be guilty of a misdemeanor and shall be fined or imprisoned at the discretion of the court punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1893, c. 347; Rev., s. 3685; C. S., s. 4316; 1969, c. 1224, s. 1.)

Local Modification. — Durham: 1929, c. 109.

Cross References. — As to trespass, see § 14-134; as to taking possession of house without consent, see § 14-159.

§ 14-144. Injuring houses, churches, fences and walls.

If any person shall, by any other means than burning or attempting to burn, unlawfully and willfully demolish, destroy, deface, injure or damage any of the houses or other buildings mentioned in this Chapter in the Article entitled Arson and Other Burnings; or shall by any other means than burning or attempting to burn unlawfully and willfully demolish, pull down, destroy, deface, damage or injure any church, uninhabitated house, outhouse or other house or building not mentioned in such article; or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure, or any part thereof, surrounding or about any yard, garden, cultivated field or pasture, or about any church or graveyard, or about any factory or other house in which machinery is used, every person so offending shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (R. C., c. 34, s. 103; Code, s. 1062; Rev., s. 3673; C. S., s. 4317; 1957, c. 250, s. 2; 1969, c. 1224, s. 1.)

Cross References. — As to injuring buildings or fences, see § 14-159; as to willful destruction by a tenant, see § 42-11.

CASE NOTES

I. Houses and Other Buildings.
II. Fences and Walls.

I. HOUSES AND OTHER BUILDINGS.

Trespass Necessary Part of Offense. — It is held, to constitute a criminal offense under this section, there must be a trespass. State v. Williams, 44 N.C. 197 (1853); State v. Watson, 86 N.C. 626 (1882); State v. McCracken, 118 N.C. 1240, 24 S.E. 530 (1896). And a party in lawful possession cannot commit a trespass upon the property of which he is in possession. Dobbs v. Gullidge, 20 N.C. 197 (1838); State v. Reynolds, 95 N.C. 616 (1886); State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890). Therefore, according to the logic of these decisions, if a defendant is shown to have been in the actual possession of the house at the time he tore it down, he committed no criminal offense under this section. We say the lawful possession, to distinguish his possession from that of a mere trespasser, which would not protect him from the penalty of the statute. State v. Jones, 129 N.C. 508, 39 S.E. 795 (1901).

Tenant's and Landlord's Liability to One Another. — A tenant is not subject under this section for damage done to property in his possession, but the owner of the reversion would be subject to prosecution for damage to property in the possession of a tenant, as the statute covers offenses against possession. State v. Mason, 35 N.C. 341 (1852); State v. Whitener, 92 N.C. 798 (1885).

A tenant cannot divest the possession of his landlord by an attempted attornment to another, and if the person to whom the attempted attornment is made enters the land and damages buildings he is liable under this section, in spite of proof of good faith and claim of title. State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890).

Same — Tenant at Sufferance. — If a building is torn down by a landlord while it is in the possession of a tenant at sufferance an indictment under this section cannot be supported, for this section was intended to protect property which the tenant at sufferance has no interest in. State v. Mace, 65 N.C. 344 (1871).

Houses Erected through Mistake. — One who peaceably enters upon lands believing at the time that he had the right to do so, and erects houses thereon, but, being still in possession, tears them down and removes them upon discovering that he was upon the lands of another, is not such a trespasser as will subject him to a conviction under this section. State v. Reynolds, 95 N.C. 616 (1886).

Schoolhouses Held by Adverse Possession. — If defendants are in the adverse possession of the schoolhouse and bona fide claiming it as their own, it is not a crime in them to pull it down. State v. Roseman, 66 N.C. 634 (1872).

"Other Houses". — It is manifest that the words "other house or building" embrace a jail, a jailhouse or building. State v. Bryan, 89 N.C. 531 (1883).

An "uninhabited house" within the purview of this section is a house fit for human habitation, but which is uninhabited at the time. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

Where the evidence disclosed that the structure was not fit for human habitation at the time of the alleged offense, the evidence was insufficient to be submitted to the jury in a prosecution for burning an uninhabited house in violation of this section. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

Dynamiting a Crib. — An indictment will lie under this section for injury to a crib by an explosion of dynamite. See State v. Martin, 173 N.C. 808, 92 S.E. 597 (1917).

An indictment which charged that the defendant unlawfully, willfully and feloniously set fire to and burned the dwelling house of named person, the same being unoccupied at the time of the burning, charged the burning of an "uninhabited house" in violation of this section, and not a violation of § 14-67. State v. Long, 243 N.C. 393, 90 S.E.2d 739 (1956).

Proof of defacement by either bullets or paint would be sufficient to sustain a conviction under this section. State v. Dawson, 272 N.C. 535, 159 S.E.2d 1 (1968).

II. FENCES AND WALLS.

Cultivated Field Defined. — Where a piece or tract of land has been cleared and fenced, and cultivated, or proposed to be cultivated and is kept and used for cultivation according to the ordinary course of husbandry, although nothing may be growing within the enclosure at the time of the trespass, it is a "cultivated field" within the description of the statute. State v. Allen, 35 N.C. 36 (1851); State v. McMinn, 81 N.C. 585 (1879).

The ruling in State v. Allen, 35 N.C. 36 (1851), was cited and approved in State v. McMinn, 81 N.C. 585 (1879), in which case it was also held that the smallness of the tract made no difference; that a town lot, if inclosed and cultivated, could be described as a "field" under this statute, unless it was used as a "garden," in which case it should be so described. State v. Campbell, 133 N.C. 640, 45 S.E. 344 1903).

Fence Must Enclose Something. — It is necessary under this section that the fence destroyed or injured surround or enclose something and a fence along a road to prevent passersby from turning into the field to avoid mud in the road, when not connected with any other fence is not within the meaning of this section. See State v. Roberts, 101 N.C. 744, 7 S.E. 714 (1888).

Title to Land No Defense. — It is well settled that where the State, in an indictment under this section, for unlawfully and willfully removing a fence, shows actual possession in the prosecutor, the defendant cannot excuse himself by showing title to the land upon which the fence was situated. State v. Graham, 53 N.C. 397 (1861); State v. Hovis, 76 N.C. 117 (1877); State v. Marsh, 91 N.C. 632 (1884); State v. Howell, 107 N.C. 835, 12 S.E. 569 (1890); State v. Fender, 125 N.C. 649, 34 S.E. 448 (1899); State v. Campbell, 133 N.C. 640, 45 S.E. 344 (1903); State v. Taylor, 172 N.C. 892, 90 S.E. 294 (1916).

Question of Title Cannot Be Raised. — Where a party has neither possession, nor a right of possession to land, he cannot, upon an indictment for unlawfully removing a fence therefrom, raise a question as to a right of entry, nor is it any defense to him that he did the act to bring on a civil suit in order to try the title. State v. Graham, 53 N.C. 397 (1861).

Agency No defense. — Under an indictment for tearing down a fence the defendant cannot avoid liability by showing that he acted as agent for another. State v. Campbell, 133 N.C. 640, 45 S.E. 344 (1903).

Destroying Fence When Line Is in Dispute. — Although a defendant cannot plead his title as a defense to an indictment for destroying fences, etc., on the land in possession of another, he can plead his title if the land is not in the possession of the prosecutor. In case of a disputed line if the prosecutor erects a fence on land in possession of the defendant, the defendant is not liable under this section for pulling it down. State v. Watson, 86 N.C. 626 (1882); State v. Fender, 125 N.C. 649, 34 S.E. 448 (1899). Nor is a quasi tenant occupying by the consent of the owner subject to prosecution under this section for the removal of a fence. State v. Wil'iams, 44 N.C. 197 (1853).

Right to Reclaim Fence. — Although rails of which a fence around an enclosure is made were taken from the land of another, no right to go on the land and remove the fence exists in favor of the person from whom the rails were taken as the fence is a part of the realty, and such a trespass comes within the meaning of this section. State v. McMinn, 81 N.C. 585 (1879).

Applicable to Wire Fences. — An indictment for cutting and destroying a wire fence may be maintained under this section if it charges that the wire fence was an enclosure. State v. Biggers, 108 N.C. 760, 12 S.E. 1024 (1891).

Fences across a Street Removed by Officer. — A fence erected across a public street is a public nuisance, and a city marshal will not be liable for abating the nuisance by pulling it down. State v. Godwin, 145 N.C. 461, 59 S.E. 132 (1907).

Defective Bill of Indictment. — A motion in arrest of judgment after conviction for a removal of fences on the ground that the bill of indictment is defective, will not be granted, unless it appears that the bill is so defective

that judgment cannot be pronounced upon it. State v. Taylor, 172 N.C. 892, 90 S.E. 294 (1916).

Instruction That Pasture Is a Field. — Where in a criminal prosecution for the violation of this section providing that a person removing a fence surrounding "any yard, garden, cultivated field, or pasture" should be guilty of a misdemeanor, the indictment charges the defendant with having removed a fence surrounding a cultivated field, and the evidence is that the fence surrounded a pasture, the word "pasture" and "cultivated field" are not synonymous and are distinguished in the statute by a disjunctive, and an instruction which charges that a pasture is a cultivated field within the meaning of the statute is erroneous. State v. Cornett, 199 N.C. 634, 155 S.E. 451 (1930).

§ 14-145. Unlawful posting of advertisements.

Any person who in any manner paints, prints, places, or affixes, or causes to be painted, printed, placed, or affixed, any business or commercial advertisement on or to any stone, tree, fence, stump, pole, automobile, building, or other object, which is the property of another without first obtaining the written consent of such owner thereof, or who in any manner paints, prints, places, puts, or affixes, or causes to be painted, printed, placed, or affixed, such an advertisement on or to any stone, tree, fence, stump, pole, mile-board, milestone, danger-sign, danger-signal, guide-sign, guide-post, automobile, building or other object within the limits of a public highway, shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. (Ex. Sess. 1924, c. 109.)

Cross References. — As to injuring, defacing, or destroying notices and advertisements, see §§ 14-384 and 14-385.

Legal Periodicals. — For comment on application of this section, see 3 N.C.L. Rev. 25.

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

§ 14-146. Injuring bridges.

If any person shall unlawfully and willfully demolish, destroy, break, tear down, injure or damage any bridge across any of the creeks or rivers or other streams in the State, he shall be guilty of a misdemeanor, and fined or imprisoned, or both, in the discretion of the court. (1883, c. 271; Code, s. 993; Rev., s. 3771; C. S., s. 4318.)

§ 14-147. Removing, altering or defacing landmarks.

If any person, firm or corporation shall knowingly remove, alter or deface any landmark in anywise whatsoever, or shall knowingly cause such removal, alteration or defacement to be done, such person, firm or corporation shall be guilty of a misdemeanor. This section shall not apply to landmarks, such as creeks and other small streams, which the interest of agriculture may require to be altered or turned from their channels, nor to such persons, firms or corporations as own the fee simple in the lands on both sides of the lines designated by the landmarks removed, altered or defaced. Nor shall this section apply to those adjoining landowners who may by agreement remove, alter or deface landmarks in which they alone are interested. (1858-9, c. 17; Code, s. 1063; Rev., s. 3674; 1915, c. 248; C. S., s. 4319.)

CASE NOTES

Removal of Stakes. — As between the parties stakes are evidence of a definite location of land, as also is the planting of a stone, and a removal of such stakes comes within the meaning of this section. State v. Jenkins, 164 N.C. 527, 80 S.E. 231 (1913).

Indictment. — An indictment charging that one A. B., with force and arms, etc., willfully and unlawfully did alter, and deface and remove a corner tree, the property of C., against the form of the statute, is good without a negative averment of the matter contained in the proviso to the act creating the offense. State v. Bryant, 111 N.C. 693, 16 S.E. 326 (1892).

§ 14-148. Defacing or desecrating grave sites.

(a) It is unlawful to willfully:

(1) Throw, place or put any refuse, garbage or trash in or on any cemetery;

(2) Take away, disturb, vandalize, destroy or change the location of any stone, brick, iron or other material or fence enclosing a cemetery without authorization of law or consent of the surviving spouse or next of kin of the deceased thereby causing damage of less than one thousand dollars ($1,000); or

(3) Take away, disturb, vandalize, destroy, tamper with or deface any tombstone, headstone, monument, grave marker, grave ornamentation, grave artifacts, shrubbery, flowers, plants or other articles within any cemetery erected or placed to designate where a body is interred or to preserve and perpetuate the memory and name of any person, without authorization of law or the consent of the surviving spouse or next of kin, thereby causing damage of less than one thousand dollars ($1,000).

(b) The provisions of this section shall not apply to a professional archaeologist as defined in G.S. 70-28(4) acting pursuant to the provisions of Article 3 of Chapter 70 of the General Statutes.

(c) Violation of this section is a misdemeanor punishable by a fine of not more than five hundred dollars ($500.00), imprisonment for not less than 60 days nor more than one year, or both, in the discretion of the court. In passing sentence, the court shall consider the appropriateness of restitution or reparation as a condition of probation under G.S. 15A-1343(b)(6) as an alternative to actual imposition of a fine, jail term, or both. (1840, c. 6; R. C., c. 34, s. 102; Code, s. 1088; Rev., s. 3680; C. S., s. 4320; 1969, c. 987; 1981, c. 752, s. 1; c. 853, s. 4.)

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, rewrote this section, which formerly related only to removing, breaking or defacing, monuments and tombstones.

The second 1981 amendment, effective Oct. 1, 1981, added subsection (b).

CASE NOTES

Editor's Note. — The cases cited in the following annotation were decided under this section as it stood prior to the 1981 amendment.

This section creates a misdemeanor not defined as larceny. State v. Jackson, 218 N.C. 373, 11 S.E.2d 149 (1940).

Right of Landowner to Remove. — Where the owner of land consents, either expressly or by implication to the interment of dead bodies on his land, he has no right to afterwards remove the bodies or to deface or pull down the gravestones and monuments erected to perpetuate their memory. State v. Wilson, 94 N.C. 1015 (1886).

Indictment. — It is not necessary, to charge in the indictment that the monument removed was intended to designate the spot where the dead body of a particular person named, or a person unknown, was interred. State v. Wilson, 94 N.C. 1015 (1886).

Applied in State v. Schultz, 294 N.C. 381, 240 S.E.2d 451 (1978).

Cited in Mills v. Carolina Cem. Park Corp., 242 N.C. 20, 86 S.E.2d 893 (1955).

§ 14-149. Desecrating, plowing over or covering up graves.

(a) It is a Class I felony, without authorization of law or the consent of the surviving spouse or next of kin of the deceased, to knowingly and willfully:

(1) Open, disturb, destroy, remove, vandalize or desecrate any casket, human remains or any portion thereof or the repository of any such remains, by any means including plowing under, tearing up, covering over or otherwise obliterating or removing any grave;

(2) Take away, vandalize or destroy any stone, brick, iron or other material or fence enclosing a cemetery, causing damage of more than one thousand dollars ($1,000); or

(3) Take away, vandalize, destroy or deface any tombstone, headstone, monument, grave marker, grave ornamentation, grave artifacts, shrubbery, flowers, plants or other articles within any cemetery erected or placed to designate the place where any dead body is interred or to preserve and perpetuate the memory and the name of any person, causing damage of more than one thousand dollars ($1,000).

(b) The provisions of this section shall not apply to a professional archaeologist as defined in G.S. 70-28(4) acting pursuant to the provisions of Article 3 of Chapter 70 of the General Statutes. (1889, c. 130; Rev., s. 3681; 1919, c. 218; C. S., s. 4321; 1981, c. 752, s. 2; c. 853, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The first 1981 amendment, effective Oct. 1, 1981, rewrote this section.

The second 1981 amendment, effective Oct. 1, 1981, designated the provisions of this section as rewritten by the first 1981 amendment as subsection (a) and added subsection (b).

CASE NOTES

Editor's Note. — The cases cited in the following section were decided under former § 14-150 which, prior to its repeal and prior to the 1981 amendment to this section, governed the felony of disturbing graves.

Intent. — The intent to open a grave and remove the dead body is sufficient criminal intent, and proof of the intent to disturb the grave is conclusive. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

Persons Liable. — The mayor or other town officers counseling their subordinates to remove bodies are liable under this section although they were honestly mistaken as to the scope of their official power. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

When Lot Is Not Paid For. — The fact that the lot has not been paid for will not excuse the disturbance of a body only for the purpose of moving it to a pauper section. State v. McLean, 121 N.C. 589, 28 S.E. 140 (1897).

§§ 14-150, 14-150.1: Repealed by Session Laws 1981, c. 752, s. 3, effective October 1, 1981.

Cross References. — As to defacing or desecrating grave sites, see § 14-148. As to desecrating, plowing over or covering up graves, see § 14-149.

§ 14-151. Interfering with gas, electric and steam appliances.

If any person shall willfully, with intent to injure or defraud, commit any of the acts set forth in the following subdivisions, he shall be guilty of a misdemeanor:

(1) Connect a tube, pipe, wire or other instrument or contrivance with a pipe or wire used for conducting or supplying illuminating gas, fuel, natural gas or electricity in such a manner as to supply such gas or electricity to any burner, orifice, lamp or motor where the same is or can be burned or used without passing through the meter or other instrument provided for registering the quantity consumed; or,

(2) Obstruct, alter, injure or prevent the action of a meter or other instrument used to measure or register the quantity of illuminating fuel, natural gas or electricity consumed in a house or apartment, or at an orifice or burner, lamp or motor, or by a consumer or other person other than an employee of the company owning any gas or electric meter, who willfully shall detach or disconnect such meter, or make or report any test of, or examine for the purpose of testing any meter so detached or disconnected; or,

(3) In any manner whatever change, extend or alter any service or other pipe, wire or attachment of any kind, connecting with or through which natural or artificial gas or electricity is furnished from the gas mains or pipes of any person, without first procuring from said person written permission to make such change, extension or alterations; or,

(4) Make any connection or reconnection with the gas mains, service pipes or wires of any person, furnishing to consumers natural or artificial gas or electricity, or turn on or off or in any manner interfere with any valve or stopcock or other appliance belonging to such person, and connected with his service or other pipes or wires, or enlarge the orifices of mixers, or use natural gas for heating purposes except through mixers, or electricity for any purpose without first procuring from such person a written permit to turn on or off such stopcock or valve, or to make such connection or reconnections, or to enlarge the orifice of mixers, or to use for heating purposes without mixers, or to interfere with the valves, stopcocks, wires or other appliances of such, as the case may be; or,

(5) Retain possesison of or refuse to deliver any mixer, meter, lamp or other appliance which may be leased or rented by any person, for the purpose of furnishing gas, electricity or power through the same, or sell, lend or in any other manner dispose of the same to any person other than such person entitled to the possession of the same; or,

(6) Set on fire any gas escaping from wells, broken or leaking mains, pipes, valves or other appliances used by any person in conveying gas to consumers, or interfere in any manner with the wells, pipes, mains, gateboxes, valves, stopcocks, wires, cables, conduits or any other appliances, machinery or property of any person engaged in furnishing gas to consumers unless employed by or acting under the authority and direction of such person; or,

(7) Open or cause to be opened, or reconnect or cause to be reconnected any valve lawfully closed or disconnected by a district steam corporation; or

(8) Turn on steam or cause it to be turned on or to reenter any premises when the same has been lawfully stopped from entering such premises. (1901, c. 735; Rev., s. 3666; C. S., s. 4323.)

§ 14-151.1. Interfering with electric, gas or water meters; prima facie evidence of intent to alter, tamper with or bypass electric, gas or water meters; civil liability.

(a) It shall be unlawful for any unauthorized person to alter, tamper with or bypass a meter which has been installed for the purpose of measuring the use of electricity, gas or water or knowingly to use electricity, gas or water passing through any such tampered meter or use electricity, gas or water bypassing a meter provided by an electric, gas or water supplier for the purpose of measuring and registering the quantity of electricity, gas or water consumed.

(b) Any meter or service entrance facility found to have been altered, tampered with, or bypassed in a manner that would cause such meter to inaccurately measure and register the electricity, gas or water consumed or which would cause the electricity, gas or water to be diverted from the recording apparatus of the meter shall be prima facie evidence of intent to violate and of the violation of this section by the person in whose name such meter is installed or the person or persons so using or receiving the benefits of such unmetered, unregistered or diverted electricity, gas or water.

(c) Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not longer than two years, or both fined and imprisoned, in the discretion of the court.

(d) Whoever is found in a civil action to have violated any provion hereof shall be liable to the electric, gas or water supplier in triple the amount of losses and damages sustained or five hundred dollars ($500.00), whichever is greater.

(e) Nothing in this section shall be construed to apply to licensed contractors while performing usual and ordinary services in accordance with recognized customs and standards. (1977, c. 735, s. 1.)

CASE NOTES

Applied in State v. Hill, 41 N.C. App. 722, 255 S.E.2d 757 (1979).

§ 14-152. Injuring fixtures and other property of gas companies; civil liability.

If any person shall willfully, wantonly or maliciously remove, obstruct, injure or destroy any part of the plant, machinery, fixtures, structures or buildings, or anything appertaining to the works of any gas company, or shall use, tamper or interfere with the same, he shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not more than 30 days for such offense. Such person shall also forfeit and pay to the company so injured, to be sued for and recovered in a civil action, double the amount of the damages sustained by any such injury. (1889 (Pr.), c. 35, s. 3; Rev., s. 3671; C. S., s. 4324.)

§ 14-153. Tampering with engines and boilers.

If any person shall willfully turn out water from any boiler or turn the bolts of any engine or boiler, or meddle or tamper with such boiler or engine, or any other machinery in connection with any boiler or engine, causing loss, damage, danger or delay to the owner in the prosecution of his work, he shall be guilty of a misdemeanor. (1901, c. 733; Rev., s. 3667; C. S., s. 4325.)

CASE NOTES

Cited in State v. Hargett, 196 N.C. 692, 146 S.E. 801 (1929).

§ 14-154. Injuring wires and other fixtures of telephone, telegraph and electirc-power companies.

If any person shall willfully injure, destroy or pull down any telegraph, telephone or elctric-power-transmission pole, wire, insulator or any other fixture or apparatus attached to a telegraph, telephone or electric-power-transmission line, he shall be guilty of a misdemeanor, and shall be fined and imprisoned at the discretion of the court. (1881, c. 4; 1883, c. 103; Code, s. 1118; Rev., s. 3847; 1907, c. 827, s. 1; C. S., s. 4326.)

§ 14-155. Unauthorized connections with telephone or telegraph.

It shall be unlawful for any person to tap or make any connection with any wire or apparatus of any telephone or telegraph company operating in this State, except such connection as may be authorized by the person or corporation operating such wire or apparatus. Any person violating this section shall, upon conviction, be fined not more than ten dollars ($10.00) or imprisoned not more than 10 days for each offense. Each day's continuance of such unlawful connection shall be a separate offense. No connection approved by the Federal Communications Commission or the North Carolina Utilities Commission shall be a violation of this section. (1911, c. 113; C.S., s. 4327; 1973, c. 648; 1977, 2nd Sess., c. 1185, s. 2.)

Cross References. — As to theft of cable television service, see § 14-118.5.

CASE NOTES

Admissibility of tape recordings made in violation of this section in a prosecution under § 14-196.1. See State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966).

§ 14-156. Injuring fixtures and other property of electric-power companies.

It shall be unlawful for any person willfully and wantonly, and without the consent of the owner, to take down, remove, injure, obstruct, displace or destroy any line erected or constructed for the transmission of electrical current, or any poles, towers, wires, conduits, cables, insulators or any support upon which wires or cables may be suspended, or any part of any such line or appurtenances or apparatus connected therewith, or to sever any wire or cable thereof, or in any manner to interrupt the transmission of electrical current over and along any such line, or to take down, remove, injure or destroy any house, shop, building or other structure or machinery connected with or necessary to the use of any line erected or constructed for the transmission of electrical current, or to wantonly or willfully cause injury to any of the property

mentioned in this section by means of fire. Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned not longer than one year, or both fined and imprisoned, in the discretion of the court. (1907, c. 919; C. S., s. 4328.)

§ 14-157. Felling trees on telephone and electric-power wires.

If any person shall negligently and carelessly cut or fell any tree, or any limb or branch therefrom, in such a manner as to cause the same to fall upon and across any telephone, electric light or electric-power-transmission wire, from which any injury to such wire shall be occasioned, he shall be guilty of a misdemeanor, and shall also be liable to penalty of fifty dollars ($50.00) for each and every offense. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1903, c. 616; Rev., s. 3849; 1907, c. 827, s. 2; C. S., s. 4329; 1969, c. 1224, s. 9.)

§ 14-158. Interfering with telephone lines.

If any person shall unnecessarily disconnect the wire or in any other way render any telephone line, or any part of such line, unfit for use in transmitting messages, or shall unnecessarily cut, tear down, destroy or in any way render unfit for the transmission of messages any part of the wire of a telephone line, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1901, c. 318; Rev., s. 3845; C. S., s. 4330; 1969, c. 1224, s. 3.)

CASE NOTES

Civil Action for Damages. — The willful cutting of a telephone wire in public use for hire is made a misdemeanor by this section, and where such act has caused damages to another the action sounds in tort, making the tort-feasor liable for any injuries naturally following and flowing from the wrongful act, independent of any contractual relations between the parties. Hodges v. Virginia-Carolina Ry., 179 N.C. 566, 103 S.E. 145 (1920).

§ 14-159. Injuring buildings or fences; taking possession of house without consent.

If any person shall deface, injure or damage any house, uninhabited house or other building belonging to another; or deface, damage, pull down, injure, remove or destroy any fence or wall enclosing, in whole or in part, the premises belonging to another; or shall move into, take possession of and/or occupy any house, uninhabited house or other building situated on the premises belonging to another, without having first obtained authority so to do and consent of the owner or agent thereof, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars ($50.00), or imprisoned not exceeding 30 days. (1929, c. 192, s. 1.)

Cross References. — See § 14-144. As to willful destruction by a tenant, see § 42.11. As to taking unlawful possession of another's house, see § 14-143.

§§ 14-159.1 to 14-159.5: Reserved for future codification purposes.

ARTICLE 22A.

Trespassing upon "Posted" Property to Hunt, Fish or Trap.

§ 14-159.6. Trespass for purposes of hunting, etc., without written consent a misdemeanor.

Any person who willfully goes on the land, waters, ponds, or a legally established waterfowl blind of another upon which notices, signs or posters, described in G.S. 14-159.7, prohibiting hunting, fishing or trapping, or upon which "posted" notices have been placed, to hunt, fish or trap without the written consent of the owner or his agent shall be guilty of a misdemeanor and punished by a fine of not less than fifty dollars ($50.00) nor more than two hundred fifty dollars ($250.00), or by imprisonment for not more than six months, or by both fine and imprisonment. Provided, further, that no arrests under authority of this section shall be made without the consent of the owner or owners of said land, or their duly authorized agents in the following counties: Halifax, Onslow, Warren. (1949, c. 887, s. 1; 1953, c. 1226; 1965, c. 1134; 1975, c. 280, s. 1; 1979, c. 830, s. 11.)

Editor's Note. — This section was formerly § 113-120.1. It was transferred to its present location by Session Laws 1979, c. 830, s. 11, effective July 1, 1980.

§ 14-159.7. Regulations as to posting of property.

The notices, signs or posters described in G.S. 14-159.6 shall measure not less than 120 square inches and shall be conspicuously posted on private lands not more than 200 yards apart close to and along the boundaries. At least one such notice, sign, or poster shall be posted on each side of such land, and one at each corner thereof, provided that said corner can be reasonably ascertained. For the purpose of prohibiting fishing, or the taking of fish by any means, in any stream, lake, or pond, it shall only be necessary that the signs, notices, or posters be posted along the stream or shoreline of a pond or lake at intervals of not more than 200 yards apart. (1949, c. 887, s. 2; 1953, c. 1226; 1965, c. 923; 1975, c. 280, ss. 2, 3; 1979, c. 830, s. 11.)

Editor's Note. — This section was formerly § 113-120.2. It was transferred to its present location by Session Laws 1979, c. 830, s. 11, effective July 1, 1980.

§ 14-159.8. Mutilation, etc., of "posted" signs; posting signs without consent of owner or agent.

Any person who shall mutilate, destroy or take down any "posted," "no hunting" or similar notice, sign or poster on the lands, waters, or legally established waterfowl blind of another, or who shall post such sign or poster on the lands, waters or legally established waterfowl blind of another, without the consent of the owner or his agent, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars ($100.00). (1949, c. 887, s. 3; 1953, c. 1226; 1969, c. 51; 1979, c. 830, s. 11.)

Editor's Note. — This section was formerly § 113-120.3. It was transferred to its present location by Session Laws 1979, c. 830, s. 11, effective July 1, 1980.

§ 14-159.9. Entrance on navigable waters, etc., for purpose of fishing, hunting or trapping not prohibited.

Nothing in this Article shall be construed to prohibit the entrance of any person upon navigable waters and the bays and sounds adjoining such waters for the purpose of fishing, hunting or trapping. (1949, c. 887, s. 4; 1953, c. 1226; 1979, c. 830, s. 11.)

Editor's Note. — This section was formerly § 113-120.4. It was transferred to its present location by Session Laws 1979, c. 830, s. 11, effective July 1, 1980.

§ 14-159.10. Enforcement of Article by peace officers; wildlife protectors authorized to execute process.

This Article may be enforced by deputy sheriffs and other peace officers with general subject matter jurisdiction. Law-enforcement officers of the North Carolina Wildlife Resources Commission may execute process issued by the court for violations of this Article. (1979, c. 830, s. 11.)

Editor's Note. — Session Laws 1979, c. 830, s. 17, makes this section effective July 1, 1980.

ARTICLE 23.

Trespasses to Personal Property.

§ 14-160. Willful and wanton injury to personal property; punishments.

(a) If any person shall wantonly and willfully injure the personal property of another he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months or both.

(b) Notwithstanding the provisions of subsection (a), if any person shall wantonly and willfully injure the personal property of another, causing damage in an amount in excess of two hundred dollars ($200.00), he shall be guilty of a misdemeanor punishable as provided in G.S. 14-3(a).

(c) This section applies to injuries to personal property without regard to whether the property is destroyed or not. (1876-7, c. 18; Code, s. 1082; 1885, c. 53; Rev., s. 3676; C. S., s. 4331; 1969, c. 1224, s. 14.)

Cross References. — As to definition of personal property, see § 12-3, subdivision (6). As to prosecution for perjury based upon acquittal in former prosecution under this section, see note to § 14-209.

CASE NOTES

This section was designed to avoid the element of malicious ill will required by the common-law crime of malicious mischief. State v. Cannady, 18 N.C. App. 213, 196 S.E.2d 617 (1973), aff'd, 22 N.C. App. 53, 205 S.E.2d 358 (1974).

Thus, Common-Law Malicious Mischief Not Superseded. — This section was not intended to supersede the common law as to malicious mischief, and though malice must be charged at common law it is not necessary under this section. State v. Martin, 141 N.C. 832, 53 S.E. 874 (1906).

And Malice Not Necessary. — It is not necessary to allege or prove any malice to the owner of personal property on the part of one

who wantonly and willfully injures it nor is it material whether the property was destroyed or not. State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Injury Must Be Wanton and Willful. — Destruction of personal property is not a crime. It becomes so only when the injury is wanton and willful under this section. State v. Sims, 247 N.C. 751, 102 S.E.2d 143 (1958).

Elements Differ from Discharging Firearm into Occupied Vehicle. — The elements of willful damage to property by shooting out the automobile window are not the same as discharging a firearm into an occupied vehicle. The element of damages which must be shown in a charge of willful damage to property is not an element in a charge of discharging a firearm into an occupied vehicle. Therefore, the two charges are not the same in fact or in law. State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

Offense May Be Committed Jointly. — The offense under this section may be committed jointly by several persons, one doing the act, the others aiding and abetting or participating. State v. Martin, 141 N.C. 832, 53 S.E. 874 (1906); State v. Parrish, 251 N.C. 274, 111 S.E.2d 314 (1959).

What Constitutes Personal Property — Promissory Note. — A promissory note or due bill being an "evidence of debt" is personal property within the meaning of this section and § 12-3, subdivision (6). State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Same — Electric Streetcar. — An electric streetcar is personalty and not a fixture. State v. Sneed, 121 N.C. 614, 28 S.E. 365 (1897).

Same — Fence. — Proof of the destruction of a fence erected upon land was held to be insufficient to sustain a conviction upon an indictment charging wanton and willful injury to personal property, since a fence is a part of the realty and there was a fatal variance between allegation of ownership of the realty and proof. State v. Baker, 231 N.C. 136, 56 S.E.2d 424 (1949).

Destruction of Whiskey by Revenue Officer. — The mere possession of whiskey gives no title; and a revenue officer who seizes a barrel concealed on private premises, and in good faith destoys it, is not guilty of a misdemeanor under this section. North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888).

"Unlawfully" Not Necessary Allegation. — An indictment for injury to personal property, under this section, which charged that the act was "wantonly and willfully" done, was not defective because it did not aver the act to have been unlawfully perpetrated. Lawful acts are not done wantonly and willfully. State v. Martin, 107 N.C. 904, 12 S.E. 194 (1890).

But "Willfully and Wantonly" Necessary. — An indictment cannot be sustained under this section if there is neither an allegation nor finding that the injury was "willfully and wantonly" done. The words "unlawfully and on purpose" will not supply in their place. State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

And the words "unlawfully and on purpose" will not supply in their place. State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

Effect of Erroneous Conviction under This Section Instead of § 14-165. — Where there is an erroneous conviction under this section, when the indictment should have been drawn under § 14-165, et seq., the prisoner should be discharged with permission to the solicitor (now district attorney) to send another bill, if so advised. State v. Reed, 196 N.C. 357, 145 S.E. 691 (1928).

In the absence of any proof that damage was greater than $200, defendant should be sentenced pursuant to subsection (a). State v. Tanner, 25 N.C. App. 251, 212 S.E.2d 695 (1975).

Applied in State v. Fisher, 270 N.C. 315, 154 S.E.2d 333 (1967); State v. Locklear, 7 N.C. App. 375, 172 S.E.2d 267 (1970); In re Ingram, 8 N.C. App. 266, 174 S.E.2d 89 (1970).

Stated in State v. Stinson, 263 N.C. 283, 139 S.E.2d 558 (1965).

Cited in State v. Hicks, 233 N.C. 511, 64 S.E.2d 871 (1951); State v. Clayton, 251 N.C. 261, 111 S.E.2d 299 (1959).

§ 14-160.1. Alteration, destruction or removal of permanent identification marks from personal property.

(a) It shall be unlawful for any person to alter, deface, destroy or remove the permanent serial number, manufacturer's identification plate or other permanent, distinguishing number or identification mark from any item of personal property with the intent thereby to conceal or misrepresent the identity of said item.

(b) It shall be unlawful for any person knowingly to sell, buy or be in possession of any item of personal property, not his own, on which the permanent serial number, manufacturer's identification plate or other permanent,

distinguishing number or identification mark has been altered, defaced, destroyed or removed for the purpose of concealing or misrepresenting the identity of said item.

(c) A violation of any of the provisions of this section shall be a misdemeanor, punishable on conviction thereof by imprisonment not to exceed two years or by a fine not to exceed one thousand dollars ($1,000) or both, in the discretion of the court.

(d) This section shall not in any way affect the provisions of G.S. 20-108, 20-109(a) or 20-109(b). (1977, c. 767, s. 1.)

§ 14-161. Malicious removal of packing from railway coaches and other rolling stock.

If any person shall willfully and maliciously take or remove the waste or packing from the journal box of any locomotive, engine, tender, carriage, coach, car, caboose or truck used or operated upon any railroad whether the same be operated by steam or electricity, he shall upon conviction thereof be fined or imprisoned in the jail or State's prison, in the discretion of the court. (1905, c. 335; Rev., s. 3759; C. S., s. 4332.)

§ 14-162. Removing boats.

If any person shall loose, unmoor, or turn adrift from any landing or other place wherever the same shall be, any boat, canoe, or other marine vessel, or if any person shall direct the same to be done without the consent of the owner, or the person having the lawful custody or possession of such vessel, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars ($500.00), imprisonment for not more than six months or both. The owner may also have his action for such injury. The penalties aforesaid shall not extend to any person who shall press any such property by public authority. (R.C., c. 14, ss. 1, 3; Code, s. 2288; 1889, c. 378; Rev., s. 3544; C. S., s. 4333; 1977, c. 729.)

§ 14-163. Poisoning livestock.

If any person shall willfully and unlawfully poison any horse, mule, hog, sheep or other livestock, the property of another, such person shall be punished as a Class I felon. (1898-9, c. 253; Code, s. 1003; Rev., s. 3313; C. S., s. 4334; 1969, c. 1224, s. 3; 1973, c. 1388; 1979, c. 760, s. 5.)

Cross References. — As to molesting or injuring livestock generally, see § 14-366. For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony punishable by imprisonment for not more than five years or by a fine in the discretion of the court, or both" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-164. Taking away or injuring exhibits at fairs.

If any person, without the license of the owner, or any agricultural or other society, shall unlawfully carry away, remove, destroy, mar, deface or injure anything, animate or inanimate, while on exhibition on the grounds of any such society, or going to or returning from the same, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. It shall be sufficient in any indictment for any such offense, or for the larceny of any such thing, animate or inanimate as aforesaid, to charge that the thing so carried away, destroyed, marred, injured or feloniously stolen is the property of the society to which the said thing shall be forwarded for exhibition. (1870-1, c. 184, s. 4; Code, s. 2796; Rev., s. 3668; C. S., s. 4335; 1969, c. 1224, s. 2.)

Cross References. — As to fraudulent entries at fairs, see § 14-116.

Article 24.

Vehicles and Draft Animals—Protection of Bailor against Acts of Bailee.

§ 14-165. Malicious or willful injury to hired personal property.

Any person who shall rent or hire from any person, firm or corporation, any horse, mule or like animal, or any buggy, wagon, truck, automobile, or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, who shall maliciously or willfully injure or damage the same by in any way using or driving the same in violation of any statute of the State of North Carolina, or who shall permit any other person so to do, shall be guilty of a misdemeanor and subject to punishment as hereinafter provided. (1927, c. 61, s. 1; 1965, c. 1073, s. 1.)

Cross References. — See note under § 14-160.

§ 14-166. Subletting of hired property.

Any person who shall rent or hire, any horse, mule, or other like animal, or any buggy, wagon, truck, automobile, or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, who shall, without the permission of the person, firm or corporation from whom such property is rented or hired, sublet or rent the same to any other person, firm or corporation, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more that six months, or both. (1927, c. 61, s. 2; 1965, c. 1073, s. 2; 1969, c. 1224, s. 15.)

§ 14-167. Failure to return hired property.

Any person who shall rent or hire, any horse, mule or other like animal, or any buggy, wagon, truck, automobile, or other vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, and who shall willfully fail to return the same to the possession of the person, firm or corporation from whom such property has been rented or hired at the expiration of the time for

which such property has been rented or hired, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 61, s. 3; 1965, c. 1073, s. 3; 1969, c. 1224, s. 15.)

§ 14-168. Hiring with intent to defraud.

Any person who shall, with intent to cheat and defraud the owner thereof of the rental price therefor, hire or rent any horse or mule or any other like animal, or any buggy, wagon, truck, automobile or other like vehicle, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value, or who shall obtain the possession of the same by false and fraudulent statements made with intent to deceive, which are calculated to deceive, and which do deceive, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 61, s. 4; 1965, c. 1073, s. 4; 1969, c. 1224, s. 15.)

§ 14-168.1. Conversion by bailee, lessee, tenant or attorney-in-fact.

Every person entrusted with any property as bailee, lessee, tenant or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same, or the proceeds thereof, to his own use, or secretes it with a fraudulent intent to convert it to his own use, shall be guilty of a misdemeanor.

If, however, the value of the property converted or secreted, or the proceeds thereof, is in excess of four hundred dollars ($400.00), every person so converting or secreting it is guilty of a Class H felony. In all cases of doubt the jury shall, in the verdict, fix the value of the property converted or secreted. (1965, c. 1073, s. 5; 1979, c. 468; 1979, 2nd Sess., c. 1316, s. 13.)

Effect of Amendments. — The 1979 amendment, effective Jan. 1, 1980, added the second paragraph.

The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, inserted "Class H" near the end of the first sentence in the second paragraph. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

CASE NOTES

Embezzlement and fraudulent conversion are not necessarily and strictly synonymous. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Section 14-90 Compared. — This section is more limited in its scope with regard to bailees than § 14-90; it appears to embrace a bailee "who fraudulently converts the same" to his own use, while § 14-90 covers the bailee who "shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use." State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

There is no irreconcilable conflict between § 14-90 and this section as they relate to bailees. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

This section does not remove bailees from § 14-90 or make embezzlement by a bailee a misdemeanor. State v. Hutson, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

Quoted in State v. Bailey, 25 N.C. App. 412, 213 S.E.2d 400 (1975).

§ 14-168.2. Definitions.

For the purposes of this Article, the terms "rent," "hire" and "lease" are used to designate the letting for hire of any horse, mule or other like animal, or any buggy, wagon, truck, automobile, aircraft, motor, trailer, appliance, equipment, tool, or other thing of value by lease, bailment, or rental agreement. (1965, c. 1073, s. 5.)

§ 14-168.3. Prima facie evidence of intent to convert property.

It shall be prima facie evidence of intent to commit a crime as set forth in G.S. 14-167, 14-168, and 14-168.1 when one who has, by written instrument, leased or rented the personal property of another:

(1) Failed or refused to return such property to its owner after the lease, bailment, or rental agreement has expired,
   a. Within 10 days, and
   b. Within 48 hours after written demand for return thereof is personally served or given by registered mail delivered to the last known address provided in such lease or rental agreement, or
(2) When the leasing or rental of such personal property is obtained by presentation of identification to the lessor or rentor thereof which is false, fictitious, or knowingly not current as to name, address, place of employment, or other identification. (1965, c. 1118.)

§ 14-169. Violation made misdemeanor.

Except as otherwise provided, any person violating the provisions of this Article shall be guilty of a misdemeanor and punished at the discretion of the court. (1927, c. 61, s. 5; 1929, c. 38, s. 1; 1969, c. 1224, s. 15.)

Article 25.

Regulating the Leasing of Storage Batteries.

§ 14-170. "Rental battery" defined; identification of rental storage batteries.

As used in this Article the words "rental battery" are defined as an electric storage battery loaned, rented or furnished for temporary use by any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries. All such persons, firms or corporations may mark any such rental batteries belonging to them with the word "rental," or any other word of similar meaning, printed or stamped upon or attached to such battery together with such words as shall identify such batteries as the property of the person, firm or corporation so marking the same. It shall be unlawful for any person, firm or corporation to so mark any such batteries which are not the property of such person, firm or corporation. (1933, c. 185, s.1.)

§ 14-171. Defacing word "rental" prohibited.

It is unlawful for any person, firm or corporation to remove, deface, alter or destroy the word "rental" on any rental battery or any other word, mark or character printed, painted or stamped upon or attached to any rental battery to identify the same as belonging to or being the property of any person, firm or corporation. (1933, c. 185, s. 2.)

§ 14-172. Sale, etc., of rental battery prohibited.

It is unlawful for any person, firm or corporation other than the owner thereof to sell, dispose of, deliver, rent or give to any other person, firm or corporation any rental battery marked by the owner as provided by G.S. 14-170. (1933, c. 185, s. 3.)

§ 14-173. Repairing another's rental battery prohibited.

It is unlawful for any person, firm or corporation engaged in the business of buying, selling, repairing or recharging electric storage batteries to recharge or repair any rental battery not owned by such person, firm or corporation marked by the owner thereof as provided by G.S. 14-170. (1933, c. 185, s. 4.)

§ 14-174. Time limit on possession of rental battery without written consent.

It is unlawful for any person, firm or corporation to retain in his, their or its possession for a longer period than 10 days, without the written consent of the owner, any rental battery marked as such by the owner as provided by G.S. 14-170. Demand must be made on any person who so retains a rental battery in his possession at least five days before a prosecution can be instituted: Provided, however, that proof of a registered letter having been sent to the person so offending at his last known address shall be accepted as conclusive evidence of such demand. (1933, c. 185, s. 5.)

§ 14-175. Violation made misdemeanor.

Any person, firm or corporation, and the officers, agents, employees, and members of any firm or corporation violating any of the provisions of G.S. 14-170 to 14-174 shall be guilty of a misdemeanor and upon conviction thereof shall be sentenced to pay a fine not exceeding fifty dollars ($50.00) or be imprisoned for a term of not exceeding 30 days in the discretion of the court. (1933, c. 185, s. 6.)

§ 14-176. Rebuilding storage batteries out of old parts and sale of, regulated.

Any person, firm or corporation who assembles or rebuilds an electric storage battery for use on automobiles, in whole or in part, out of secondhand or used material such as containers, separators, plates, groups or other battery parts, and sells same or offers same for sale in the State of North Carolina without the word "rebuilt" placed in the side of the container, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine not exceeding two hundred and fifty dollars ($250.00) or imprisoned for a term not exceeding six months or both. (1933, c. 535.)

SUBCHAPTER VII. OFFENSES AGAINST PUBLIC MORALITY AND DECENCY.

ARTICLE 26.

Offenses against Public Morality and Decency.

§ 14-177. Crime against nature.

If any person shall commit the crime against nature, with mankind or beast,

he shall be punished as a Class H felon. (5 Eliz., c. 17; 25 Hen. VIII, c. 6; R. C., c. 34, s. 6; 1868-9, c. 167, s. 6; Code, s. 1010; Rev., s. 3349; C. S., s. 4336; 1965, c. 621, s. 4; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1. As to the crime of loitering for the purpose of violating this section, see § 14-204.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall be fined or imprisoned in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For article on the law of crime against nature with particular regard to this section, see 32 N.C.L. Rev. 312 (1954).

For survey of 1974 case law on this section, see 53 N.C.L. Rev. 1037 (1975).

For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

This section is constitutional. State v. Enslin, 25 N.C. App. 662, 214 S.E.2d 318, appeal dismissed, 288 N.C. 245, 217 S.E.2d 669 (1975), cert. denied, 425 U.S. 903, 96 S. Ct. 1492, 48 L. Ed. 2d 810 (1976). See State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

This section is constitutional, and a defendant is not entitled to quash the bill of indictment against him on grounds that it is unconstitutional because of its vagueness and overbreadth. State v. Moles, 17 N.C. App. 664, 195 S.E.2d 352 (1973); State v. Crouse, 22 N.C. App. 47, 205 S.E.2d 361 (1974).

This section is not unconstitutionally vague. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied, 298 N.C. 303, 259 S.E.2d 304 (1979).

Persons of ordinary intelligence would conclude a fellatio between a man and a woman would be classified as a crime against nature and forbidden by this section. This keeps it from being unconstitutionally vague. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied, 298 N.C. 303, 259 S.E.2d 304 (1979).

The right of privacy does not prohibit the prosecution of unmarried persons for concensual fellatio done in private. State v. Poe, 40 N.C. App. 385, 253 S.E.2d 843, cert. denied, 298 N.C. 303, 259 S.E.2d 304 (1979).

The State, consistent with the Fourteenth Amendment, can classify unmarried persons so as to prohibit fellatio between males and females without forbidding the same acts between married couples. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied, 298 N.C. 303, 259 S.E.2d 304 (1979).

No authority prohibits a state on constitutional grounds from punishing under a statute such as this section individuals who commit the proscribed act in a public restroom. State v. Jarrell, 24 N.C. App. 610, 211 S.E.2d 837, cert. denied, 286 N.C. 725, 213 S.E.2d 724 (1975).

Purpose. — The legislative intent and purpose of this section is to punish persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality. State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966); State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Definition. — The crime against nature is sexual intercourse contrary to the order of nature. It includes acts with animals and acts between humans per anum and per os. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969); State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).

Conduct declared criminal by this section is sexual intercourse contrary to the order of nature. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

Scope of Section. — This section includes all kindred acts of bestial character whereby degraded and perverted sexual desires are sought to be gratified. State v. Griffin, 175 N.C. 767, 94 S.E. 678 (1917); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section includes unnatural intercourse between male and male. State v. Fenner, 166 N.C. 247, 80 S.E. 970 (1914).

This section includes acts with animals and acts between humans per anum and per os. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

This section is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and perverted sexual desires are sought to be gratified. State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975).

The crime against nature includes a concensual fellatio between a man and a woman. State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843, cert. denied, 298 N.C. 303, 259 S.E.2d 304 (1979).

In this jurisdiction crime against nature embraces sodomy, buggery and bestiality as those offenses were known and defined at common law. State v. O'Keefe, 263 N.C. 53, 138 S.E.2d 767 (1964), cert. denied, 380 U.S. 985, 85 S. Ct. 1355, 14 L. Ed. 2d 277 (1965); State v. Stokes, 1 N.C. App. 245, 161 S.E.2d 53, rev'd on other grounds, 274 N.C. 409, 163 S.E.2d 770 (1968).

Though penetration by or of a sexual organ is an essential element of the crime, the crime against nature is not limited to penetration by the male sexual organ. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

This section condemns crimes against nature whether committed against adults or children. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

This section and § 14-202.1 are complementary rather than repugnant or inconsistent. Section 14-202.1, of course, condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled, and both declared to be operative without repugnance. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969).

Section 14-202.1 is not repugnant to this section so as to work a repeal in part of this section, intentionally or otherwise. The two sections are complementary rather than repugnant or inconsistent. State v. Lance, 244 N.C. 455, 94 S.E.2d 335 (1956).

Section 14-202.1 supplements this section. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961).

Section 14-202.1 condemns other acts against children than unnatural sexual acts. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

This section and § 14-202.1 can be reconciled and both declared to be operative without repugnance. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

And § 14-202.1 Not Lesser Included Offense. — Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of § 14-202.1 is not a lesser included offense of the crime against nature described in this section. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

There was no merit to defendant's contention that the trial court lacked jurisdiction to try him under the indecent liberties with children statute, § 14-202.1, because the criminal act he committed was a crime against nature prohibited by § 14-177, since the crime against nature statute and the indecent liberties with children statute are complementary but not mutually exclusive. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Proof of penetration of or by the sexual organ is essential to conviction under this section. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961); State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965); State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969); State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971); State v. Wright, 27 N.C. App. 263, 218 S.E.2d 511, cert. denied, 288 N.C. 733, 220 S.E.2d 622 (1975); State v. Adams, 299 N.C. 699, 264 S.E.2d 46 (1980).

Where evidence showed that the defendant penetrated the victim's female sexual organ with his tongue, there was sufficient evidence to overrule defendant's motion for nonsuit. State v. Joyner, 295 N.C. 55, 243 S.E.2d 367 (1978).

Assault with intent to commit rape and committing a crime against nature are not essentially the same offense since the elements of each offense are distinct and different. State v. Webb, 26 N.C. App. 526, 216 S.E.2d 382, cert. denied, 288 N.C. 251, 217 S.E.2d 676 (1975).

An assault upon a woman is not a lesser degree of the crime of sodomy. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961).

Conviction for Attempt. — Upon the trial of an indictment for the crime against nature the prisoner may be convicted of the crime charged therein, or of an attempt to commit a less degree of the same crime. State v. Savage, 161 N.C. 245, 76 S.E. 238 (1912); State v. Harward, 265 N.C. 746, 142 S.E.2d 691 (1965).

A valid warrant or indictment is an essential of jurisdiction in a prosecution under this section. State v. Jernigan, 255 N.C. 732, 122 S.E.2d 711 (1961).

Sufficiency of Indictment. — An indictment under this section which charges that defendant did unlawfully, willfully, and feloniously commit the infamous crime against nature with a particular man, woman, or beast is sufficient. State v. O'Keefe, 263 N.C. 53, 138 S.E.2d 767 (1964), cert. denied, 380 U.S. 985, 85 S. Ct. 1355, 14 L. Ed. 2d 277 (1965); State v. Stubbs, 266 N.C. 295, 145 S.E.2d 899 (1966).

It is essential to a valid indictment in this jurisdiction that the indictment must allege that the defendant did unlawfully, willfully, and feloniously commit the infamous crime against nature with a particular man, woman, or beast. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

It is necessary to the legal sufficiency of an indictment charging the commission of a crime against nature to state with exactitude, inter alia, the name of the person with or against whom the offense was committed, in order that there can be certitude in the statement of the accusation as will identify the offense with which the accused is sought to be charged and to protect the accused from being twice put in jeopardy for the same offense. State v. Stokes, 274 N.C. 409, 163 S.E.2d 770 (1968).

The sole testimony of an accomplice will support a conviction in a prosecution for crime against nature. State v. Moles, 17 N.C. App. 664, 195 S.E.2d 352 (1973).

Instruction Defining Unnatural Sexual Intercourse. — In a prosecution of defendant for crime against nature, cunnilingus, the trial court's definition of "unnatural sexual intercourse" in the jury charge was proper and could not have caused the jury to confuse cunnilingus with sexual intercourse. State v. Thacker, 301 N.C. 348, 271 S.E.2d 252 (1980).

Applied in State v. Callett, 211 N.C. 563, 191 S.E. 27 (1937); State v. Spivey, 213 N.C. 45, 195 S.E. 1 (1938); State v. Mintz, 242 N.C. 761, 89 S.E.2d 463 (1955); State v. Williams, 247 N.C. 272, 100 S.E.2d 500 (1957); State v. King, 256 N.C. 236, 123 S.E.2d 486 (1962); State v. Walston, 259 N.C. 385, 130 S.E.2d 636 (1963); State v. Hayes, 261 N.C. 648, 135 S.E.2d 653 (1964); State v. Ward, 263 N.C. 93, 138 S.E.2d 779 (1964); State v. Wright, 263 N.C. 129, 139 S.E.2d 10 (1964); State v. Stubbs, 265 N.C. 420, 144 S.E.2d 262 (1965); State v. Cox, 272 N.C. 140, 157 S.E.2d 717 (1967); State v. Best, 13 N.C. App. 204, 184 S.E.2d 905 (1971); State v. Mitchell, 283 N.C. 462, 196 S.E.2d 736 (1973); State v. Gray, 21 N.C. App. 63, 203 S.E.2d 88 (1974); State v. Middleton, 25 N.C. App. 632, 214 S.E.2d 248 (1975); State v. Speight, 28 N.C. App. 201, 220 S.E.2d 628 (1975); Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975); State v. Sharratt, 29 N.C. App. 199, 223 S.E.2d 906 (1976).

Cited in State v. Reid, 230 N.C. 561, 53 S.E.2d 849 (1949); State v. Tyner, 50 N.C. App. 206, 272 S.E.2d 626 (1980).

§ 14-178. Incest between certain near relatives.

The parties shall be guilty of a felony in all cases of carnal intercourse between (i) grandparent and grandchild, (ii) parent and child or stepchild or legally adopted child, or (iii) brother and sister of the half or whole blood. Every such offense is punishable as a Class G felony. (1879, c. 16, s. 1; Code, s. 1060; Rev., s. 3351; 1911, c. 16; C. S., s. 4337; 1965, c. 132; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote the second sentence, which formerly provided for punishment by imprisonment in the State prison for a term of not more than fifteen years, in the discretion of the court. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

The crime of incest is purely statutory. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Incest was not indictable at common law. State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925). State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

Incest, although punished by the ecclesiastical courts of England as an offense against good morals, is not at common law an indictable offense. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Intercourse with Daughter. — A father violates this section and by reason thereof is guilty of the statutory felony of incest if he has sexual intercourse, either habitual or in a single instance, with a woman or girl whom he knows to be his daughter in fact, regardless of whether she is his legitimate or his illegitimate child. State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952); State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963); State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971); State v. Harvell, 45 N.C. App. 243, 262 S.E.2d 850, appeal dismissed, 300 N.C. 200, 269 S.E.2d 626 (1980).

Carnal intercourse by the father with his illegitimate daughter constitutes the offense. State v. Lawrence, 95 N.C. 659 (1886). Strider v. Lewey, 176 N.C. 448, 97 S.E. 398 (1918).

Both parties are not necessarily guilty. Strider v. Lewey, 176 N.C. 448, 97 S.E. 398 (1918).

Failure to Charge "Carnal" Knowledge. — The mere fact that indictment failed to charge "carnal" knowledge is not a fatal defect that would sustain the defendant's motion to quash the indictment. State v. Sauls, 190 N.C. 810, 130 S.E. 848 (1925).

Corroboration of Prosecutrix' Testimony Not Required. — There is no statute providing that the testimony of the prosecutrix must be corroborated by the evidence of others in a prosecution for incest. In consequence, a conviction for incest may be had against a father upon the uncorroborated testimony of the daughter if such testimony suffices to establish all of the elements of the offense beyond a reasonable doubt. State v. Wood, 235 N.C. 636, 70 S.E.2d 665 (1952); State v. Vincent, 278 N.C. 63, 178 S.E.2d 608 (1971).

Evidence of Acts Other Than Those Charged in Indictment. — In a prosecution for incest, evidence of acts of incestuous intercourse between the prosecuting witness and defendant other than those charged in the indictment, whether prior or subsequent thereto, is admissible to corroborate the proof of the act relied upon for conviction. State v. Austin, 285 N.C. 364, 204 S.E.2d 675 (1974).

Proof of other similar acts is competent in corroboration. State v. Broadway, 157 N.C. 598, 72 S.E. 987 (1911).

Confessions of the wife to the husband are not admissible in a trial for incest. State v. Brittain, 117 N.C. 783, 23 S.E. 433 (1895).

Testimony of Other Daughter as to Similar Acts. — In a prosecution under this section for an offense allegedly committed upon defendant's daughter, testimony of an older daughter, that within the past three years defendant several times had made to her improper advances of a similar nature, was competent solely for the purpose of showing intent or guilty knowledge. State v. Edwards, 224 N.C. 527, 31 S.E.2d 516 (1944).

Statements Made by Prosecutrix to Witnesses. — The trial court in an incest prosecution did not err in permitting repeated testimony by other witnesses of statements allegedly made to them by the prosecuting witness regarding defendant's acts toward her since the trial judge has wide discretion in allowing corroborative testimony. State v. Pollock, 50 N.C. App. 169, 273 S.E.2d 501 (1980).

Prosecutrix May Not Be Bastardized by Mother. — In a prosecution under this section, the married mother of the prosecutrix may not testify that defendant, a person not her husband, is the natural father of the prosecutrix, since a mother will not be permitted to bastardize her own issue and testify to illicit relations, except in an action which directly involves the parentage of the child, and, the prosecutrix having been born in wedlock, the law will conclusively presume legitimacy in the absence of evidence that the father was impotent or could not have had access. State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 (1963).

Sufficiency of Evidence. — Where defendant was charged with incest in violation of this section, and the State's evidence established that defendant had sexual intercourse with his stepchild, and that defendant knew the person was related to him, the three elements of the crime of incest were sufficiently established as a matter of law and this is sufficient evidence of a violation of this section to take to a jury. State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979).

Applied in State v. Rhodes, 290 N.C. 16, 224 S.E.2d 631 (1976).

Cited in State v. Mizelle, 15 N.C. App. 583, 190 S.E.2d 277 (1972).

§ 14-179. Incest between uncle and niece and nephew and aunt.

In all cases of carnal intercourse between uncle and niece, and nephew and aunt, the parties shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, in the discretion of the court. (1879, c. 16, s. 2; Code, s. 1061; Rev., s. 3352; C. S., s. 4338.)

CASE NOTES

With Daughter of Half Sister. — It has been held under this section that carnal intercourse of a man with the daughter of his half sister is incest. State v. Harris, 149 N.C. 513, 62 S.E. 1090 (1908).

§ 14-180: Repealed by Session Laws 1975, c. 402.

§§ 14-181, 14-182: Repealed by Session Laws 1973, c. 108, s. 4.

§ 14-183. Bigamy.

If any person, being married, shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be punished as a Class H felon. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction. (See 9 Geo. IV, c. 31, s. 22; 1790, c. 323, P. R.; 1809, c. 783, P. R.; 1829, c. 9; R. C., c. 34, s. 15; Code, s. 988; Rev., s. 3361; 1913, c. 26; C. S., s. 4342; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall be imprisoned in the State's prison or county jail for any term not less than four months nor more than ten years" at the end of the first sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For note as to consequences of a voidable divorce decree, see 35 N.C.L. Rev. 409 (1957).

CASE NOTES

Constitutionality. — This section, making bigamous cohabitation in this State a felony is valid and offends neither the federal nor State Constitutions. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, Williams v. State, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

The 1913 amendment to this section, which added the words "shall thereafter cohabit with such person in this State," which qualify and constitute a requisite to the jurisdiction when the second marriage is not in North Carolina is constitutional and does not confer extraterritorial jurisdiction upon the courts. See State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917); State v. Moon, 178 N.C. 715, 100 S.E. 614 (1919).

Offense against Society. — At common law and under this section bigamy is an offense against society rather than against the lawful spouse of the offender. State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941), rev'd on other grounds, Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

Validity of First Marriage. — That the first marriage was celebrated without procurement of a license, while subjecting the parties to punishment, will not so invalidate the marriage that bigamy cannot be predicated thereon. State v. Robbins, 28 N.C. 23 (1845).

In a trial for bigamy, an instruction that defendant could not be convicted, unless the jury was satisfied beyond a reasonable doubt that the magistrate who solemnized the first marriage was a "duly appointed, qualified, and acting justice of the peace," was properly refused, it being sufficient if such justice was a de facto officer. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

The evidence showing that there were a number of eyewitnesses to the marriage, and a certified copy of the license with return endorsed being produced, it was not error to charge the jury that it would be presumed the ceremony was valid. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

A ceremony solemnized by a Roman Catholic layman, who bought for $10.00 a mail order certificate giving him "credentials of minister" in the Universal Life Church, Inc., was not a ceremony of marriage to be recognized for purposes of a bigamy prosecution in this State. State v. Lynch, 301 N.C. 479, 272 S.E.2d 349 (1980).

Burden on Defendant to Show Absence of Wife. — The burden is on the defendant to show as a matter of defense that his wife had absented herself for the space of seven years next before the second marriage, and that he was ignorant all that time that she was living. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Absence for Less Than Seven Years. — A belief by the defendant that his first wife is dead or his ignorance of her being alive, she having been away for less than seven years, is no defense in a prosecution for bigamy. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Indictment — First Marriage. — An indictment for bigamy which charges that defendant "willfully, unlawfully and feloniously, being a married man, did marry one W. during the life of his first wife," sufficiently avers the first marriage. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

Same — Name of First Wife. — It is not necessary, in an indictment for bigamy, to set out the name of the first wife. State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891).

Same — Defendant Not Divorced from Wife. — It was not necessary that an indictment for bigamy should contain an averment that the defendant had not been divorced from his wife. State v. Norman, 13 N.C. 222 (1829); State v. Davis, 109 N.C. 780, 14 S.E. 55 (1891); State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

Same — Time and Place of Marriage. — This section does not by its language make it necessary for the indictment to state the dates of the marriages, and § 15-155 expressly enacts that such a statement shall not be necessary. State v. Long, 143 N.C. 670, 57 S.E. 349 (1907), overruled on other grounds, State v. Ray, 151 N.C. 710, 66 S.E.2d 204 (1909).

Under this section it is unnecessary to state where the second marriage took place, and it is not necessary that the offense should be committed in the county where the bill is found to confer jurisdiction. State v. Long, 143 N.C. 670, 57 S.E. 349 (1907), overruled on other grounds, State v. Ray, 151 N.C. 710, 66 S.E. 204 (1909).

Venue. — Defendant may be prosecuted for bigamy in the county in which he is apprehended, and it is not required that the prosecution be instituted in the county in which the bigamous cohabitation takes place. State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941), rev'd on other grounds, Williams v. North Carolina, 317 U.S. 287, 63 S. Ct. 207, 87 L. Ed. 279 (1942).

Where the bigamous cohabitation took place in one county and the parties were apprehended in another county, the prosecution may be instituted in the county of their apprehension. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, Williams v. State, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

Admissions as to Prior Marriage. — In a prosecution for bigamy an admission of the defendant is competent to prove the first marriage. State v. Goulden, 134 N.C. 743, 47 S.E. 450 (1904).

Where a defendant charged with bigamy, upon the preliminary examination before a justice of peace, and after being cautioned that his statements could be used against him, stated that he had been married to his former wife while a slave in South Carolina, had children by her and was subsequently married in North Carolina to his present wife, such admissions were competent to go to the jury, on his trial in the superior court, as to his guilt. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

Testimony of First Wife. — In an indictment for bigamy the first wife of the defendant is a competent witness to prove the marriage. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

By the express provisions of § 8-57, defendant's legal wife was a competent witness before the grand jury, which was considering an indictment against defendant charging him with a violation of the provisions of this section. State v. Vandiver, 265 N.C. 325, 144 S.E.2d 54 (1965).

The record book of marriage for the county or the original marriage license signed by the justice solemnizing the marriage is admissible to prove a marriage. State v. Melton, 120 N.C. 591, 26 S.E. 933 (1897).

Proof of Second Marriage Out of State. — If the defendant wishes to rely upon the fact that the offense of bigamy was committed outside the State, he cannot more to quash or in arrest, but must prove the fact in defense under his plea of not guilty. State v. Mitchell, 83 N.C. 674 (1880); State v. Burton, 138 N.C. 575, 50 S.E. 214 (1905); State v. Barrington, 141 N.C. 820, 53 S.E. 663 (1906); State v. Long, 143 N.C. 670, 57 S.E. 349 (1907).

In a prosecution for bigamous cohabitation based upon a second marriage in another state, the State must prove beyond a reasonable doubt, each of the essential elements of the offense. State v. Setzer, 226 N.C. 216, 37 S.E.2d 513 (1946).

Proof of Foreign Divorces. — Where a decree of divorce in another state, which is attacked by the prosecution for insufficient residence in such other state, is relied upon as the only defense on a trial for bigamy, the defendant must satisfy the jury, but not beyond a reasonable doubt, of the bona fides of his residence in the other state. State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917).

While decrees of divorce granted citizens of this State by the courts of another state, standing alone, are taken as prima facie valid, they are not conclusive; and, when challenged in a prosecution under this section for bigamous cohabitation, the burden is on defendants to show to the satisfaction of the jury that they had acquired bona fide domiciles in the state granting their divorces and that such divorces are valid. State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944), aff'd, Williams v. State, 325 U.S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577, 157 A.L.R. 1366 (1945).

Proof of a divorce granted in another state, upon a trial for bigamy, in our own courts is only evidence which should be submitted to the jury under proper instructions. State v. Herron, 175 N.C. 754, 94 S.E. 698 (1917).

Applied in State v. Hill, 241 N.C. 409, 85 S.E.2d 411 (1955).

§ 14-184. Fornication and adultery.

If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a misdemeanor: Provided, that the admissions or confessions of one shall not be received in evidence against the other. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1805, c. 684, P. R.; R. C., c. 34, s. 45; Code, s. 1041; Rev., s. 3350; C. S., s. 4343; 1969, c. 1224, s. 9.)

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For a note on dependency tax deductions for paramours and how I.R.C. § 152(b)(5) applies to this statute, see 3 Campbell L. Rev. 133 (1981).

CASE NOTES

History of Section. — See State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Offense Is Statutory. — The offense of fornication and adultery is statutory. State v. Ivey, 230 N.C. 172, 52 S.E.2d 346 (1949).

Protected Sexual . Relationship. — Because this section makes fornication and adultery a misdemeanor in this State, the only sexual relationship the law protects is that between married partners. Nicholson v. Hugh Chatham Mem. Hosp., 300 N.C. 295, 266 S.E.2d 818 (1980).

Adultery is an aggravated species of fornication. State v. Crowell, 26 N.C. 231 (1844).

"Lewdly and lasciviously cohabit" implies habitual intercourse in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945); State v. Ivey, 230 N.C. 172, 52 S.E.2d 346 (1949); State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

A single act of illicit sexual intercourse is not fornication and adultery as defined by this section. "Lewdly and lasciviously cohabit" plainly implies habitual intercourse, in the manner of husband and wife, and together with the fact of not being married to each other, constitutes the offense, and in plain words draws the distinction between single or nonhabitual intercourse and the offense the statute means to denounce. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

Thus a single act of illicit sexual intercourse does not constitute fornication and adultery as defined by this section, the offense being habitual sexual intercourse in the manner of husband and wife by a man and woman not married to each other. However, the duration of the association is immaterial if the requisite habitual intercourse is established and it has been held that a period of two weeks is sufficient to constitute the offense. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

However, the duration of the association is immaterial if the requisite habitual intercourse is established and it has been held that a period of two weeks is sufficient to constitute the offense. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

State Need Not Prove That Male Defendant and Wife Were Separated. — In a prosecution under this section, it is not required that the State prove that the male defendant and his wife were separated. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

Acquittal as to One Party. — Where only one party is convicted and the other acquitted, there can be no judgment against the one convicted. State v. Mainor, 28 N.C. 340 (1846). This holding was followed in the case of State v. Lyerly, 52 N.C. 158 (1859), and was held as law in this State until doubted in State v. Rhinehart, 106 N.C. 787, 11 S.E. 512 (1890). The question came before the court again in State v. Cutshall, 109 N.C. 764, 14 S.E. 107 (1891), when it was held that an acquittal of one defendant did not work the same result as to the other, or prevent the court from rendering judgment. This seems to be the present status of the law on this point. It was followed in State v. Simpson, 133 N.C. 676, 45 S.E. 567 (1903).

Both defendants need not be convicted of mutual intent to violate the law before conviction of one of them can be sustained. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

New Trial as to One Defendant. — If both defendants are convicted, a new trial may be granted as to one party without disturbing the verdict as to the other. State v. Parham, 50 N.C. 416 (1858).

Indictment — "Adulterously". — The use of the word "adulterously" dispenses with the necessity of alleging that the parties were not married and were of different sex. (State v. McDuffie, 107 N.C. 885, 12 S.E. 83 (1890)).

Same — "Lewdly and Lasciviously". — The words "lewdly and lasciviously" need not be used. State v. Britt, 150 N.C. 811, 63 S.E. 1056 (1909).

Same — Criminal Intent. — The State is not called upon to allege or prove the criminal intent. State v. Cutshall, 109 N.C. 764, 14 S.E. 107 (1891).

Same — "Spinster". — The fact that the female is erroneously alleged to be a "spinster" is not ground of arrest of judgment. State v. Guest, 100 N.C. 410, 6 S.E. 253 (1888).

When Declarations of Codefendant Admissible. — While the admissions or confessions of one party are not to be received against the codefendant, it has been held that under certain circumstances such declarations are admissible when made by the female defendant in the presence of the male. See State v. Roberts, 188 N.C. 460, 124 S.E. 833 (1924).

Testimony of an admission made by defendant that "he was guilty" of another charge based upon sexual relations with the other party, is competent as an admission of acts which with other similar acts tend to prove the offense of fornication and adultery. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

But the proviso in this section relates to extra-judicial declarations, and does not prevent a woman jointly charged with the of-

fense from testifying as a witness at the trial of her paramour to facts, otherwise competent, which are within her personal knowledge, where at the time she testifies her plea of nolo contendere has been accepted by the State, and she is no longer on trial. The prohibition of the proviso is directed not to the person testifying but against the use in evidence of such person's previous admissions or confessions. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948), discussed in 27 N.C.L. Rev. 365.

Where, in a prosecution for fornication and adultery, the person jointly charged has testified as to the facts forming the basis of the prosecution, testimony that she had made substantially the same statements to another upon the investigation is competent for the purpose of corroboration. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Circumstantial Evidence. — It is never essential to conviction of fornication and adultery that even a single act of illicit sexual intercourse be proven by direct testimony. While necessary to a conviction that such acts must have occurred, it is, nevertheless, competent to infer them from the circumstances presented in the evidence. State v. Robinson, 9 N.C. App. 433, 176 S.E.2d 253 (1970).

The guilt of defendants or of a defendant, in a prosecution for fornication and adultery, must be established in almost every case by circumstantial evidence. It is never essential to conviction that a single act of intercourse be shown by direct testimony. State v. Davenport, 225 N.C. 13, 33 S.E.2d 136 (1945).

The acts of illicit intercourse may be proved by circumstantial evidence, and it is not required that even one such act be directly proven. State v. Kleiman, 241 N.C. 277, 85 S.E.2d 148 (1954).

It is competent to prove that either defendant had a living spouse. State v. Manly, 95 N.C. 661 (1886).

Statements and conduct prior to the offense charged are admissible. State v. Austin, 108 N.C. 780, 13 S.E. 219 (1891).

Testimony as to conduct of the parties after indictment is admissible. State v. Stubbs, 108 N.C. 774, 13 S.E. 90 (1891).

Improper Advances Made by Defendant to Another Woman. — Where defendant was charged with fornication and adultery with one of the orphanage girls under his supervision, testimony of another orphanage girl that defendant made improper advances to her is competent for the purpose of showing attitude, animus and purpose of defendant, and as corroborative of the State's case. State v. Davis, 229 N.C. 386, 50 S.E.2d 37 (1948).

Applied in State v. Miller, 214 N.C. 317, 199 S.E. 89 (1938).

Cited in Wilson v. Swing, 463 F. Supp. 555 (M.D.N.C. 1978); State v. Poe, 40 N.C. App. 385, 252 S.E.2d 843 (1979).

§ 14-185: Repealed by Session Laws 1975, c. 402.

§ 14-186. Opposite sexes occupying same bedroom at hotel for immoral purposes; falsely registering as husband and wife.

Any man and woman found occupying the same bedroom in any hotel, public inn or boardinghouse for any immoral purpose, or any man and woman falsely registering as, or otherwise representing themselves to be, husband and wife in any hotel, public inn or boardinghouse, shall be deemed guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1917, c. 158, s. 2; C. S., s. 4345; 1969, c. 1224, s. 3.)

CASE NOTES

Constitutionality. — The portion of this section making it a misdemeanor to occupy a bedroom with a member of the opposite sex for immoral purposes is too vague and indefinite to comply with constitutional due process standards. Such opinion does not apply to statutes which refer to "immoral purposes" but which also contain phrases which, by the doctrine of ejusdem generis, may be used to define "immoral purposes." The phrase "any immoral purposes" within this section is not preceded by any phrases from which could be determined the meaning of "immoral purposes." State v. Sanders, 37 N.C. App. 53, 245 S.E.2d 397 (1978).

This section fails to define with sufficient precision exactly what the term "any immoral purpose" may encompass. The word immoral is

not equivalent to the word illegal; hence, enforcement of this section may involve legal acts which, nevertheless, are immoral in the view of many citizens. One must necessarily speculate, therefore, as to what acts are immoral. If the legislative intent of this section is to proscribe illicit sexual intercourse the statute could have specifically so provided. State v. Sanders, 37 N.C. App. 53, 245 S.E.2d 397 (1978).

§ 14-187: Repealed by Session Laws 1975, c. 402.

§ 14-188. Certain evidence relative to keeping disorderly houses admissible; keepers of such houses defined; punishment.

(a) On a prosecution in any court for keeping a disorderly house or bawdy house, or permitting a house to be used as a bawdy house, or used in such a way as to make it disorderly, or a common nuisance, evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute and boisterous conversation of the inmates and frequenters, while in and around such house, shall be prima facie evidence of the bad character of the inmates and frequenters, and of the disorderly character of the house. The manager or person having the care, superintendency or government of a disorderly house or bawdy house is the "keeper" thereof, and one who employs another to manage and conduct a disorderly house or bawdy house is also "keeper" thereof.

(b) On a prosecution in any court for keeping a disorderly house or a bawdy house, or permitting a house to be used as a bawdy house or used in such a way to make it disorderly or a common nuisance, the offense shall constitute a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1907, c. 779; C. S., s. 4347; 1969, c. 1224, s. 22.)

CASE NOTES

Constitutionality. — This section is constitutional. State v. Price, 175 N.C. 804, 95 S.E. 478 (1918).

Disorderly House Defined. — A disorderly house is kept in such a way as to disturb or scandalize the public generally, or the inhabitants of a particular neighborhood, or the passersby. State v. Wilson, 93 N.C. 608 (1885).

Persons Leasing Premises as a "Keeper". — A person who leases a house knowing that it is to be used for disorderly and unlawful purposes is treated as a direct offender. State v. Boyd, 175 N.C. 791, 95 S.E. 161 (1918).

Powers of City Authorities. — The extent of the powers of the authorities of a municipality to enact ordinances concerning houses of ill fame is discussed in State v. Webber, 107 N.C. 962, 12 S.E. 598 (1890).

Illustrative Cases. — The following have been held to constitute disorderly houses: a shop in which disorderly crowds assemble. State v. Robertson, 86 N.C. 628 (1882); a store in which persons collect and disturb the neighborhood. State v. Thornton, 44 N.C. 252 (1853).

The following have been held not to constitute disorderly houses: a private dwelling wherein an uproar was frequently raised but which disturbed few people. State v. Wright, 51 N.C. 25 (1858); the residence of an unchaste woman. State v. Evans, 27 N.C. 603 (1845).

Stated in State v. Hilderbran, 201 N.C. 780, 161 S.E. 488 (1931).

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

§§ 14-189, 14-189.1: Repealed by Session Laws 1971, c. 405, s. 4.

§§ 14-189.2, 14-190: Repealed by Session Laws 1971, c. 591, s. 4.

§ 14-190.1. Obscene literature and exhibitions.

(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity in any public place. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a respresentation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary statewide community standards relating to the depiction or representation of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, educational or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) Sexual conduct shall be defined as:

(1) Patently offensive representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral;

(2) Patently offensive representations or descriptions of excretion in the context of sexual activity or a lewd exhibition of uncovered genitals, in the context of masturbation or other sexual activity.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences. In any prosecution for an offense involving dissemination of obscenity under this Article, evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) Whether the material is published in such a manner that an unwilling adult could not escape it;

(3) Whether the material is exploited so as to amount to pandering;

(4) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(5) Literary, artistic, political, educational, scientific, or other social value, if any, of the material;

(6) The degree of public acceptance of the material throughout the State of North Carolina;

(7) Appeal to prurient interest, or absence thereof, in advertising or in the promotion of the material.

Expert testimony and testimony of the author, creator or publisher relating to factors entering into the determination of the issue of obscenity shall also be admissible.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor and, unless a greater penalty is expressly provided for in this Article, shall be fined or imprisoned in the discretion of the court. (1971, c. 405, s. 1; 1973, c. 1434, s. 1.)

Cross References. — As to civil remedy for sale of harmful materials to minors, see §§ 19-9 through 19-20.

Editor's Note. — Section 2, c. 405, Session Laws 1971, effective July 1, 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Section 3, c. 405, Session Laws 1971, effective July 1, 1971, contains a severability clause.

Legal Periodicals. — For article, "regulating Obscenity Through the Power To Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

CASE NOTES

History of Section. — See State v. Bryant, 285 N.C. 27, 203 S.E.2d 27 (1974).

Section Is Constitutional. — This section specifically defines the elements of obscenity and hence is not unconstitutional on grounds of vagueness or overbreadth. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

This section is constitutional. State v. Johnson, 20 N.C. App. 699, 202 S.E.2d 479 (1974).

The dissemination of obscenity is not protected by the State and federal constitutions; thus, this section by its terms does not infringe upon the rights to disseminate protected material. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Motion to quash the warrant grounded on the alleged unconstitutionality of this section will be denied. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Sections 14-190.1 to 14-190.8 made material and substantial changes in North Carolina law prohibiting the dissemination of obscenity. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

And Section 14-189.1 Not Continued in Effect. — Session Laws 1971, c. 405, which repealed § 14-189.1, did not substantially reenact it, therefore it was not continued in effect. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

There is nothing in Session Laws 1971, c. 405, which repealed § 14-189.1 outright and enacted this section, to indicate an intent to leave the old law unrepealed, or to reaffirm it. On the contrary, the clear implication is that the legislature intended to get rid of a law of dubious constitutionality. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

The changes made in the 1971 Act evidence the legislature's apprehension that § 14-189.1 did not meet the requirements of the federal Constitution. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

The enactment of this section was an obvious attempt to provide a new law which would meet the latest tests enunciated by the United States Supreme

Court in order that State law-enforcement officers might proceed with assurance against public dissemination and pandering of obscenity. State v. McCluney, 280 N.C. 404, 185 S.E.2d 870 (1972).

Application of 1973 amendment to defendants arrested prior to the amendment violated neither due process nor the ex post facto doctrine as the materials had to be found obscene under the doctrines of both Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), which precipitated the 1973 amendment and a book named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966), the pre-1973 obscenity test in order to convict. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

County or Municipal Ordinance Relating to Obscenity. — Nothing in §§ 14-190.1 to 14.190.9, statewide laws relating to obscene literature and exhibitions and to indecent exposure, expresses or indicates an intent by the General Assembly to preclude cities and towns or counties from enacting and enforcing ordinances requiring a higher standard of conduct or condition within their respective jurisdictions. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972), wherein the Supreme Court declined to express any opinion as to whether a county or municipal ordinance, otherwise valid, may constitutionally prohibit and make punishable an exhibition or the dissemination of materials found to be "obscene" under the standards of the community in which such ordinance applies, though not "obscene" as judged by the "contemporary national community standards."

This section specifically defines the elements of obscenity. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036, aff'd 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Effect of U.S. Supreme Court Decisions. — The United States Supreme Court, in the interest of strengthening powers to regulate pornography, did not elect to eliminate constitutionally valid law that would otherwise be available in prosecuting pending obscenity cases. State v. Bryant, 20 N.C. App. 223, 201 S.E.2d 211, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Definitions in U.S. Supreme Court Cases to Be Considered. — In appellate review, the court shall consider both definitions of obscenity in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and a book named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966). If the film is not obscene under both of these standards the charges must be dismissed. State v. Bryant, 20 N.C. App. 223, 201 S.E.2d 211, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Construction of Section to Conform to Guidelines Set by U.S. Supreme Court. — The broad terms in which obscene material was defined in subsection (b) of this section before the 1973 amendment fall far short of the United States Supreme Court's requirement that the sexual conduct which may be deemed obscene and patently offensive must be specifically defined. However, in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), the United States Supreme Court held that where state obscenity statutes as written do not define what sexual conduct may be deemed obscene and patently offensive with sufficient specificity to comply with the guidelines set forth in that case, the state courts should be afforded and opportunity by construction to confine the obscene matter prohibited by their statutes to "hard-core" pornography. Thus this section as it stood before the 1973 amendment would be construed to prohibit as obsence only material consisting of the following: (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. State v. Bryant, 285 N.C. 27, 203 S.E.2d 27, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Films which are stark portrayals of sex acts without a suggested theme or purpose other than to protray the acts in the most blatant manner, and which exhibit a morbid interest in nudity and portray sex acts far beyond customary limits of candor in description or representation of such matters, are patently offensive "hard-core" portrayals of sexual conduct proscribed by this section which regulates dissemination of obscene materials in a public place. State v. Bryant, 20 N.C. App. 223, 201 S.E.2d 211, aff'd, 285 N.C. 27, 203 S.E.2d 27 (1973), cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Photographs can be so obscene — it is conceivably possible that they be so obscene — that the fact is incontrovertible. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Application of More Stringent Criteria Than Constitutionally Required. — Where there was ample evidence to support the jury finding that films were "utterly without redeeming social value," more stringent criteria than the present test of "lacking serious literary, artistic, political or scientific value,"

the fact that the prosecution in these cases was required to meet the more difficult test gives these defendants no ground for complaint. State v. Bryant, 285 N.C. 27, 203 S.E.2d 27 (1974).

Although whether material alleged to be obscene is patently offensive may now be determined by "contemporary community standards" rather than by "contemporary national community standards," the fact that the prosecution was required to establish and did establish that films were patently offensive when tested by "contemporary national community standards" affords defendant no ground of complaint, since the prosecution was required to meet a more difficult test. State v. Bryant, 285 N.C. 27, 203 S.E.2d 27 (1974).

Positive and Negative Findings Required. — This section, in addition to requiring positive findings on the questions of offensive display of sexual conduct patently offensive to the average person, requires an additional negative finding that the material lacks serious literary, artistic, political, educational or scientific value. State ex rel. Yeager v. Neal, 26 N.C. App. 741, 217 S.E.2d 576 (1975).

Finding of Intent and Guilty Knowledge Required for Conviction. — This section requires a finding of intent and guilty knowledge before a defendant may be convicted for dissemination of obscenity in a public place. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973).

Notice of Nature of Material and Protection against Exposure to Juveniles. — In dissemination of obscenity case, court properly denied request for an instruction to the jury that if the jury found the defendant provided notice to the public of the nature of the magazines involved in the case, and if they found the defendant provided reasonable protection against the exposure of the magazines to juveniles, then the jury would have to find that the defendant's conduct was protected under the First and Fourteenth Amendments to the Constitution of the United States, and that it would be the duty of the jury to return a verdict of not guilty. State v. Horn, 18 N.C. App. 377, 197 S.E.2d 274 (1973), aff'd, 285 N.C. 82, 203 S.E.2d 36, cert. denied, 419 U.S. 974, 95 S. Ct. 238, 42 L. Ed. 2d 188 (1974).

Case Properly Submitted to Jury. — Films shown in defendants' place of business which had no plot, no real motive and no objectives other than to appeal to the prurient interest in sex were uncontrovertibly obsence and exhibition of such films was not protected by the First and Fourteenth Amendments; therefore, the trial court did not err in submitting the case to the jury in an action under this section. State v. Bryant, 16 N.C. App. 456, 192 S.E.2d 693 (1972), cert. denied, 282 N.C. 583, 193 S.E.2d 747, vacated and remanded, 413 U.S. 913, 93 S. Ct. 3065, 37 L. Ed. 2d 1036 (1973).

Applied in State v. Horn, 285 N.C. 82, 203 S.E.2d 36 (1974).

Cited in State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972); State v. Fulcher, 34 N.C. App. 233, 237 S.E.2d 909 (1977); U.T., Inc. v. Brown, 457 F. Supp. 163 (W.D.N.C. 1978).

§ 14-190.2. Adversary hearing prior to seizure or criminal prosecution.

(a) The purpose of this section is to provide an adversary determination of the question of whether books, magazines, motion pictures, or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials.

(b) The public policy of this State requires that all proceedings prescribed in this section shall be examined, heard and disposed of with the maximum promptness and dispatch commensurate with the Constitution of the United States and the Constitution of North Carolina.

(c) Whenever any law-enforcement officer has reasonable cause to believe that any person, firm or corporation is engaged in the sale, display, distribution or dissemination in a public place of any books, magazines, motion pictures or other materials which are obscene within the meaning of G.S. 14-190.1, he shall, without seizing such material, notify the district attorney for the judicial district in which such material is so believed to be offered. Upon receiving such notification the district attorney for said judicial district shall submit a written complaint to any resident judge of the Superior Court Division of the General Court of Justice or any judge of the District Court Division of the General Court of Justice, to which shall be attached, if available without purchase or seizure, a true copy of the allegedly obscene material. The complaint shall:

(1) Be directed against the person, firm or corporation believed to be engaged in the sale, display, distribution or dissemination in a public place of the material alleged to be obscene and against such material by name, description, volume and issue as appropriate;
(2) Allege that such material is obscene within the meaning of G.S. 14-190.1;
(3) Designate as respondent the person, firm or corporation believed to be engaged in the sale, display, distribution or dissemination in a public place of the material alleged to be obscene within the said judicial district;
(4) Seek an adjudication that said material is obscene;
(5) Seek a temporary restraining order prohibiting the respondent from removing, causing, or permitting to be removed the material alleged to be obscene within the meaning of G.S. 14-190.1; and,
(6) Seek a warrant to search for and seize said material as obscene within the meaning of G.S. 14-190.1.

(d) Upon receipt of such complaint from the district attorney, the judge shall:
(1) Issue a summons to be served upon the respondent which shall be in the same form prescribed for warrants in G.S. 15-20, except that it shall summon the respondent to appear before the said judge at a stated time not less than two days, including the day of service, and not more than four days, including the day of service, after service of the summons, and to show cause why the said material should not be declared obscene and a warrant issued authorizing a search for and seizure of said material;
(2) Issue a subpoena as provided for under G.S. 1A-1, Rule 45 of the Rules of Civil Procedure commanding the respondent to produce copies of all items of said material not attached to the complaint in order that a complete adversary hearing may be held on the question of whether said material should be declared obscene and a warrant issued authorizing a search for and seizure of said material;
(3) Issue a temporary restraining order prohibiting the respondent from removing, causing, or permitting to be removed the material which is alleged to be obscene within the meaning of G.S. 14-190.1; provided, however, that such temporary restraining order shall not be construed as prohibting the respondent from conducting sales in the normal course of business only, so long as at least one copy of each item alleged in the complaint to be obscene is retained for evidentiary purposes at the said hearing;
(4) Insure that any and all hearings held pursuant to this section are designed to focus searchingly upon the issue of whether the said material is obscene within the meaning of G.S. 14-190.1, and that the rights of the respondent to counsel, to confrontation and cross-examination of witnesses for the State, to present witnesses including expert witnesses in his own behalf, and all other rights granted the respondent by the Constitution of the United States or the Constitution of North Carolina are protected, and;
(5) Render a decision on the issue of whether said material is obscene within the meaning of G.S. 14-190.1 within two days, excluding the final day of said hearing, after the conclusion of any hearing held under the authority of this section.

(e) In the event that the judge fails to find the material involved is obscene within the meaning of G.S. 14-190.1, he shall enter judgment accordingly and dismiss the complaint. Should the respondent fail to appear or the judge find that said material is obscene within the meaning of G.S. 14-190.1, the judge involved shall enter judgment accordingly and issue a warrant to search for and seize said material. The warrant shall describe with reasonable certainty

the person, premises or other place to be searched and the material for which the search is to be made and which is to be seized. The warrant must be signed by the issuing judge and bear the date and hour of its issuance above his signature.

(f) No judgment or subsequent order of enforcement thereof, entered pursuant to the provisions of this section, shall be of any force and effect outside the judicial district in which entered; and no such order or judgment shall be res judicata in any proceeding in any other judicial district. Further, evidence of any hearing held pursuant to this section shall not be competent or admissible in any criminal action for the violation of any other section of this Article; provided, however, that in any criminal action, charging the violation of any other section of this Article, against any person, firm or corporation that was a respondent in such hearing, and involving the same material declared to be obscene under the provisions of this section, then evidence of such hearing shall be competent and admissible as bearing on the issue of scienter only.

(g) Any respondent described in this section who shall violate any provision of this section or any order issued under any provision of this section shall be subject to punishment, by the court, as for contempt.

(h) No person, firm, or corporation shall be arrested or indicted for any violation of G.S. 14-190.1, 14-190.3, 14-190.4 or 14-190.5 until the material involved has first been the subject of an adversary determination under the provisions of this section, wherein such person, firm, or corporation is a respondent, and wherein such material has been declared by the court to be obscene and until such person, firm or corporation continues subsequent to such determination, to engage in the conduct prohibited by a provision of the sections hereinabove set forth.

Notwithstanding any provision of G.S. 14-190.2, an adversary determination to adjudge whether material is obscene shall not be required prior to the arrest or indictment of any person, firm or corporation for a violation of any provision of G.S. 14-190.6, 14-190.7, 14-190.8, or whether such material is sexually oriented pursuant to G.S. 14-190.10 or 14-190.11.

(i) Any person, firm or corporation which is given written notice by registered mail of the filing of the complaint and of the judgment of the court as provided for in this section shall be deemed a respondent and shall be bound by the judgment of the court.

(j) The State or any respondent may appeal from a judgment. Such appeal shall not stay the judgment. If any respondent engages in conduct prohibited by this Article subsequent to notice of the judgment, finding the material to be obscene he shall be subject to criminal prosecution notwithstanding the appeal from the judgment.

(k) Any person, firm or corporation which is disseminating or which may disseminate the material challenged in the civil proceeding provided for in this section may intervene in said proceeding as a matter of right. Said intervenor shall have all the rights of a respondent and shall be bound by the judgment. (1971, c. 405, s. 1; 1973, c. 47, s. 2; c. 1434, ss. 2-8; 1977, c. 440, s. 1; 1981, c. 682, ss. 3, 4.)

Cross References. — See note to § 14-190.1.

Editor's Note. — Section 15-20, referred to in subdivision (d)(1) of this section, was repealed by Session Laws 1973, c. 1286, s. 26, effective Sept. 1, 1975. For present provisions as to criminal process, see §§ 15A-301 to 15A-305.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "district attorney" for "solicitor" in two places in the introductory paragraph of subsection (c) and once in the introductory paragraph of subsection (d).

Legal Periodicals. — For article, "Regulating Obsenity Through the Power To Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

CASE NOTES

1973 Amendment Not Retroactive. — Since the General Assembly specifically provided that the 1973 amendment become effective July 1, 1974, this clearly demonstrates the manifest intent of the General Assembly that it should not be applied retroactively. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

There is in the 1973 amendment a manifest legislative intent that this section should be applied prospectively only and should not be applicable to pending prosecutions. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

Effect of 1973 Amendment. — The 1973 amendment to subsection (h) does not reduce the punishment or otherwise remove any burden imposed upon these defendants by prior law. To the contrary, that amendment places an additional procedural burden upon the State to obtain an adversary judicial determination that the material in question is obscene, and thereafter disseminated by the accused, before he may be arrested or indicted. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

The 1973 changes did not repeal the former anti-obscenity statutes but only amended them effective July 1, 1974. State v. Hart, 287 N.C. 76, 213 S.E.2d 291 (1975).

Subsection (a) of this section clearly evidences the legislative intent to prevent wholesale seizures prior to an adversary judicial determination that the materials to be seized are obscene. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

Seizure of Single Copies for Evidentiary Purposes. — Subsection (h) as it stood before the 1973 amendment made it clear that this section did not prohibit a law-enforcement officer from seizing for evidentiary purposes single copies of printed material which he reasonably believed to be obscene within the meaning of § 14-190.1, when such seizure was made pursuant to a lawful arrest. State v. Bryant, 280 N.C. 407, 185 S.E.2d 854 (1972).

Applied in State ex rel. Yeager v. Neal, 26 N.C. App. 741, 217 S.E.2d 576 (1975).

§ 14-190.3. Exhibition of obscene pictures; posting of advertisements.

If any person, firm or corporation shall intentionally disseminate in any public place any motion picture which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1; or, if any person, firm or corporation shall intentionally post any placard, writings, pictures, or drawings, which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, on walls, fences, billboards, or other public places; or, if any person, firm or corporation shall intentionally permit any exhibition or show, which he or it knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, to be conducted in any public placed owned or controlled by said person, firm or corporation; the person, firm or corporation performing either one or all of the said acts shall be guilty of a misdemeanor and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, ch. 405, s. 1.)

Cross References. — See note to § 14-190.1.

§ 14-190.4. Coercing acceptance of obscene articles or publications.

No person, firm or corporation shall, as a condition to any sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the purchaser or consignee receive for resale any other article, book, or publication which is obscene within the meaning of G.S. 14-190.1; nor shall any person, firm or corporation deny or threaten to deny any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure or refusal of any person to accept such articles, books, or publications, or by reason of the return thereof. Any violation of this section

shall be a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 405, s. 1.)

Cross References. — See note to § 14-190.1.

§ 14-190.5. Preparation of obscene photographs, slides and motion pictures.

Every person who knowingly:

(1) Photographs himself or any other person, for purposes of preparing an obscene film, photograph, negative, slide or motion picture for the purpose of dissemination in a public place; or

(2) Models, poses, acts, or otherwise assists in the preparation of any obscene film, photograph, negative, slide or motion picture for the purpose of dissemination in a public place,

shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 405, s. 1.)

Cross References. — See note to § 14-190.1.

§ 14-190.6. Employing or permitting minor to assist in offense under Article.

Every person 18 years of age or older who intentionally, in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, shall be guilty of a misdemeanor, and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court. (1971, c. 405, s. 1.)

Cross References. — See note to § 14-190.1.

§ 14-190.7. Dissemination to minors under the age of 16 years.

Every person 18 years of age or older who knowingly disseminates to any minor under the age of 16 years any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be guilty of a misdemeanor and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court, except this statute shall not apply to a teacher, a member of the clergy, priests, and rabbis, physician, nurse, or a librarian in the discharge of official responsibilities. (1971, c. 405, s. 1; 1977, c. 440, s. 2.)

Cross References. — See note to § 14-190.1.

§ 14-190.8. Dissemination to minors 12 years of age or younger.

Every person 18 years of age or older who knowingly disseminates to any minor 12 years of age or younger any material which he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1 shall be punished as a Class I felon, except this statute shall not apply to a teacher, a member of the clergy, priests, and rabbis, physician, nurse, or a librarian in the discharge of official responsibilities. (1971, c. 405, s. 1; 1977, c. 440, s. 3; 1979, c. 760, s. 5.)

Cross References. — See note to § 14-190.1.

For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony and upon conviction shall be imprisoned in the State's prison for not more than five years and shall be fined at the discretion of the court" near the middle of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Cited in State v. King, 20 N.C. App. 505, 201 S.E.2d 724 (1974).

§ 14-190.9. Indecent exposure.

Any person who shall willfully expose the private parts of his or her person in any public place and in the presence of any other person or persons, of the opposite sex, or aids or abets in any such act, or who procures another to perform such act; or any person, who as owner, manager, lessee, director, promoter or agent, or in any other capacity knowingly hires, leases or permits the land, building, or premises of which he is owner, lessee or tenant, or over which he has control, to be used for purposes of any such act, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1971, c. 591, s. 1.)

Editor's Note. — Section 2, c. 591, Session Laws 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

Section 3, c. 591, Session Laws 1971, contains a severability clause.

CASE NOTES

This section is not unconstitutional on its face. State v. King, 20 N.C. App. 505, 201 S.E.2d 724, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (1974).

Nudity Is Conduct Subject to Regulation. — When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is as fit a subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours. State v. King, 20 N.C. App. 505, 201 S.E.2d 724, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (1974).

This section is separate and apart from the general obscenity statutes, §§ 14-190.1 through 14-190.8, all of which deal with dissemination of obscenity. State v. King, 20 N.C. App. 505, 201 S.E.2d 724, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (1974).

This section was enacted by the 1971 General Assembly by passage of Chapter 591 of the 1971 Session Laws, and is separate and apart from those statutes dealing with the dissemination of obscenity (§§ 14-190.1 through 14-190.8) all of which were enacted by passage of Chapter 405 of the 1971 Session Laws. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Conduct Is Not Required to Be "Obscene" or "Indecent". — This section, like its predecessors, simply declares the act of exposing one's private parts in a public place in the presence of persons of the opposite sex, or permitting or aiding or abetting another in doing so, to be a misdemeanor. The statute does not use the term "obscene" and for that matter does not even require the act of exposing one's private parts in public to be "indecent." State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

And Court Is Not Concerned with Definitions of "Obscene" and "Obscenity". — Since this section does not involve the concept of "obscenity" — the definition of which has given both the federal and State courts so much difficulty — the North Carolina court is not concerned with the many and often conflicting decisions attempting to define "obscene" or "obscenity." State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Taking Part in Immoral Show, etc., Is Covered by Obscenity Statutes. — In 1971, the General Assembly amended the obscenity statutes and the indecent exposure statute. In amending the indecent exposure statute the prohibition against procuring or "taking part in any immoral show, exhibition or performance where indecent, immoral, or lewd dances are conducted in any booth, tent, room or other public or private place to which the public is invited . . ." was deleted. This proscription was placed in the obscenity statutes and is covered by § 14-190.1, particularly subdivision (2) of subsection (a) thereof. State v. King, 20 N.C. App. 505, 201 S.E.2d 724, modified on other grounds, 285 N.C. 305, 204 S.E.2d 667 (1974).

Viewers of Exposure Need Not Be Unwilling. — There is nothing whatsoever in the present or former indecent exposure statutes that in any way requires the viewers of the exposure of one's private parts to be unwilling observers. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Warrant Must Allege Exposure in Presence of Person of Opposite Sex. — When one of the essential elements of the offense created by this section is that the exposure of the private parts be "in the presence of any other person or persons, of the opposite sex," and the warrants fail to so charge, such omission is fatal, and the warrants must be quashed. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Aiding and Abetting. — Both former § 14-190 and this section clearly and expressly proscribe the conduct for which defendant was arrested, namely, aiding or abetting other persons in willfully exposing their private parts in the presence of other persons of the opposite sex and in a public place. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Conduct Constituting Violation of Section. — Where four females involved willfully exhibited their private parts to an audience of some seventy-five males in a public place, and that defendant aided and abetted in such exposure, such conduct constitutes a misdemeanor under this section. State v. King, 285 N.C. 305, 204 S.E.2d 667 (1974).

Quoted in State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972).

Cited in Freewood Assocs. v. Davie County Zoning Bd. of Adjustment, 28 N.C. App. 717, 222 S.E.2d 910 (1976).

§ 14-190.10. Disseminating sexually oriented material to minors.

(a) Every person, firm or corporation who intentionally and knowingly disseminates sexually oriented material to any person under 18 years of age shall be guilty of a misdemeanor. A person, firm or corporation disseminates sexually oriented material within the meaning of this section if he, she or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any sexually oriented writing, picture, record or other representation or embodiment that is sexually oriented; or

(2) Presents or directs a sexually oriented play, dance or other performance or participates directly in that portion thereof which makes it sexually oriented; or

(3) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion

picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication that is sexually oriented.

(b) For purposes of this section any material is sexually oriented if:

(1) The material is made up in whole or dominant part of representation or descriptions, actual or simulated, or human sexual intercourse, masturbation, sodomy, direct physical stimulation of unclothed gentials, or flagellation or torture in the context of a sexual relationship or which emphasizes the uncovered human genitals; and

(2) The material lacks serious literary, artistic, political, educational or scientific value for persons under 18 years of age; and

(3) The dominant theme of the material appeals to the prurient interests in sex of persons under 18 years of age.

(c) It shall be an affirmative defense to a prosecution under this section for the defendant to show:

(1) That the dissemination was made with the consent of a parent or guardian of the recipient, that the defendant was misled as to the existence of parental consent by a misrepresentation of parental status by an individual purporting to be a parent of the recipient, or that the dissemination was made to the recipient by his teacher, clergyman or a librarian in the discharge of official responsibilities;

(2) That the recipient was married, or that the defendant was misled in this regard by a misrepresentation of marital status by the recipient;

(3) That the defendant was misled as to the age of the recipient by false proof of identification and age offered by the recipient.

(d) Any person under the age of 18 years who gains admission to any theater by falsely claiming to be 18 years of age or older shall be guilty of a misdemeanor and punished by a fine of not more than fifty dollars ($50.00). (1973, c. 1434, s. 9.)

§ 14-190.11. Public display of sexually oriented materials.

(a) Every person, firm or corporation who intentionally and knowingly places sexually oriented materials upon public display, or who knowingly and intentionally fails to take prompt action to remove such a display from property in his possession after learning of its existence shall be guilty of a misdemeanor.

(b) For purposes of this section any material is sexually oriented if the material is made up in whole or dominant part of representations or descriptions of actual or simulated human sexual intercourse, masturbation sodomy, direct physical stimulation of unclothed genitals or flagellation, or torture in the context of a sexual relationship or emphasizes the uncovered human genitals and the materials lacks serious literary, artistic, political, educational or scientific value and the dominant theme of the material appeals to the prurient interest in sex.

(c) A person, firm or corporation places sexually oriented material upon public display within the meaning of this Article if he, she or it places the material on or in a billboard, viewing screen, theater stage or marquee, newsstand, display rack, window, showcase, display case or similar place so that explicit sexually oriented material is easily visible from a public street, public road or sidewalk or from the normally occupied property of others.

(d) Nothing contained in this section shall be deemed to prohibit or make unlawful the dissemination or display of material, the external visible covers of which do not depict any of the acts embraced within the definition of "sexually oriented." (1973, c. 1434, s. 10.)

§ 14-191: Repealed by Session Laws 1971, c. 591, s. 4.

§§ 14-192, 14-193: Repealed by Session Laws 1971, c. 405, s. 4.

§ 14-194: Repealed by Session Laws 1971, c. 591, s. 4.

§ 14-195. Using profane or indecent language on passenger trains.

It shall be unlawful for any person to curse or use profane or indecent language on any passenger train. Any person so offending shall upon conviction be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. (1907, c. 470, ss. 1, 2; C. S., s. 4350.)

§ 14-196. Using profane, indecent or threatening language to any person over telephone; annoying or harassing by repeated telephoning or making false statements over telephone.

(a) It shall be unlawful for any person:

(1) To use in telephonic communications any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation;

(2) To use in telephonic communications any words or language threatening to inflict bodily harm to any person or physical injury to the property of any person, or for the purpose of extorting money or other things of value from any person;

(3) To telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number;

(4) To make a telephone call and fail to hang up or disengage the connection with the intent to disrupt the service of another;

(5) To telephone another and to knowingly make any false statement concerning death, injury, illness, disfigurement, indecent conduct or criminal conduct of the person telephoned or of any member of his family or household with the intent to abuse, annoy, threaten, terrify, harass, or embarrass;

(6) To knowingly permit any telephone under his control to be used for any purpose prohibited by this section.

(b) Any of the above offenses may be deemed to have been committed at either the place at which the telephone call or calls were made or at the place where the telephone call or calls were received.

(c) Anyone violating the provisions of this section shall be guilty of a misdemeanor and shall be subject to a fine or imprisonment, or both, in the discretion of the court. (1913, c. 35; 1915, c. 41; C. S., s. 4351; 1967, c. 833, s. 1.)

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Constitutionality. — Subsections (a)(1) and (a)(2) as drafted and construed are held unconstitutional as being overly broad. Radford v. Webb, 446 F. Supp. 608 (W.D.N.C. 1978), aff'd, 596 F.2d 1205 (4th Cir. 1979).

Subsection (a)(1) is constitutional. The language of this section is broad, but it is neither so vague as to be easily misunderstood nor so broad as to reach beyond the State's power to enact.

Use of one's telephone clearly involves substantial privacy interests which the State may recognize and protect. Subsection (a)(1) seeks to protect that interest from an invasion made in an essentially intolerable manner, and the means chosen by the legislature were both appropriate and sufficiently narrowed to achieving the legitimate ends sought to be attained. In re Simmons, 24 N.C. App. 28, 210 S.E.2d 84 (1974).

Threat to take one's life or to beat one falls within this section's proscription against using in telephonic communication language threatening to inflict bodily harm. State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (1975).

An attempt to commit common-law robbery, a crime punishable as a felony by virtue of § 14-3(b), is an entirely different crime from the misdemeanor offense created by subdivision (a)(2) of this section. State v. Jacobs, 25 N.C. App. 500, 214 S.E.2d 254, cert. denied, 287 N.C. 666, 216 S.E.2d 909 (1975).

Consent by the victim is not an essential element bearing on the offense. State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967), decided under former § 14-196.1.

Failure of Court to Define "Annoy" and "Harass". — See State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Tape recordings allegedly containing telephone conversations by the defendant with the prosecuting witness made by a recorder attached to the witness's telephone are not incompetent in prosecuting for annoying a female by repeated telephoning because they violate the North Carolina Wiretapping Statute (§ 14-155) and also §§ 14-372 and 15-27, these statutes were not enacted to prevent introduction of evidence obtained in such a case and are not relevant in such prosecution. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

The State has laid the requisite foundation for the admissibility of tape recordings allegedly containing telephone conversations by the defendant with the prosecuting witness where the witness identified them as being the voice of the defendant, and stated that they were a fair and accurate representation of the conversations she had with the defendant. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Right to Counsel. — A warrant charging a violation of this section charges a serious offense, entitling defendant to the assistance of legal counsel. State v. Best, 5 N.C. App. 379, 168 S.E.2d 433 (1969).

Evidence of Intent. — It is competent for the purpose of showing the intent of the defendant and her attitude toward the prosecuting witness for the court to permit the witness to testify that the defendant had attempted to block her car in the parking lot of the supermarket, that she had frequently followed her to such places as the hospital, school, etc., and would cut her car in front of the witness's "at least once a week, sometimes more than that, and many times was very very close." Her conduct in blocking the witness's car and cutting in front of it showed the defendant's intent to harass, annoy, and molest her and is competent as interpreting the reasons for her frequent telephone calls which were alleged to be for the same purpose. State v. Godwin, 267 N.C. 216, 147 S.E.2d 890 (1966), decided under former § 14-196.1.

Entrapment. — Where police placed a want ad in the newspapers, similar to ads which had been placed by women who subsequently received obscene telephone calls, and used an electronic device to identify the telephone number of the caller, they merely set a trap to catch defendant in the execution of a crime which had its genesis in his own mind, and the defense of entrapment was not available to him in a prosecution for violating former § 14-196.1. State v. Coleman, 270 N.C. 357, 154 S.E.2d 485 (1967).

§§ 14-196.1, 14-196.2: Repealed by Session Laws 1967, c. 833, s. 3.

§ 14-197. Using profane or indecent language on public highways; counties exempt.

If any person shall, on any public road or highway and in the hearing of two or more persons, in a loud and boisterous manner, use indecent or profane language, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. The following counties shall be exempt from the provisions of this section: Pitt and Swain. (1913, c. 40; C. S., s. 4352; Pub. Loc. Ex. Sess., 1924, c. 65; 1933, c. 309; 1937, c. 9; 1939, c. 73; 1945, c. 398; 1947, cc. 144, 959; 1949, c. 845; 1957, c. 348; 1959, c. 733; 1963, cc. 39, 123; 1969, c. 300; 1971, c. 718; 1973, cc. 120, 233.)

Legal Periodicals. — For article dealing with the legal problems in southern desegregation, see 43 N.C.L. Rev. 689 (1965).

CASE NOTES

Sufficiency of Warrant or Indictment. — A bill of indictment charging that defendant "unlawfully and willfully did appear in a public place in a rude and disorderly manner and did use profane and indecent language in the presence of two or more persons" is insufficient to charge a violation of this section in failing to charge that the indecent or profane language was spoken on a public road or highway and in a loud and boisterous manner. State v. Smith, 262 N.C. 472, 137 S.E.2d 819 (1964).

A warrant charging that defendant unlawfully and willfully violated the laws of North Carolina "by disorderly conduct by using profane and indecent language" is insufficient to charge the statutory crime proscribed by this section, since it fails to charge that defendant used the profane language (1) on a public road or highway, (2) in the hearing of two or more persons, or (3) in a loud and boisterous manner. State v. Thorne, 238 N.C. 392, 78 S.E.2d 140 (1953).

§ 14-198: Repealed by Session Laws 1975, c. 402.

§ 14-199. Obstructing way to places of public worship.

If any person shall maliciously stop up or obstruct the way leading to any place of public worship, or to any spring or well commonly used by the congregation, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1785, c. 241, P. R.; R. C., c. 97, s. 5; Code, s. 3669; Rev., s. 3776; C. S., s. 4354; 1945, c. 635; 1969, c. 1224, s. 1.)

Cross References. — As to procedure for laying out church roads, see § 136-71. As to obstruction of such highway, see § 136-90 and note thereto.

Legal Periodicals. — For article dealing with the legal problems in southern desegregation, see 43 N.C.L. Rev. 689 (1965).

§ 14-200. Disturbing religious assembly by certain exhibitions.

If any person shall bring within half a mile of any place where the people are assembled for divine worship, and stop for exhibition, any stallion or jack, or shall bring within that distance any natural or artificial curiosities and there

exhibit them, he shall forfeit and pay to anyone who will sue therefor the sum of twenty dollars ($20.00) and shall also be guilty of a misdemeanor: Provided, that nothing herein shall be construed to prohibit such exhibitions at any time if made within the limits of any incorporated town, or without such limits if made before the hour of ten o'clock in the forenoon or after three o'clock in the afternoon. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1809, c. 779, s. 1, P. R.; R. C., c. 97, s. 6; Code, s. 3670; Rev., s. 3705; 1907, c. 412; C. S., s. 4355; 1969, c. 1224, s. 9.)

Local Modification. — Dare, Hatteras township: C.S. 4355.

§ 14-201. Permitting stone-horses and stone-mules to run at large.

If any person shall let any stone-horse or stone-mule of two years old or upwards run at large, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. (R. C., c. 17, s. 6; Code, s. 2325; Rev., s. 3323; 1907, c. 412; C. S., s. 4356.)

Local Modification. — Dare, Hatteras township: C.S. 4356.

§ 14-202. Secretly peeping into room occupied by female person.

Any person who shall peep secretly into any room occupied by a female person shall be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1923, c. 78; C. S., s. 4356(a); 1957, c. 338.)

Legal Periodicals. — For discussion of application of this section to police officers, see 1 N.C.L. Rev. 286.

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Constitutionality. — This section is sufficiently narrowed by judicial interpretation to require that the act condemned must be a spying for the wrongful purpose of invading the privacy of the female occupant of the room, thereby omitting from its scope those persons who have a legitimate purpose upon another's property and those who only inadvertently glance in the window of another. Thus, the statute is not so overbroad as to proscribe legitimate conduct. Therefore, this section is not unconstitutional for overbreadth. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

This section is sufficiently definite to give an individual fair notice of the conduct prohibited, and to guide a judge in its application and a lawyer in defending one charged with its violation, and therefore, this statute violates neither N.C. Const., Art. I, § 19, nor the Due Process Clause of the Federal Constitution by reason of vagueness and uncertainty. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

This section prohibits the wrongful spying into a room upon a female with the intent of violating the female's legitimate expectation of privacy. This is sufficient to inform a person of ordinary intelligence, with reasonable precision, of those acts the statute intends to prohibit, so that he may know what acts he should avoid in order that he may not bring himself within its provisions. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

This section apparently was derived from the common-law crimes of common nuisance and eavesdropping. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

"Peep". — The word "peep" means to look cautiously or slyly — as if through a crevice — out from chinks and knotholes. State v. Bivins, 262 N.C. 93, 136 S.E.2d 250 (1964).

The word "secretly" as used in this section conveys the definite idea of spying upon another with the intention of invading her privacy. In re Banks, 295 N.C. 236, 244 S.E.2d 386 (1978).

Defendant is entitled to know identity of female person whose privacy he is charged with having invaded. State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

Length of Blind Irrelevant. — The fact that a venetian blind lacks some six to ten inches of reaching the window sill is entirely irrelevant in a prosecution of defendant for peeping into a room occupied by a female. State v. Bivins, 262 N.C. 93, 136 S.E.2d 250 (1964).

Warrant Defective. — The warrant was defective in that it failed to name the victim of the peeping misdemeanant, and could not be cured by a bill of particulars supplying the name. State v. Banks, 263 N.C. 784, 140 S.E.2d 318 (1965).

Evidence Held Sufficient. — Evidence in prosecution of defendant for peeping secretly into a room occupied by a woman, was held sufficient to be submitted to the jury where a witness for the State testified that the room was usually occupied by a woman and he saw someone in the room immediately after defendant left the window. State v. Peterson, 232 N.C. 332, 59 S.E.2d 635 (1950).

Evidence Held Insufficient. — Evidence tending to show that shoeprints were found six or eight feet from the window of a house in which a woman lived alone, that shoeprints were also found in the edge of a field nearby, and that bloodhounds were put on the trail at the edge of the field and followed the scent to defendant's house, without evidence as to when or by whom the tracks were made, was insufficient evidence of the corpus delicti, aliunde the confession of the defendant, to be submitted to the jury in a prosecution under this section. State v. Bass, 253 N.C. 318, 116 S.E.2d 772 (1960).

§ 14-202.1. Taking indecent liberties with children.

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is punishable as a Class H felony. (1955, c. 764; 1975, c. 779; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punishable as a Class H felony" for "a felony punishable by a fine, imprisonment for not more than 10 years, or both" in subsection (b). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Constitutionality. — The use of language such as "immoral, improper, indecent liberties," and "lewd or lascivious act" in this section is not unconstitutionally vague. State v. Vehaun, 34 N.C. App. 700, 239 S.E.2d 705 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 846 (1978).

This section making it a crime to take indecent liberties with a female under the age of 16, the offender being over 16 years old and more than five years older than the female child, is not unconstitutionally vague. State v. Maxwell, 47 N.C. App. 658, 267 S.E.2d 582 (1980).

This section is not unconstitutionally void for vagueness since it clearly prohibits sexual conduct with a minor child and describes with reasonable specificity the proscribed conduct. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

This section does not violate equal protection because it requires a five-year difference between the age of the defendant, who cannot himself be under 16, and the age of the victim, who must be under age 16, since the age classifications within the statute are reasonably related to the purpose of the statute, i.e., the protection of children from the sexual advances of adults. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Same-Standing to Challenge. — Defendant held to lack standing to challenge constitutionality of section on equal protection grounds. See State v. Vehaun, 34 N.C. App. 700, 239 S.E.2d 705 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 846 (1978).

Defendant had no standing to attack this section on the ground that it is unconstitutionally overbroad in that it proscribes innocent displays of affection in violation of the First Amendment since the statute has never been so interpreted and was not so applied against defendant, and defendant had no First Amendment right to express himself through unlawful actions. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Construed With § 14-177. — This section and § 14-177 are complementary rather than repugnant or inconsistent. State v. Lance, 244 N.C. 455, 94 S.E.2d 335 (1956). See note to § 14-177; State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section supplements § 14-177. State v. Whittemore, 255 N.C. 583, 122 S.E.2d 396 (1961).

It is clear that there was no legislative intent in enacting this section to repeal § 14-177 in any aspect; the intent was to supplement it and to give even broader protection to children. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of § 14-177. State v. Harward, 264 N.C. 746, 142 S.E.2d 691 (1965).

This section and § 14-177 are complementary rather than repugnant or inconsistent. Section 14-177 condemns crimes against nature whether committed against adults or children. This section condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of § 14-177. This section, of course, condemns other acts against children than unnatural sexual acts. The two statutes can be reconciled, and both declared to be operative without repugnance. State v. Chance, 3 N.C. App. 459, 165 S.E.2d 31 (1969).

Sections 14-177 and this section can be reconciled and both declared to be operative without repugnance. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

Section 14-177 condemns crimes against nature whether committed against adults or children while this section condemns other acts against children than unnatural sexual acts and condemns those offenses of an unnatural sexual nature against children under 16 years of age by persons over 16 years of age which cannot be reached and punished under the provisions of § 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

There was no merit to defendant's contention that the trial court lacked jurisdiction to try him under the indecent liberties with children statute, this section, because the criminal act he committed was a crime against nature prohibited by § 14-177, since the crime against nature statute and the indecent liberties with children statute are complementary but not mutually exclusive. State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

Same — Not a Lesser Included Offense. — Because the two offenses are separate and distinct and the constituent elements are not identical, a violation of this section is not a lesser included offense of the crime against nature described in § 14-177. State v. Copeland, 11 N.C. App. 516, 181 S.E.2d 722, cert. denied, 279 N.C. 512, 183 S.E.2d 688 (1971).

Intent to commit an unnatural sexual act is an essential element in this crime and must be proved by the State. State v. Richmond, 266 N.C. 357, 145 S.E.2d 915 (1966).

Evidence of Bias Properly Excluded. — In a prosecution of defendant for taking indecent liberties with a child, the trial court did not err in excluding testimony by defendant, his wife, and an employee of the county department of social services which was offered to show bias, interest, corruption, undue prejudice and influence on the part of the mother of the prosecuting witness, since the competency of the 10 year old victim was determined by the trial judge after a voir dire hearing; her credibility was tested by careful cross-examination by defendant; defendant was unable to show on cross-examination that the prosecuting witness was biased or prejudiced against him or that her testimony was in any way influenced by her mother. State v. Locklear, 50 N.C. App. 165, 272 S.E.2d 597 (1980).

Evidence of Prior Misconduct toward Prosecuting Witness Admissible. — In a prosecution for taking immoral, improper, and

indecent liberties with a female under the age of 16, evidence of prior misconduct by the defendant toward the prosecuting witness was admissible as an exception to the rule that evidence of independent offenses is not admissible. State v. Jenkins, 35 N.C. App. 758, 242 S.E.2d 505, cert. denied, 295 N.C. 470, 246 S.E.2d 11 (1978).

The uncorroborated testimony of a victim under this section would be sufficient to convict a defendant if such testimony suffices to establish all the elements of the offense. State v. Vehaun, 34 N.C. App. 700, 239 S.E.2d 705 (1977), cert. denied, 294 N.C. 445, 241 S.E.2d 846 (1978).

Instructions — Failure to Charge on Willfulness. — In a prosecution of defendant for taking indecent liberties with a female under the age of 16, defendant being over 16 years old and more than five years older than the female child, the jury, by finding that defendant committed the crime, necessarily found that he acted willfully and accordingly the court's failure to charge on willfulness was harmless beyond a reasonable doubt. State v. Maxwell, 47 N.C. App. 658, 267 S.E.2d 582 (1980).

Same — Failure to Define "Lewd or Lascivious Act." — The words "lewd or lascivious act" are ordinary words which the jury is presumed to understand. State v. Stell, 39 N.C. App. 75, 249 S.E.2d 480 (1978).

Since the words "lewd or lascivious act" are ordinary words which the jury is presumed to understand, there was no error in a prosecution under this section when the trial court failed to define the words in its charge to the jury. State v. Stell, 39 N.C. App. 75, 249 S.E.2d 480 (1978).

Applied in State v. Cox, 272 N.C. 140, 157 S.E.2d 717 (1967); State v. Wells, 31 N.C. App. 736, 230 S.E.2d 437 (1976).

Quoted in State v. Shaw, 293 N.C. 616, 239 S.E.2d 439 (1977).

Stated in Perkins v. North Carolina, 234 F. Supp. 333 (W.D.N.C. 1964).

Cited in State v. Collins, 44 N.C. App. 27, 259 S.E.2d 802 (1979); State v. Turgeon, 44 N.C. App. 547, 261 S.E.2d 501 (1980).

§§ 14-202.2 to 14-202.9: Reserved for future codification purposes.

Article 26A.

Adult Establishments.

§ 14-202.10. Definitions.

As used in this Article:

(1) "Adult bookstore" means a bookstore having as a preponderance of its publications books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section.

(2) "Adult establishment" means an adult bookstore, adult motion picture theater, adult mini motion picture theater, or a massage business as defined in this section.

(3) "Adult motion picture theater" means an enclosed building with a capacity of 50 or more persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(4) "Adult mini motion picture theater" means an enclosed building with a capacity for less than 50 persons used for presenting motion pictures, a preponderance of which are distinguished or characterized by an emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas, as defined in this section, for observation by patrons therein.

(5) "Massage" means the manipulation of body muscle or tissue by rubbing, stroking, kneading, or tapping, by hand or mechanical device.

(6) "Massage business" means any establishment or business wherein massage is practiced, including establishments commonly known as health clubs, physical culture studios, massage studios, or massage parlors.
(7) "Sexually oriented devices" means without limitation any artificial or simulated specified anatomical area or other device or paraphenalia that is designed in whole or part for specified sexual activities.
(8) "Specified anatomical areas" means:
a. Less than completely and opaquely covered: (i) human genitals, pubic region, (ii) buttock, or (iii) female breast below a point immediately above the top of the areola; or
b. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.
(9) "Specified sexual activities" means:
a. Human genitals in a state of sexual stimulation or arousal;
b. Acts of human masturbation, sexual intercourse or sodomy; or
c. Fondling or other erotic touchings of human genitals, pubic regions, buttocks or female breasts. (1977, c. 987, s. 1.)

Legal Periodicals. — For article, "Regulating Obscenity Through the Power to Define and Abate Nuisances," see 14 Wake Forest L. Rev. 1 (1978).

CASE NOTES

Purpose of Article. — This Article is aimed at prohibiting a "supermarket" marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 1124 (1980).

The essential regulation implemented by this Article is of location. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Constitutionality. — No Equal Protection Violation. — This Article does not violate equal protection since the unequal treatment of commercial establishments involved in this Article is based most essentially on the different effects they are considered to have on their surroundings. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Same — First Amendment Not Violated. — Under this Article the incidental restriction on First Amendment interests is no greater than is essential to furtherance of the state's interest. The means chosen by North Carolina in its effort to eliminate the undesired secondary effects of adult establishments is one of the least burdensome means the state could have chosen. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

On its face this Article is a permissible regulation of the external costs of adult establishments that is unrelated to the overall suppression of any protected materials offered by them for public consumption. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

This Article is merely a regulation of the place and manner of expression, without proscription of that expression, of the type not forbidden by the First Amendment. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

While the First Amendment sets limits on the economic burdens that can be imposed upon the dissemination of protected materials, those limits are not exceeded by the relocation burden involved in this Article. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

This Article furthers an important or substantial interest. North Carolina has a substantial interest in maintaining a stable, healthful environment in its cities. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Same — Right of Privacy Not Violated. — This Article does not violate the constitutionally protected right of privacy. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Same — Standing to Challenge. — Adult establishments which clearly came within the terms of this Article lacked standing to challenge the Article for vagueness. But even were they granted standing to raise this issue, the statute would withstand a vagueness challenge. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Same — This Article is within the concept of the public welfare that defines the limits of the police power. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

Whether or not this Article is a true zoning law, it is a legitimate exercise of the police power, under which the state may limit the use of private property for the public welfare. Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), cert. denied, 447 U.S. 929, 100 S. Ct. 3028, 65 L. Ed. 2d 1124 (1980).

§ 14-202.11. Restrictions as to adult establishments.

No building, premises, structure, or other facility that contains any adult establishment shall contain any other kind of adult establishment. No building, premises, structure, or other facility in which sexually oriented devices are sold, distributed, exhibited, or contained shall contain any adult establishment. (1977, c. 987, s. 1.)

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

CASE NOTES

Purpose and Constitutionality of Article. — See notes to § 14-202.10.

§ 14-202.12. Violations; penalties.

Any person who violates G.S. 14-202.11 shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed three months or fined an amount not to exceed three hundred dollars ($300.00), or both, in the discretion of the court. Any person who has been previously convicted of a violation of G.S. 14-202.11, upon conviction for a second or subsequent violation of G.S. 14-202.11, shall be guilty of a misdemeanor and shall be imprisoned for a term not to exceed six months or fined an amount not to exceed five hundred dollars ($500.00), or both, in the discretion of the court. (1977, c. 987, s. 1.)

CASE NOTES

Purpose and Constitutionality of Article. — See notes to § 14-202.10.

ARTICLE 27.

Prostitution.

§ 14-203. Definition of terms.

The term "prostitution" shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body fo. indiscriminate sexual intercourse without hire. The term "assignation" shall be construed to include

the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement. (1919, c. 215, s. 2; C. S., s. 4357.)

CASE NOTES

Applied in State v. Bethea, 9 N.C. App. 544, 176 S.E.2d 904 (1970); Brown v. Brannon, 399 F. Supp. 133 (M.D.N.C. 1975).

Quoted in State v. Johnson, 220 N.C. 773, 18 S.E.2d 358 (1942); State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975); State ex rel. Gilchrist v. Hurley, 48 N.C. App. 433, 269 S.E.2d 646 (1980).

Cited in State v. Fletcher, 199 N.C. 815, 155 S.E. 927 (1930); State v. Harrill, 224 N.C. 477, 31 S.E.2d 353 (1944); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

§ 14-204. Prostitution and various acts abetting prostitution unlawful.

It shall be unlawful:

(1) To keep, set up, maintain, or operate any place, structure, building or conveyance for the purpose of prostitution or assignation.

(2) To occupy any place, structure, building, or conveyance for the purpose of prostitution or assignation; or for any person to permit any place, structure, building or conveyance owned by him or under his control to be used for the purpose of prostitution or assignation, with knowledge or reasonable cause to know that the same is, or is to be, used for such purpose.

(3) To receive, or to offer or agree to receive any person into any place, structure, building, or conveyance for the purpose of prostitution or assignation, or to permit any person to remain there for such purpose.

(4) To direct, take, or transport, or to offer or agree to take or transport, any person to any place, structure, or building or to any other person, with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution or assignation.

(5) To procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation.

(6) To reside in, enter, or remain in any place, structure, or building, or to enter or remain in any conveyance, for the purpose of prostitution or assignation.

(7) To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever. (1919, c. 215, s. 1; C. S., s. 4358.)

Cross References. — As to the crime of loitering for the purpose of violating this section, see § 14-204.1; as to declaring houses of prostitution to be nuisances, see § 19-1.

CASE NOTES

Purpose. — The enterprise sought to be proscribed by this section, the offering of the body for hire, has been fragmented into multiple substantive offenses. This fragmentation serves the laudable purpose of not only punishing those who, at any state, engage in the promotion of the enterprise, but is an obvious prosecutorial aid to those whose responsibility it is to suppress the vice. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Each Step a Separate Crime. — The legislature, by making each step taken in furtherance of the vice of offering the body for sexual hire a separate crime, has made it possible to obtain convictions where, given the nature of the activity, they would otherwise be

most difficult to obtain. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

The violation of subdivision (4) is complete when defendant directs and invites agent to her apartment for prostitution. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Same — Transporting. — Where defendants, taxi drivers, were apprehended in a clearing in the woods, each under the wheel of his taxi with motor running, and carrying soldiers, the evidence of the character of the scene and the other circumstantial evidence was sufficient to support the inference that defendants knew their destination and brought their passengers to the place for the purpose of engaging in prostitution. State v. Willis, 220 N.C. 712, 18 S.E.2d 118 (1942).

The violation of subdivision (6) is complete when defendant enters her appartment with a person for the stated purpose. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Anyone who has violated subdivision (7) has most likely, in the process of doing so, violated one or more of the other subdivisions of this section. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Aiding and Abetting. — It is to be noted that subdivision (7) does not merely say "to aid or abet prostitution or assignation," but there are added the descriptive words "by any means whatsoever," thereby covering a multitude of acts. Thus, it is manifest that the legislature intended that these supplemental words should be given a meaning, and catch all other acts of aiding and abetting prostitution or assignation. Therefore in order to determine whether any offense be committed, it is essential that for the words of the statute "by any means whatsoever" to be given force and effect, there must be stated in the warrant the acts and circumstances of the particular charge, so that the court can see as a matter of law that a crime is charged. State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).

A warrant which charged that defendant did "aid and abet in prostitution and assignation" was defective since it failed to state wherein the defendant aided and abetted, and defendant's motion in arrest of judgment should have been granted. State v. Cox, 244 N.C. 57, 92 S.E.2d 413 (1956).

This section punishes all who aid and abet prostitution by the means set out in the statute or by "any means whatsoever" to the same extent that it punishes those who offer their bodies for that purpose. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Allegations in warrants charging violations of subdivisions (2), (4) and (6) can be so cast that neither offense is made an essential element of any other. State v. Demott, 26 N.C. App. 14, 214 S.E.2d 781 (1975).

Competency of Evidence. — Evidence of the reputation of the upstairs of a building owned by defendant, and of the persons frequenting it, is competent in a prosecution under this section. State v. Waggoner, 207 N.C. 306, 176 S.E. 566 (1934).

Sufficiency of Evidence. — In a criminal prosecution for permitting property to be used for prostitution where the State's evidence tended to show that defendant owned the property so used, which was across the road from his residence, that defendant's wife was one of the operators of the place of ill fame and that its general reputation was bad, motion for judgment as of nonsuit was held properly denied. State v. Herndon, 223 N.C. 208, 25 S.E.2d 611, cert. denied, 320 U.S. 759, 64 S. Ct. 67, 88 L. Ed. 452 (1943).

Applied in State v. McClain, 240 N.C. 171, 81 S.E.2d 364 (1954); State v. Bethea, 9 N.C. App. 544, 176 S.E.2d 904 (1970); State v. Butler, 17 N.C. App. 167, 193 S.E.2d 117 (1972).

Quoted in State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

Cited in State v. Fletcher, 199 N.C. 815, 155 S.E. 927 (1930); State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961); In re Dillingham, 257 N.C. 684, 127 S.E.2d 584 (1962); State v. Blalock, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

§ 14-204.1. Loitering for the purpose of engaging in prostitution offense.

(a) For the purposes of this section, "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility, or the doorways and entrance ways to any building which fronts on any of those places, or a motor vehicle in or on any of those places.

(b) If a person remains or wanders about in a public place and

(1) Repeatedly beckons to, stops, or attempts to stop passers-by, or repeatedly attempts to engage passers-by in conversation; or

(2) Repeatedly stops or attempts to stop motor vehicles; or

(3) Repeatedly interferes with the free passage of other persons for the purpose of violating any subdivision of G.S. 14-204 or 14-177, that person is guilty of a misdemeanor and, upon conviction, shall be punished as for a violation of G.S. 14-204. (1979, c. 873, s. 2.)

§ 14-205. Prosecution; in what courts.

Prosecutions for the violation of any of the provisions of this Article shall be tried in the courts of this State wherein misdemeanors are triable except those courts the jurisdiction of which is so limited by the Constitution of this State that such jurisdiction cannot by statute be extended to include criminal actions of the character herein described. (1919, c. 215, s. 6; C. S., s. 4359.)

§ 14-206. Reputation and prior conviction admissible as evidence.

In the trial of any person charged with a violation of any of the provisions of this Article, testimony of a prior conviction, or testimony concerning the reputation of any place, structure, or building, and of the person or persons who reside in or frequent the same, and of the defendant, shall be admissible in evidence in support of the charge. (1919, c. 215, s. 3; C.S., s. 4360.)

CASE NOTES

Stated in State v. Harrill, 224 N.C. 477, 31 S.E.2d 353 (1944).

§ 14-207. Degrees of guilt.

Any person who shall be found to have committed two or more violations of any of the provisions of G.S. 14-204 of this Article within a period of one year next preceding the date named in an indictment, information, or charge of violating any of the provisions of such section, shall be deemed guilty in the first degree. Any person who shall be found to have committed a single violation of any of the provisions of such section shall be deemed guilty in the second degree. (1919, c. 215, s. 4; C.S., s. 4361.)

CASE NOTES

Province of Judge. — When the degree of guilt has been properly ascertained the judge doubtless has the right to hear testimony for the purpose of fixing the terms of imprisonment within the limits of the statute; but this right does not extend to or include the finding by the judge of the degree of the offender's guilt. State v. Barnes, 122 N.C. 1031, 29 S.E. 381 (1898); State v. Lee, 192 N.C. 225, 134 S.E. 458 (1926); State v. Brinkley, 193 N.C. 747, 138 S.E. 138 (1927).

§ 14-208. Punishment; probation; parole.

Any person who shall be deemed guilty in the first degree, as set forth in G.S. 14-207, shall be guilty of a misdemeanor, and may be fined or imprisoned in the discretion of the court, or may be committed to any penal or reformatory institution in this State: Provided, that in case of a commitment to a reformatory institution, the commitment shall be made for an indeterminate period of time of not less than one nor more than three years in duration, and the board of managers or directors of the reformatory institution shall have authority to discharge or to place on parole any person so committed after the service of the minimum term or any part thereof, and to require the return to said institution for the balance of the maximum term of any person who shall violate the terms or conditions of the parole.

Notwithstanding the previous paragraph, any person who shall be deemed guilty in the first degree, as set forth in G.S. 14-207, shall be guilty of a misdemeanor and shall be imprisoned for not less than 60 days nor more than two years, and may be fined in the discretion of the court. This paragraph applies only in cities with a population of 300,000 or over, according to the most recent decennial federal census, but shall only apply in a city within that class if the city has adopted an ordinance to that effect, which ordinance makes a finding that prostitution is a serious problem within the city.

Any person who shall be deemed guilty in the second degree, as set forth in G.S. 14-207, shall be guilty of a misdemeanor, and shall be fined or imprisoned at the discretion of the court: Provided, that the defendant may be placed on probation in the care of a probation officer designated by law, or theretofore appointed by the court.

Probation or parole shall be granted or ordered in the case of a person infected with venereal disease only on such terms and conditions as shall insure medical treatment therefor and prevent the spread thereof, and the court may order any convicted defendant to be examined for venereal disease.

No girl or woman who shall be convicted under this Article shall be placed on probation or on parole in the care or charge of any person except a woman probation officer. (1919, c. 215, s. 5; C. S., s. 4362; 1921, c. 101; 1981, c. 969, ss. 1, 2.)

Effect of Amendments. — The 1981 amendment, ratified July 10, 1981, and effective 10 days after ratification, added the second paragraph.

CASE NOTES

Admission of Guilt — Effect on Time Limitation. — A defendant sentenced for the crime of prostitution upon his own admission of guilt, may not successfully resist a sentence therefor upon the ground that the offense charged in the indictment did not come within the period of time prescribed by the statute. State v. Brinkley, 193 N.C. 747, 138 S.E. 138 (1927).

Cited in Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

SUBCHAPTER VIII. OFFENSES AGAINST PUBLIC JUSTICE.

ARTICLE 28.

Perjury.

§ 14-209. Punishment for perjury.

If any person shall willfully and corruptly commit perjury, on his oath or affirmation, in any suit, controversy, matter or cause, depending in any of the courts of the State, or in any deposition or affidavit taken pursuant to law, or in any oath or affirmation duly administered of or concerning any matter or thing whereof such person is lawfully required to be sworn or affirmed, every person so offending shall be punished as a Class H felon. (1791, c. 338, s. 1, P. R.; R. C., c. 34, s. 49; Code, s. 1092; Rev., s. 3615; C. S., s. 4364; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1; as to swearing falsely to official reports, see § 14-232; as to form of bill for perjury, see § 15-145; as to false swearing by creditor in assignment for benefit of creditors, see § 23-9; as to making false affidavits in applications for motor vehicle licenses, see

§ 20-31; as to false swearing in an investigation before the Commissioner of Insurance, see § 69-3; as to false swearing in an investigation of trusts and combinations in restraint of trade, see § 75-12; as to perjury in application for oyster license, see § 113-203.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail or State's prison not less than four months nor more than ten years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Purpose. — Law of perjury was intended to afford defendant greater protection against the chance of unjust conviction than is ordinarily afforded in prosecuting for crime. State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

Definition of Perjury. — Perjury, as defined by common law and enlarged by this section, is a false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949); State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954); State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. Arthur, 244 N.C. 582, 94 S.E.2d 646 (1956); State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

This section does not specifically define perjury or state all the elements essential to constitute the crime. It enlarges the scope of the criminality of a false oath, and prescribes punishment. The definition is derived from the common law. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

Essential Elements. — The administration of an oath is an essential element of perjury. State v. Glisson, 93 N.C. 506 (1885). Another is jurisdiction of the court. Governor ex rel. Halcombe v. Deaver, 3 N.C. 56 (1842); Boling v. Luther, 4 N.C. 635 (1816); State v. Alexander, 11 N.C. 182 (1825). The false testimony given must be material. State v. Cline, 146 N.C. 640, 61 S.E. 522 (1908); State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Elements essential to constitute perjury are substantially these: A false statement under oath, knowingly, willfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question. To constitute materiality essential to sustain a charge of perjury the false testimony must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact. State v. Chaney, 256 N.C. 255, 123 S.E.2d 498 (1962).

Same — Offense Must Be Willfull and Corrupt. — Where the defendant swears to an answer in a civil action before one authorized to administer the oath and the answer contains a false statement of fact, in order to convict him of perjury under the provisions of this section it must be shown that he "willfully and corruptly" committed the offense. State v. Dowd, 201 N.C. 714, 161 S.E. 205 (1931).

Same — False Statement Must Be Material to Issue. — A false statement under oath must be so connected with the fact directly in issue as to have a legitimate tendency to prove or disprove such fact, in order to be material to the issue and constitute a basis for a prosecution for perjury. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

In a prosecution for willful failure of defendant to support his illegitimate child, defendant swore he had not had sexual intercourse with prosecutrix and was not the father of her child, and testified as to the number of times he had visited prosecutrix. In a subsequent prosecution for perjury it was made to appear that defendant had visited prosecutrix or had been seen with her more times than he had admitted under oath, but there was no evidence that he was the father of the child. It was held that the proof of false testimony did not relate to matters determinative of the issue in the first prosecution, and the evidence was insufficient to withstand nonsuit in the prosecution for perjury. State v. Smith, 230 N.C. 198, 52 S.E.2d 348 (1949).

One of the essential elements of the crime of perjury is that the false statement must be material to an issue or point in question. State v. Chaney, 256 N.C. 255, 123 S.E.2d 498 (1962).

Same — Materiality of False Testimony a Question of Law. — On a trial for perjury the question of the materiality of the alleged false testimony is in its nature a question of law for the court rather than of fact for the jury. State

v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

Acquittal No Shield from Charge of Perjury. — To hold that a person could go into a court of justice and by perjured testimony secure an acquittal and by that acquittal be shielded from a charge of perjury would be a dangerous doctrine. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

A verdict of acquittal is not equivalent to an affirmative finding that all of defendant's testimony at a former trial was true. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

Former acquittal of malicious injury to personal property under § 14-160 would not support a plea of former jeopardy in a prosecution for perjury committed at the trial, since the crimes are not the same either in fact or in law and the charge of perjury was not based on the assumption that defendant was guilty of the charge of malicious injury, and his acquittal upon the latter charge did not necessarily establish the fact that all material evidence given by him in that case was true. State v. Leonard, 236 N.C. 126, 72 S.E.2d 1 (1952), cert. denied, 344 U.S. 916, 73 S. Ct. 339, 97 L. Ed. 706 (1953).

Civil Action Will Not Lie. — Aside from defamation and malicious prosecution, the courts refuse to recognize any injury from false testimony on which a civil action for damages can be maintained, and no action for damages lies for false testimony in a civil suit, whereby the plaintiff fails to recover a judgment, or a judgment is rendered against him. Brewer v. Carolina Coach Co., 253 N.C. 257, 116 S.E.2d 725 (1960).

It seems to be the general rule that a civil action in tort cannot be maintained upon the ground that a defendant gave false testimony or procured other persons to give false or perjured testimony. Brewer v. Carolina Coach Co., 253 N.C. 257, 116 S.E.2d 725 (1960).

Perjured testimony and the subornation of perjured testimony are criminal offenses, but neither are torts supporting a civil action for damages. Gillikin v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961).

Vacating Judgment Because of Perjured Testimony. — A judgment cannot be vacated because of perjured testimony unless the party charged with perjury has been indicted and convicted or he has passed beyond the jurisdiction of courts and is not amenable to criminal process. Gillikin v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961).

Irregularity of Warrant Immaterial. — When perjury is charged to have been committed by a witness in the trial of a criminal proceeding which was begun by warrant, if the court had jurisdiction to investigate the offense charged, it is no defense that the warrant was issued without complaint or affidavit. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890).

Burden of Proof on State. — The burden is not on the defendant in perjury to show the truth of the matter at issue, but the burden is on the State to show that it is false. State v. Cline, 150 N.C. 854, 64 S.E. 591 (1909), overruled on other grounds, State v. Hawley, 186 N.C. 433, 119 S.E. 888 (1923).

Corroborative Evidence Required. — To prove the falsity of the oath, the evidence must not necessarily equal in weight the testimony of two witnesses. It is sufficient if there is the testimony of one witness and corroborative circumstances sufficient to turn the scale against the oath which is charged to have been false. State v. Peters, 107 N.C. 876, 12 S.E. 74 (1890).

In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath. State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954). See State v. Arthur, 244 N.C. 582, 94 S.E.2d 646 (1956); State v. Allen, 260 N.C. 220, 132 S.E.2d 302 (1963).

To sustain a conviction for perjury, the falsity of the oath must be directly proved by one witness and there must be corroborating evidence of independent and supplemental character, sufficient to resolve "the dilemma of weighing [one] oath against [another]." State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

In a prosecution for perjury it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances sufficient to turn the scales against the defendant's oath. State v. Wilson, 30 N.C. App. 149, 226 S.E.2d 518 (1976).

Circumstantial evidence of perjury alone is not sufficient. State v. Horne, 28 N.C. App. 475, 221 S.E.2d 715 (1976).

Evidence Must Relate to Statement upon Which Indictment Predicated. — Testimony of two or more witnesses as to conflicting statements made by defendant while under oath in courts of competent jurisdiction, but without evidence that the statement upon which the bill of indictment was predicated was the false testimony, is insufficient to be submitted to the jury in a prosecution for perjury. State v. Allen, 260 N.C. 220, 132 S.E.2d 302 (1963).

Evidence Sufficient. — The direct oath of one witness and proof of declarations of the prisoner in an action for perjury are sufficient to convict. State v. Molier, 12 N.C. 263 (1827).

Cited in Grudger v. Penland, 108 N.C. 593, 13 S.E. 168 (1891); In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

§ 14-210. Subornation of perjury.

If any person shall, by any means, procure another person to commit such willful and corrupt perjury as is mentioned in G.S. 14-209, the person so offending shall be punished in like manner as the person committing the perjury. (1791, c. 338, s. 2, P. R.; R. C., c. 34, s. 50; Code, s. 1093; Rev., s. 3616; C. S., s. 4365.)

Cross References. — As to bill and form of indictment for subornation of perjury, see § 15-146.

CASE NOTES

Elements of Offense. — The crime of subornation of perjury consists of two elements — the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. The guilt of both the suborned and the suborner must be proved on the trial of the latter. The commission of the crime of perjury is the basic element in the crime of subornation of perjury. State v. Sailor, 240 N.C. 113, 81 S.E.2d 191 (1954); State v. Lucas, 244 N.C. 53, 92 S.E.2d 401 (1956); State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

In a prosecution under this section, the State was required to establish, inter alia, that the alleged perjurer made the alleged false statement under oath in a court of competent jurisdiction and that such false statement was material to the matter then in issue. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

The commission of the crime of perjury is the basic element in the crime of subornation of perjury. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

The crime of subornation of perjury consists of two elements, the commission of perjury by the person suborned, and willfully procuring or inducing him to do so by the suborner. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

The guilt of both the suborned and the suborner must be proved on the trial of the latter. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966).

The suborner of perjury and the perjurer stand on an equal footing, especially in respect of turpitude and punishment. State v. Cannon, 227 N.C. 338, 42 S.E.2d 344 (1947).

How Falsity of Alleged Perjurer's Oath Established. — In a prosecution for subornation of perjury, the falsity of the oath of the alleged perjurer must be established by the testimony of two witnesses, or one witness and corroborating circumstances. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

In a prosecution for perjury or subornation of perjury, it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances, sometimes called adminicular circumstances. State v. King, 267 N.C. 631, 148 S.E.2d 647 (1966); State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

The requirement of proving by independent circumstances the commission of perjury does not apply to the procurement element of the offense of subornation of perjury. State v. McBride, 15 N.C. App. 742, 190 S.E.2d 658 (1972).

Civil Action Will Not Lie. — See note to § 14-209.

Competency of Corroborative Evidence. — See State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Instructions held erroneous for failure to instruct the jury that the alleged perjury must be established by the testimony of two witnesses, or by one witness and corroborating circumstances and failure to instruct that the State was required to establish, inter alia, that the alleged perjurer testified as charged in the bill of indictment. State v. Lucas, 247 N.C. 208, 100 S.E.2d 366 (1957).

Cited in In re Martin, 295 N.C. 291, 245 S.E.2d 766 (1978).

§ 14-211. Perjury before legislative committees.

If any person shall willfully and corruptly swear falsely to any fact material to the investigation of any matter before any committee or commission of either house of the General Assembly, he shall be subject to all the pains and penalties of willful and corrupt perjury, and, on conviction in the Superior Court of Wake County, shall be punished as a Class H felon. (1869-70, c. 5, s. 4; Code, s. 2857; Rev., s. 3611; C. S., s. 4366; 1977, c. 344, s. 4; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "confined in the State's prison for the time prescribed by law for perjury" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-212. Perjury in court-martial proceedings.

If any person shall willfully and corruptly swear falsely before any court-martial, touching and concerning any matter or thing cognizable before such court-martial, he shall be punished as a Class H felon. (1812, c. 828, s. 3, P. R.; R. C., c. 70, s. 73; Code, s. 3235; Rev., s. 3612; C. S., s. 4367; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "liable to the pains and penalties of perjury" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-213. False oath to statement of insurance company.

Any person who shall make oath to a willfully false statement in the annual report or other statement required by law from an insurance company shall be guilty of perjury. (1899, c. 54, s. 97; Rev., s. 3493; C. S., s. 4368.)

§ 14-214. False statement to procure benefit of insurance policy or certificate.

Any person who shall willfully and knowingly present or cause to be presented a false or fraudulent claim, or any proof in support of such claim, for the payment of a loss, or other benefits, upon any contract of insurance or certificate of insurance; or prepares, makes or subscribes to a false or fraudulent account, certificate, affidavit or proof of loss, or other documents or writing, with intent that the same may be presented or used in support of such claim, shall be punished as a Class I felon. (1899, c. 54, s. 60; Rev., s. 3487; 1913, c. 89, s. 28; C. S., s. 4369; 1937, c. 248; 1967, c. 1088, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony punishable by imprisonment for not more than five years or by a fine of not more than five thousand dollars ($5,000), or by both such fine or imprisonment in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981,

and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Meaning of "Willfully" and "Knowingly". — The word "willfully" as used in this section means something more than an intention to commit the offense. It implies committing the offense purposely and designedly in violation of law. The word "knowingly" as so used means that defendant knew what he was about to do, and with such knowledge, proceeded to do the act charged. These words combined in the phrase "willfully and knowingly" in reference to violation of the statute, mean intentionally and consciously. One does not "willfully and knowingly" violate a statute when he does that which he believes he has a bona fide right to do. State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

The existence of unreported liens or other insurance upon the property is a civil matter governed by §§ 58-178 and 58-180, but does not tend to show criminal intent in connection with the filing of proofs of claim within the meaning of this section. State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

The filing of an insurance claim based on an accident admittedly staged with the intent to defraud the insurance company is a violation of this section. State v. Walker, 22 N.C. App. 291, 206 S.E.2d 395 (1974).

Burden on the State. — The gravamen of the offense defined by this section is the willfully and knowingly presenting a false or fraudulent proof of claim for a loss upon a contract of insurance; and in the prosecution thereunder the burden is upon the State to prove that the claim for loss was false, that defendant knew it was false, and that, with such knowledge, he proceeded to make the claim for payment of insurance thereon. State v. Stephenson, 218 N.C. 258, 10 S.E.2d 819 (1940).

In a prosecution under this section, the burden is upon the State to prove that defendant "willfully and knowingly" presented a false and fraudulent claim and presented proof in support of such claim and when the evidence considered in the light most favorable to the State raises no more than a suspicion or conjecture of defendant's guilt of the charge under the statute, defendant's motion to nonsuit must be allowed. State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

Broker Is Competent Witness. — It was not necessary that a broker have the authority to contract directly with the insurance company, vis a vis, the power to broker the policy in order to be a competent witness with regard to the contract of insurance in a prosecution under this section where his testimony relating to the insurance contract did not extend beyond his personal knowledge and observation of the facts so as to render his testimony incompetent or hearsay. State v. Moose, 36 N.C. App. 202, 243 S.E.2d 425 (1978).

Evidence Sufficient to Show Conspiracy to Procure Insurance by Means of False Claim. — Evidence held sufficient to be submitted to jury in prosecution for conspiracy to procure insurance benefits by means of false claim. State v. Hedrick, 236 N.C. 727, 73 S.E.2d 904 (1953).

Evidence held insufficient to show that defendant willfully and knowingly presented fraudulent claim for insurance loss and proofs in support thereof. State v. Fraylon, 240 N.C. 365, 82 S.E.2d 400 (1954).

Applied in State v. Martin, 30 N.C. App. 512, 227 S.E.2d 172 (1976); State v. Downing, 31 N.C. App. 743, 230 S.E.2d 581 (1976).

Cited in Meekins v. Aetna Ins. Co., 231 N.C. 452, 57 S.E.2d 777, 15 A.L.R.2d 949 (1950).

§ 14-215. False oath to statement required of fraternal benefit societies.

Any person who shall willfully make any false statement in any verified report or declaration under oath, required or authorized by law from fraternal benefit societies, shall be guilty of perjury. (1913, c. 89, s. 28; C. S., s. 4370.)

Cross References. — As to criminal offenses by members of fraternal orders, see § 58-302.

§ 14-216. False oath to certificate of mutual fire insurance company.

Any person taking a false oath in respect to the certificate required by law before issuing policies in a mutual fire insurance company, that every subscription for insurance is genuine and made with an agreement that every subscriber will take the policies subscribed for by him within 30 days after granting a license to such company, shall be guilty of perjury. (1899, c. 54, s. 32; 1901, c. 391, ss. 3, 4; 1903, c. 438, s. 4; Rev., ss. 4738, 4834; C. S., s. 4371.)

Cross References. — As to the oaths required of officers of a mutual fire insurance company, see § 58-92.

ARTICLE 29.

Bribery.

§ 14-217. Bribery of officials.

If any person holding office under the laws of this State who, except in payment of his legal salary, fees or perquisites, shall receive, or consent to receive, directly or indirectly, anything of value or personal advantage, or the promise thereof, for performing or omitting to perform any official act, or with the express or implied understanding that his official action, or omission to act, is to be in any degree influenced thereby, he shall be punished as a Class I felon. (1868-9, c. 176, s. 2; Code, s. 991; Rev., s. 3568; C. S., s. 4372; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, effective July 1, 1980, see § 14-1.1; as to bank examiners accepting bribes, see § 14-233; as to bribing agents and servants to violate duties owed employers, see § 14-353; as to bribery of baseball players, umpires, and officials, see § 14-373 et seq.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony, and shall be punished by imprisonment in the State's prison for a term not exceeding five years, or fined not exceeding five thousand dollars, or both, in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Bribery Defined. — Bribery is the voluntary offering, giving, receiving or soliciting of any sum of money or thing of value with the corrupt intent to influence the recepient's action as a public officer or official in the discharge of a public legal duty. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

The distinction between bribery and extortion seems to be that the former offense consists in offering a present or receiving one, the latter in demanding a fee or present by color of office. State v. Pritchard, 107 N.C. 921, 12 S.E. 50 (1890).

Necessity of Proving Corrupt Intent. — On the trial of an officer for bribery in taking unlawful fees, it is necessary to prove a corrupt intent. State v. Pritchard, 107 N.C. 921, 12 S.E. 50 (1890).

And Receipt of Anything of Value Influencing Official Acts. — This section has an essential element of the offense of bribery of officials the receipt of anything of value with

the express or implied understanding that his official acts are to be in any degree influenced thereby. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Sufficiency of Indictment. — An allegation in an indictment against a public officer for unlawfully receiving compensation for the performance of his duty, that defendant "did receive and consent to receive" such compensation, is sufficient and is not defective because of the use of "and" instead of "or" as used in the statute. State v. Wynne, 118 N.C. 1206, 24 S.E. 216 (1896).

Evidence Sufficient for Submission to Jury. — Evidence in this case of one defendant's guilt of paying or delivering money or merchandise, directly and through agents, to each of defendant policemen to influence them in the performance of their duties, and of the acceptance by each defendant policeman of such payments or delivering with intent and understanding that his actions as a police officer would be influenced thereby, was held sufficient to be submitted to the jury as to each defendant. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Applied in State v. Cofer, 205 N.C. 653, 172 S.E. 176 (1934).

§ 14-218. Offering bribes.

If any person shall offer a bribe, whether it be accepted or not, he shall be punished as a Class I felon. (1870-1, c. 232; Code, s. 992; Rev., s. 3569; C. S., s. 4373; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony, and shall be punished by imprisonment for a term not less than one year nor more than five years in the State's prison or county jail, in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Indictment. — The general rule that an indictment for a statutory offense is sufficient, if the offense is charged in the words of the statute, either literally or substantially, or in equivalent words, does not apply where the words of the statute, as in this section, do not set forth all the essential elements necessary to constitute the offense sought to be charged. In such a situation the statutory words must be supplemented in the indictment by other allegations which explicitly and accurately set forth every essential element of the offense with such exactitude as to leave no doubt in the minds of the accused and the court as to the specific offense intended to be charged. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

An indictment for offering a bribe or bribery must allege by definite and particular statement, and not as a mere conclusion, that the acts were done to influence the performance of some public legal duty, and it must further appear, at least as a reasonable inference, that defendant had knowledge of the official character of him to whom the bribe was offered. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

Where an indictment for bribing or offering a bribe to a State highway patrolman fails to allege the official act the accused intended to influence, defendant's motion to quash should be allowed. State v. Greer, 238 N.C. 325, 77 S.E.2d 917 (1953).

Same — Not Necessary That Bribed Juror Received Fee. — In a prosecution under this section it is not necessary that the indictment should charge that the juror received any fee or other compensation, the statutes making a distinction between bribery and an offer to bribe. State v. Noland, 204 N.C. 329, 168 S.E. 412 (1933). As to venue, see note to § 15-134.

Competency of Evidence. — Evidence is competent which shows the quo animo, intent, design, guilty knowledge or scienter with which the defendant charged under this section gave money or other things of value to an official. State v. Smith, 237 N.C. 1, 74 S.E.2d 291 (1953).

Cited in State v. Barkley, 198 N.C. 349, 151 S.E. 733 (1930); State v. Stonestreet, 243 N.C. 28, 89 S.E.2d 724 (1955).

§ 14-219. Bribery of legislators.

If any person shall directly or indirectly promise, offer or give, or cause or procure to be promised, offered or given, any money, bribe, present or reward, or any promise, contract, undertaking, obligation or security for the payment or delivery of any money, goods, right of action, bribe, present or reward, or any other valuable thing whatever, to any member of the Senate or House of Representatives of this State after his election as such member, and either before or after he shall have qualified and taken his seat, with intent to influence his vote or decision on any question, matter, cause or proceeding which may then be pending before the General Assembly, or which may come before him for action in his capacity as a member of the General Assembly, such person so offering, promising or giving, or causing or procuring to be promised, offered or given any such money, goods, bribe, present or reward, or any bond, contract, undertaking, obligation or security for the payment or delivery of any money, goods, bribe, present or reward, or other valuable thing whatever, and the member-elect who shall in anywise accept or receive the same or any part thereof, shall be punished as a Class I felon, and the person convicted of so accepting or receiving the same, or any part thereof, shall forfeit his seat in the General Assembly and shall be forever disqualified to hold any office of honor, trust or profit under this State. (1868-9, c. 176, s. 5; Code, s. 2852; Rev., s. 3570; C. S., s. 4374; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony, and shall be fined not exceeding double the amount so offered, promised or given, and imprisoned in the State's prison not exceeding five years" near the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-220. Bribery of jurors.

If any juror, either directly or indirectly, shall take anything from the plaintiff or defendant in a civil suit, or from any defendant in a State prosecution, or from any other person, to give his verdict, every such juror, and the person who shall give such juror any fee or reward to influence his verdict, or induce or procure him to make any gain or profit by his verdict, shall be punished as a Class H felon. (5 Edw. III, c. 10; 34 Edw. III, c. 8; 38 Edw. III, c. 12; R. C., c. 34, s. 34; Code, s. 990; Rev., s. 3697; C. S., s. 4375; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall be imprisoned in the State's prison or county jail not less than four months nor more than ten years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides:

"This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Cited in State v. Stanley, 19 N.C. App. 684, 200 S.E.2d 223 (1973).

ARTICLE 30.

Obstructing Justice.

§ 14-221. Breaking or entering jails with intent to injure prisoners.

If any person shall conspire to break or enter any jail or other place of confinement of prisoners charged with crime or under sentence, for the purpose of killing or otherwise injuring any prisoner confined therein; or if any person shall engage in breaking or entering any such jail or other place of confinement of such prisoners with intent to kill or injure any prisoner, he shall be punished as a Class G felon. (1893, c. 461, s. 1; Rev., s. 3698; C. S., s. 4376; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1; as to investigation of lynchings, see § 114-15; as to sheriff's duty to protect prisoner, see § 162-23.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class G felon" for "guilty of a felony, and upon conviction, or upon a plea of guilty, shall be fined not less than five hundred dollars, and imprisoned in the State's prison or the county jail not less than two nor more than fifteen years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Conviction of Attempt. — On an indictment under this section as construed with §§ 15-128 (repealed) and 15-170, the defendant may be found guilty of an attempt. State v. Rumple, 178 N.C. 717, 100 S.E. 622 (1919).

Indictment Need Not Charge Accomplices. — It was error to quash a bill of indictment under this section which charged the defendant with conspiring "with others" to commit the crime of lynching, because it did not name the others or charge that they were unknown. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

Indictment in Adjoining County. — In an indictment for lynching it was error to quash the bill on the ground that it appeared on the face of the bill that the offense charged was not committed in the county in which the bill was found, but in an adjoining county. State v. Lewis, 142 N.C. 626, 55 S.E. 600 (1906).

§ 14-221.1. Altering, destroying, or stealing evidence of criminal conduct.

Any person who breaks or enters any building, structure, compartment, vehicle, file, cabinet, drawer, or any other enclosure wherein evidence relevant to any criminal offense or court proceeding is kept or stored with the purpose

of altering, destroying or stealing such evidence; or any person who alters, destroys, or steals any evidence relevant to any criminal offense or court proceeding shall be punished as a Class I felon.

As used in this section, the word evidence shall mean any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice being retained for the purpose of being introduced in evidence or having been introduced in evidence or being preserved as evidence. (1975, c. 806, ss. 1, 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony punishable by a fine not to exceed five thousand dollars, or imprisonment for not more than five years, or both" at the end of the first paragraph. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Illegal to Destroy Any Relevant Evidence. — This section makes it illegal to destroy evidence no matter what that evidence is (a green vegetable material or actually marijuana) so long as it is "evidence relevant to any criminal offense." State v. Tate, 300 N.C. 180, 265 S.E.2d 223 (1980).

§ 14-221.2. Altering court documents or entering unauthorized judgments.

Any person who without lawful authority intentionally enters a judgment upon or materially alters or changes any criminal or civil process, criminal or civil pleading, or other official case record is guilty of a Class H felony. (1979, c. 526; 1979, 2nd Sess., c. 1316, s. 14.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, inserted "Class H" near the end of the section. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 14-222. Refusal of witness to appear or to testify in investigations of lynchings.

If any person summoned as a witness in the investigation of a charge of lynching shall willfully fail to attend as a witness in obedience to the process served on him, or if, after being sworn, he shall refuse to answer questions pertinent to the matter being investigated before any tribunal, he shall be guilty of a misdemeanor, and, on conviction, shall be fined or imprisoned, or both, at the discretion of the court. (1893, c. 461, s. 3; Rev., s. 3699; C. S., s. 4377.)

§ 14-223. Resisting officers.

If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1889, c. 51, s. 1; Rev., s. 3700; C. S., s. 4378; 1969, c. 1224, s. 1.)

Legal Periodicals. — For note on interfering with police officer as obstructing justice, see 36 N.C.L. Rev. 489 (1958).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

I. General Consideration.
II. What Constitutes the Offense.
III. Practice and Procedure.

I. GENERAL CONSIDERATION.

Purpose. — The purpose of this section is to enforce orderly conduct in the important mission of preserving the peace, carrying out the judgments and orders of the court, and upholding the dignity of the law and the provisions of this section provide for safeguards that are essential to the welfare of the public. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Constitution Does Not Preclude Prosecution for Violation of Criminal Statute. — The First and Fourteenth Amendments to the United States Constitution do not preclude prosecution and conviction of a defendant for violation of the provisions of a criminal statute enacted in the public interest. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Persons Aiding and Abetting. — See State v. Morris, 10 N.C. 388 (1824).

"Resist, Delay or Obstruct." — The words "delay" and "obstruct" appear to be synonymous as used in this section. And perhaps the word "resist" would infer more direct and forceful action. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Same — This section will apply to cases falling within any one of the descriptive words, since the words describing the act are joined by the disjunctive (or). State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

In order to convict a person of a violation of this section, the State does not have to show that a defendant resisted, delayed and obstructed an officer. It is sufficient if a defendant unlawfully and willfully resists, or delays, or obstructs an officer. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

"Public officer" — An alcoholic beverage control officer is a "public officer" within the meaning of this section. State v. Taft, 256 N.C. 441, 124 S.E.2d 169 (1962).

Same — Collector of Back Tax. — See State v. Alston, 127 N.C. 518, 37 S.E. 137 (1900).

Same — A State highway patrolman, when acting as such, is a public officer within the purview of this section. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

"Discharging a Duty of His Office." — A deputy sheriff is discharging or attempting to discharge a duty of his office when he begins an investigation of a crime reported to him by eyewitnesses, under circumstances which appear to threaten a further breach of the peace. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

A police officer attempting to preserve the peace by placing the defendant under arrest for disorderly conduct was performing a duty of his office when the defendant resisted arrest. State v. Cunningham, 34 N.C. App, 72, 237 S.E.2d 334 (1977).

"Arrest". — The term "arrest" has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made. It is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law, for the purpose specified in, or contemplated by, the process. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

In criminal procedure an arrest consists in the taking into custody of another person under real or assumed authority for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offense. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

An "arrest" does not necessarily terminate the instant a person is taken into custody; arrest also includes "bringing the person personally within the custody and control of the law." State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

The defendant's contention that at the time he was in the magistrate's office his arrest had been consummated, and that the acts alleged to have occurred between the magistrate's office and the jail were not in connection with his arrest, and that, therefore, he was not guilty of resisting arrest, was rejected. State v. Leak, 11 N.C. App. 344, 181 S.E.2d 224 (1971).

Applied in State v. Wells, 259 N.C. 173, 130 S.E.2d 299 (1963); State v. Hollingsworth, 263 N.C. 158, 139 S.E.2d 235 (1964); State v. Maness, 264 N.C. 358, 141 S.E.2d 470 (1965); State v. Hollingsworth, 11 N.C. App. 674, 182 S.E.2d 26 (1971); State v. Speights, 12 N.C. App. 32, 182 S.E.2d 204 (1971); State v. Tilley, 18 N.C. App. 341, 196 S.E.2d 549 (1973); State v. Fuller, 24 N.C. App. 38, 209 S.E.2d 805 (1974); State v. Spellman, 40 N.C. App. 591, 253 S.E.2d 320 (1979); State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979); State v. Dudley, 45 N.C. App. 295, 265 S.E.2d 235 (1980).

Cited in State v. McClure, 166 N.C. 321, 81 S.E. 458 (1914); State v. Scoggins, 199 N.C. 821, 155 S.E. 927 (1930); State v. Payne, 213 N.C. 719, 197 S.E. 573 (1938); State v. Wray, 217 N.C. 167, 7 S.E.2d 468 (1940); State v. Waddell, 4 N.C. App. 517, 167 S.E.2d 6 (1969); State v. Speights, 280 N.C. 137, 185 S.E.2d 152 (1971); In re Jacobs, 33 N.C. App. 195, 234 S.E.2d 639 (1977); State v. Stephens, 35 N.C. App. 335, 241 S.E.2d 382 (1978); State v. Anderson, 40 N.C. App. 318, 253 S.E.2d 48 (1979); State v. Robinson, 40 N.C. App. 514, 253 S.E.2d 311 (1979).

II. WHAT CONSTITUTES THE OFFENSE.

Resisting Officer in Performance of Some Duty Is Primary Conduct Proscribed. — In the offense of resisting an officer, the resisting of the public officer in the performance of some duty is the primary conduct proscribed by this section, and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defense. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972), appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

There does not have to be an assault on or actual physical interference with the officer in order to constitute a crime under this section. Neither does the conduct of a defendant have to be so effective that it permanently prevents the officer from making his investigation. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

No actual assault or force or violence is necessary to complete the offense described by this section. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320 (1972), appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

Resisting Officer and Assaulting Officer Are Separate Offenses. — The charge of resisting an officer and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses and the trial judge did not err in failing to "merge" them. State v. Kirby, 15 N.C. App. 480, 190 S.E.2d 320, appeal dismissed, 281 N.C. 761, 191 S.E.2d 363 (1972).

There is a distinction between the offenses of resisting an officer under § 14-223 and assault on an officer under § 14-33(b)(4). In the offense of resisting an officer, the resisting of the public officer in the performance of some duty is the primary conduct proscribed by that statute and the particular duty that the officer is performing while being resisted is of paramount importance and is very material to the preparation of the defendant's defense, while in the offense of assaulting a public officer in the performance of some duty, the assault on the officer is the primary conduct proscribed by the statute and the particular duty that the officer is performing while being assaulted is of secondary importance. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Resisting Is Not Lesser Included Offense of Assaulting Officer Where Evidence the Same. — In a prosecution for resisting arrest and assaulting a police officer, the trial court erred in charging the jury that resisting arrest is a lesser included offense of assaulting a police officer where the evidence showed that if the defendant did resist it was by the same means as were charged in the assault case. State v. Hardy, 33 N.C. App. 722, 236 S.E.2d 709, cert. denied, 293 N.C. 363, 238 S.E.2d 150 (1977), aff'd in part, rev'd in part, 298 N.C. 191, 257 S.E.2d 426 (1979).

The offense of unlawfully resisting, delaying or obstructing a public officer in the discharge of a duty of his office, is not a lesser degree of the offense of assaulting a law-enforcement officer while he is discharging or attempting to discharge a duty of his office. This does not eliminate the possibility that the facts in a given case might constitute a violation of both statutes. In such a case the defendant could not be punished twice for the same conduct. State v. Hardy, 298 N.C. 191, 257 S.E.2d 426 (1979).

Conviction of Both Resisting and Assaulting on Same Evidence Violates Double Jeopardy. — Where the record revealed that defendant was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence, the defendant was twice convicted and sentenced for the same criminal offense. The fact that defendant was given concurrent sentences did not make the duplication of punishment and sentences any less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. State v.

Raynor, 33 N.C. App. 698, 236 S.E.2d 307 (1977).

Same — Where Warrants Based on This Section and Former § 14-33(c)(4) Included Same Elements of Offense. — Where a defendant had been tried under two warrants, one for violating this section and the other for violating former § 14-33(c)(4); and where each warrant included all the elements of the offense charged in the other, and each specified only acts of violence which defendant directed at the officer's person while he was attempting to hold defendant in custody; the defendant had been twice convicted and sentenced for the same criminal offense, and the constitutional guaranty against double jeopardy protected him from multiple punishments for the same offense. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

Thus State Must Elect between Duplicate Charges. — In a prosecution for resisting arrest and assaulting a police officer, where the warrants charge the same conduct and the evidence clearly shows that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn, the assaults being the means by which the resistance was accomplished, the State must elect between the duplicate charges. State v. Hardy, 33 N.C. App. 722, 236 S.E.2d 709, cert. denied, 293 N.C. 363, 238 S.E.2d 150 (1977), aff'd in part, rev'd in part, 298 N.C. 191, 257 S.E.2d 426 (1979).

Duty to Submit Peaceably to Arrest. — When a person has been lawfully arrested by a lawful officer and understands that he is under arrest, it is his duty to submit peaceably to the arrest. State v. Summrell, 13 N.C. App. 1, 185 S.E.2d 241 (1971), aff'd, 282 N.C. 157, 192 S.E.2d 569 (1972).

Right to Resist Unlawful Arrest. — The offense of resisting arrest presupposes a lawful arrest both a common law and under this section. And every person has the right to resist an unlawful arrest by the use of force. But such right to use force is not unlimited, and only such force may be used as reasonably appears to be necessary to prevent unlawful restraint of liberty. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954).

When an officer attempts to make an arrest without a warrant and in so doing exceeds his lawful authority, he may be resisted as in self-defense and in such case the person resisting cannot be convicted under this section of the offense of resisting an officer engaged in the discharge of his duties. State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56 (1968); aff'd, 274 N.C. 380, 163 S.E.2d 897 (1968).

Every person has the right to resist an unlawful arrest and he may use such force as reasonably appears to be necessary to prevent the unlawful arrest. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

The offense of resisting arrest, both at common law and under this section, presupposes a lawful arrest. Every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense. State v. Jefferies, 17 N.C. App. 195, 193 S.E.2d 388 (1972), cert. denied, 282 N.C. 673, 194 S.E.2d 153 (1973).

Same — Authority of Officer and Notice to Party. — If the officer has no authority to make the arrest, or having the authority, is not known to be an officer and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person. State v. Kirby, 24 N.C. 201, (1842); State v. Bryant, 65 N.C. 327 (1871); State v. Belk, 76 N.C. 10 (1877).

Same — Process Must Be Legal. — A person is not liable for resisting an unlawful arrest, as where the warrant lacked a seal and the officer did not state what he arrested him for. State v. Curtis, 2 N.C. 471 (1797).

Where police officers attempt an arrest under an invalid arrest warrant, the person sought to be arrested has a legal right to resist and that, in such instances, in prosecutions for resisting arrest, the defendant's motion for judgment as of nonsuit should be granted. State v. Carroll, 21 N.C. App. 530, 204 S.E.2d 908, cert. denied, 285 N.C. 759, 209 S.E.2d 283 (1974).

Same — Defective Process Sufficient on Its Face. — A person may not resist an arrest by an officer acting under authority of a court process which is sufficient on its face to show its purpose, even though the process may be defective or irregular in some respect. State v. Wright, 1 N.C. App. 479, 162 S.E.2d 56, aff'd, 274 N.C. 380, 163 S.E.2d 897 (1968).

Same — Where Arrestee Not Entitled to Invoke Self-Help. — Where a patrolman, while not engaged in any patrol of the highway for purposes of observing traffic or making random license checks, spontaneously decided to stop petitioner, not while petitioner was "on a public highway" nor while petitioner was operating a vehicle, but instead while petitioner was in a private driveway, although petitioner would have had a meritorious defense to any prosecution based on failure to display his license, he was not entitled to invoke self-help against what was, at the time, an arguably lawful arrest, and petitioner's conviction for assaulting the highway patrolman can survive despite the finding that the officer's initial stop and demand were illegal as an unreasonable search and seizure under the Fourth Amendment. Keziah v. Bostic, 452 F. Supp. 912 (W.D.N.C. 1978).

Right to Resist Illegal Entry. — Defendant is not liable for assault and battery for resisting an entry into her house by an officer armed with a warrant which had once been served and returned, though defendant had entered into a recognizance and failed to appear. State v. Queen, 66 N.C. 615 (1872).

Decisions of the Supreme Court recognize the right to resist illegal conduct of an officer and officers have no duty to make an illegal entry into a person's home. Hence, one who resists an illegal entry is not resisting an officer in the discharge of the duties of his office. These views are in accordance with the ancient rules of the common law and are predicated on the constitutional principle that a person's home is his castle. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Conduct Not Constituting Obstruction of Officer. — Merely remonstrating with an officer in behalf of another, or criticizing or questioning an officer while he is performing his duty, when done in an orderly manner, does not amount to obstructing or delaying an officer in the performance of his duties. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Citizen may advise another of his constitutional rights in an orderly and peaceable manner while the officer is performing his duty without necessarily obstructing or delaying the officer in the performance of his duty. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Vague, intemperate language used without apparent purpose is not sufficient to constitute the offense of resisting, delaying and obstructing an officer. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Where defendant was merely arguing with the officer and protesting the confiscation of his property, he had committed no offense and the officer had no authority to arrest him. State v. Allen, 14 N.C. App. 485, 188 S.E.2d 568 (1972).

Preventing Road Overseer Cutting Ditch. — See State v. New, 130 N.C. 731, 41 S.E. 1033 (1902).

III. PRACTICE AND PROCEDURE.

Warrant or Indictment Allegations Required. — A warrant or bill of indictment charging a violation of this section must identify the officer by name and indicate the official duty he was discharging or attempting to discharge, and should point out, in a general way at least, the manner in which the defendant is charged with having resisted, delayed, or obstructed such officer. State v. Smith, 262 N.C. 472, 137 S.E.2d 819 (1964).

A warrant charging a violation of this section must, in addition to formal parts, the name of accused, the date of the offense, and the county or locality in which it was alleged to have been committed: (a) identify by name the person alleged to have been resisted, delayed or obstructed, and described his official character with sufficient certainty to show that he was a public officer within the purview of the statute; (b) indicate the official duty he was discharging or attempting to discharge; and (c) state in a general way the manner in which accused resisted or delayed or obstructed such officer. State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965); State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967).

In charging a violation of this section, it is necessary that the warrant or indictment, in addition to other essentials, set forth the official duty the designated officer was discharging or attempting to discharge, and must point out, in a general way at least, the manner in which defendant is charged with having resisted or delayed or obstructed such public officer. It must also allege the identity of the officer alleged to have been resisted and describe his official character with sufficient certainty to show that he is a public officer. State v. White, 3 N.C. App. 443, 165 S.E.2d 19 (1969).

The prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest are set forth in State v. Wiggs, 269 N.C. 507, 153 S.E.2d 84 (1967) and State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965). State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

One of the prerequisites of the affidavit portion of a warrant properly charging the offense of resisting arrest is that the affidavit upon which the order of arrest is based shall identify by name the person alleged to have been resisted, delayed or obstructed, and describe his official character with sufficient certainty to show that he was a public officer within the purview of the statute. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

In order to properly charge an assault, there must be a victim named, since by failing to name the particular person assaulted, the defendant would not be protected from a subsequent prosecution for assault upon a named person. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

For a warrant to charge a defendant with resisting, delaying, or obstructing an officer in discharging or attempting to discharge a duty of his office in violation of this section, the warrant must indicate the official duty the officer was discharging or attempting to discharge. State v. Waller, 37 N.C. App. 133, 245 S.E.2d 808 (1978).

Same — Held Sufficient. — Warrant charging that defendant did resist, delay, and obstruct named police officers in the making of a lawful arrest "by shoving said officers and refusing to go" is sufficient to charge a violation of this section. State v. White, 3 N.C. App. 443, 165 S.E.2d 19 (1969).

Same — Held Insufficient. — The charge that defendant "did resist arrest" neither charges the offense in the language of this section, nor specifically sets forth the facts constituting the offense created by the section. It is wholly insufficient to support the verdict and judgment rendered. State v. Raynor, 235 N.C. 184, 69 S.E.2d 155 (1952).

A warrant alleging that defendant unlawfully and willfully violated the laws of North Carolina by resisting arrest is insufficient to charge the offense proscribed by this section. State v. Raynor, 235 N.C. 184, 69 S.E.2d 155 (1952); State v. Thorne, 238 N.C. 392, 78 S.E.2d 140 (1953). This allegation and the additional allegation that the defendant interfered "with an officer while legally performing the duties of his office" do not suffice to impute to defendant a violation of the section. These allegations do not describe the official character of the person alleged to have been resisted with sufficient certainty to show that he was a public officer within the purview of the statute. State v. Jenkins, 238 N.C. 396, 77 S.E.2d 796 (1953).

An indictment charging that defendant did unlawfully "resist, delay and obstruct a public officer in discharge and attempting to discharge the duty of his office ..." is insufficient to charge the offense of resisting arrest. State v. Scott, 241 N.C. 178, 84 S.E.2d 654 (1954).

Indictment is fatally defective though it identifies public officer by name where it fails to indicate the official duty he was discharging or attempting to discharge and does not point out even in a general way the manner in which the defendant is charged with having resisted or delayed or obstructed such public officer. State v. Eason, 242 N.C. 59, 86 S.E.2d 774 (1955); State v. Harvey, 242 N.C. 111, 86 S.E.2d 793 (1955). See State v. Stonestreet, 243 N.C. 28, 89 S.E.2d 734 (1955).

An indictment charging defendant with resisting an officer in the language of this section is insufficient. State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

A bill of indictment is defective that does not charge the official duty the named officer was discharging or attempting to discharge. State v. Dunston, 256 N.C. 203, 123 S.E.2d 480 (1962).

Warrant held insufficient to charge a violation of this section. State v. White, 266 N.C. 361, 145 S.E.2d 872 (1966).

The warrant in the instant case was fatally defective and void because of the combination of failing to identify the assaulted officer by name in the affidavit and failing to order the defendant arrested in the order of arrest. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

An instrument setting forth the charge of assault by the use of the words "assault on an officer" to identify the person assaulted was not sufficient to charge the offense of assault. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

A "North Carolina Uniform Traffic Ticket" setting forth the charge of resisting arrest by using only the two words "resist arrest," was not sufficient to charge the offense. State v. Powell, 10 N.C. App. 443, 179 S.E.2d 153 (1971).

Same — An order granting motion to amend warrant so as to charge the violation in the words of the statute cannot cure fatal defects in the warrant in failing to charge the offense when the amendment is not actually made, since neither the motion nor the order sets out the contemplated wording of the proposed amendment and therefore could not be self-executing. State v. Thorne, 238 N.C. 392, 78 S.E.2d 140 (1953); State v. Jenkins, 238 N.C. 396, 77 S.E.2d 796 (1953).

Same — Indictment in Two Counts. — An indictment having two counts, one against one person under this section, and the other against several persons under former § 14-224, was defective, but where not objected to before a verdict which convicted on one count and acquitted on the other, was not sufficient grounds for arrest of judgment, as the acquittal was equivalent to a nol. pros. State v. Perdue, 107 N.C. 853, 12 S.E. 253 (1890).

Same — Quashing Indictment if Sufficient to Convict of Assault. — Where an indictment for resisting an officer is defective, as such, it ought not to be quashed if the defendant may be convicted thereon for a simple assault. State v. Dunn, 109 N.C. 839, 13 S.E. 881 (1891).

Evidence — Presumption of Validity of Arrest. — Failure of State to introduce evidence tending to prove validity of warrant of arrest, in a prosecution for resisting arrest, does not justify nonsuit when defendant does not challenge the validity of the warrant, since, in the absence of a showing to the contrary, it will be presumed that the warrant and order of arrest were legally adequate. State v. Honeycutt, 237 N.C. 595, 75 S.E.2d 525 (1953).

Same — Sufficiency. — Where the evidence is sufficient for the jury to find that a defendant unlawfully and willfully, by loud and abusive language directed at an officer, delayed him in making his investigation, this requires the submission of the case to the jury. State v. Leigh, 10 N.C. App. 202, 178 S.E.2d 85 (1970), rev'd on other grounds, 278 N.C. 243, 179 S.E.2d 708 (1971).

Conceding that no actual violence or force was used by defendant, there was plenary evidence to support a jury finding that defendant did by his actions and language delay and obstruct the officer in the performance of his duties. State v. Leigh, 278 N.C. 243, 179 S.E.2d 708 (1971).

Instructions. — In prosecution charging resisting lawful arrest in violation of this section, statement of the trial court during the instructions that "the offense charged here was committed in violation of § 14-223" was held to constitute an expression of opinion. State v. Cooper, 4 N.C. App. 210, 166 S.E.2d 509 (1969).

Same — Right of Self-Defense. — While a defendant was not charged with assaulting an officer, where the actions which he contends he took in self-defense are those which the warrants charge constitute the unlawful interference and the resistance to arrest, the jury should have been properly charged on the principle of self-defense under this factual situation and if they were satisfied defendant was legitimately exercising a right of self-defense it would be their duty to acquit him, not simply to take it into consideration in arriving at their verdict as the court charged. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

Where, in a prosecution charging defendant with resisting arrest and with obstructing an officer in the performance of his duties, the defendant offered evidence that the officer had struck the first blow and that defendant was forced in self-defense to take the actions which resulted in the charges against him, the trial court should have instructed the jury to acquit defendant if they found that he was legitimately exercising a right of self-defense; the court's instruction merely that the jury "will take into consideration in arriving at your verdict" the defendant's lawful exercise of self-defense, is insufficient and is reversible error. State v. May, 8 N.C. App. 423, 174 S.E.2d 633 (1970).

OPINIONS OF ATTORNEY GENERAL

Applicability to Arrest by Special Police. — See opinion of Attorney General to Mr. G.R. Rankin, Vanguard Security Service, 40 N.C.A.G. 152 (1970).

§ 14-224: Repealed by Session Laws 1973, c. 1286, s. 26.

Cross References. — See Editor's note following the analysis to Chapter 15. For present provisions as to assistance to law-enforcement officers by private persons, see § 15A-405.

§ 14-225. False, etc., reports to police radio broadcasting stations.

Any person who shall willfully make or cause to be made to a police radio broadcasting station any false, misleading or unfounded report, for the purpose of interfering with the operation thereof, or to hinder or obstruct any peace officer in the performance of his duty, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1941, c. 363; 1969, c. 1224, s. 3.)

Legal Periodicals. — For comment on this enactment, see 19 N.C.L. Rev. 477.

§ 14-225.1. Picketing or parading.

Any person who, with intent to interfere with, obstruct, or impede the administration of justice, or with intent to influence any justice or judge of the General Court of Justice, juror, witness, district attorney, assistant district attorney, or court officer, in the discharge of his duty, pickets, parades, or uses any sound truck or similar device within 300 feet of an exit from any building housing any court of the General Court of Justice, or within 300 feet of any building or residence occupied or used by such justice, judge, juror, witness,

district attorney, assistant district attorney, or court officer, shall upon plea or conviction be guilty of a misdemeanor and imprisoned for not more than two years or fined not more than one thousand dollars ($1000), or both. (1977, c. 266, s. 1.)

§ 14-225.2. Harassment of and communication with jurors.

(a) If a person, with intent to influence the official action of another as a juror, communicates with him other than as part of the proceedings in a case, or harasses or alarms him, he is guilty of a Class I felony. Conduct directed against the juror's spouse or other relative residing in the same household with the juror constitutes conduct directed against the juror.

(b) In this section "juror" means a grand juror or a petit juror and includes a person who has been drawn or summoned to attend as a prospective juror. (1977, c. 711, s. 16; 1979, 2nd Sess., c. 1316, s. 15.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class I felony" for "felony punishable by fine, imprisonment up to five years, or both" at the end of the first sentence in subsection (a). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

§ 14-226. Intimidating or interfering with witnesses.

If any person shall by threats, menaces or in any other manner intimidate or attempt to intimidate any person who is summoned or acting as a witness in any of the courts of this State, or prevent or deter, or attempt to prevent or deter any person summoned or acting as such witness from attendance upon such court, he shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned in the discretion of the court. (1891, c. 87; Rev., s. 3696; C. S., s. 4380; 1977, c. 711, s. 16.)

CASE NOTES

In General. — This section is additional to and not a repeal of the inherent power of the court to protect itself from interference by bribery or intimidation of its jurors or witnesses in both civil and criminal cases. In re Young, 137 N.C. 552, 50 S.E. 220 (1905).

The gist of the offense under this section is the obstruction of justice. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969).

It is an offense, at common law, to dissuade or prevent, or to attempt to dissuade or prevent, a witness from attending or testifying on the trial of a cause, and such conduct may be made an offense by statute. The gist of the offense is the willful and corrupt attempt to interfere with and obstruct the administration of justice. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969).

It is immaterial that person procured to absent himself was not regularly summoned or legally bound to attend as a witness. State v. Neely, 4 N.C. App. 475, 166 S.E.2d 878 (1969).

Cited in State v. Hodge, 142 N.C. 665, 55 S.E. 626 (1906).

§ 14-226.1. Violating orders of court.

Any person who shall willfully disobey or violate any injunction, restraining order, or any order lawfully issued by any court for the purpose of maintaining or restoring public safety and public order, or to afford protection for lives or property during times of a public crisis, disaster, riot, catastrophe, or when such condition is imminent, or for the purpose of preventing and abating

disorderly conduct as defined in G.S. 14-288.4 shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than two hundred fifty dollars ($250.00) or imprisoned for not more than 30 days, or both, in the discretion of the court. This section shall not in any manner affect the court's power to punish for contempt. (1969, c. 1128.)

§ 14-227. Failing to attend as witness before legislative committees.

If any person shall willfully fail or refuse to attend or produce papers, on summons of any committee of investigation of either house of the General Assembly, either select or committee of the whole, he shall be guilty of a misdemeanor, and on conviction in the superior court of the county in which such witness may reside or be found, he shall be fined not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000), and shall be subject to imprisonment at the discretion of the court. (1869-70, c. 5, s. 2; Code, s. 2854; Rev., s. 3692; C. S., s. 4381.)

Article 30A.

Secret Listening.

§ 14-227.1. Secret listening to conference between prisoner and his attorney.

(a) It shall be unlawful for any person willfully to overhear, or procure any other person to overhear, or attempt to overhear any spoken words between a person who is in the physical custody of a law-enforcement agency or other public agency and such person's attorney, by using any electronic amplifying, transmitting, or recording device, or by any similar or other mechanical or electrical device or arrangement, without the consent or knowledge of all persons engaging in the conversation.

(b) No evidence procured in violation of this section shall be admissible over objection against any person participating in such conference in any court in this State. (1967, c. 187, s. 1.)

§ 14-227.2. Secret listening to deliberations of grand or petit jury.

It shall be unlawful for any person willfully to overhear, or procure any other person to overhear, or attempt to overhear the investigations and deliberations of, or the taking of votes by, a grand jury or a petit jury in a criminal case, by using any electronic amplifying, transmitting, or recording device, or by any similar or other mechanical or electrical device or arrangement, without the consent or knowledge of said grand jury or petit jury. (1967, c. 187, s. 1.)

§ 14-227.3. Violation made misdemeanor.

All persons violating the provisions of G.S. 14-227.1 or 14-227.2 shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1967, c. 187, s. 2; 1969, c. 1224, s. 6.)

ARTICLE 31.

Misconduct in Public Office.

§ 14-228. Buying and selling offices.

If any person shall bargain away or sell an office or deputation of an office, or any part or parcel thereof, or shall take money, reward or other profit, directly or indirectly, or shall take any promise, covenant, bond or assurance for money, reward or other profit, for an office or the deputation of an office, or any part thereof, which office, or any part thereof, shall touch or concern the administration or execution of justice, or the receipt, collection, control or disbursement of the public revenue, or shall concern or touch any clerkship in any court of record wherein justice is administered; or if any person shall give or pay money, reward or other profit, or shall make any promise, agreement, bond or assurance for any of such offices, or for the deputation of any of them, or for any part of them, the person so offending in any of the cases aforesaid shall be guilty of a misdemeanor, and on conviction thereof shall forfeit all his right, interest and estate in such office, and every part and parcel thereof, and shall be imprisoned and fined at the discretion of the court. (5, 6 Edw. VI, c. 16, ss. 1, 5; R. C., c. 34, s. 33; Code, s. 998; Rev., s. 3571; C. S., s. 4382.)

Cross References. — As to sheriff letting to farm his office, see § 162-24. As to validity of bargain to sell in office, see § 128-3.

§ 14-229. Acting as officer before qualifying as such.

If any officer shall enter on the duties of his office before he executes and delivers to the authority entitled to receive the same the bonds required by law, and qualifies by taking and subscribing and filing in the proper office the oath of office prescribed, he shall be guilty of a misdemeanor and shall be ejected from his office. (Code, s. 79; Rev., s. 3565; C. S., s. 4383.)

§ 14-230. Willfully failing to discharge duties.

If any clerk of any court of record, sheriff, magistrate, county commissioner, county surveyor, coroner, treasurer, or official of any of the State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense, and shall also be fined or imprisoned in the discretion of the court. (1901, c. 270, s. 2; Rev., s. 3592; C. S., s. 4384; 1943, c. 347; 1973, c. 108, s. 5.)

Cross References. — As to failure of sheriff to make return, see § 14-242; as to prosecution of officers failing to discharge duties, see § 128-16 et seq.

Legal Periodicals. — For an article entitled, "Removing Local Elected Officials From Office in North Carolina," see 16 Wake Forest L. Rev. 547 (1980).

CASE NOTES

In General. — The law will not countenance or condone any attempt to defy its mandates. The private citizen must obey the law, and the public officer is not exempt from this duty by any special privilege appertaining to his office. He is not wiser than the law, nor is he above it. The truth is, that if he willfully neglects or omits to perform a public duty, he is liable to indictment at common law. State v. Commissioners, 4 N.C. 419 (1816); State v. Williams, 34 N.C. 172 (1851); State v. Haywood 48 N.C. 399 (1856); State v. Furguson, 76 N.C. 197 (1877). If the neglect, omission, or refusal to discharge any of his official duties is willful and corrupt, it is criminal misbehavior, and subjects him to indictment for a misdemeanor and punishment by fine or imprisonment, and, as a part of the penalty, to removal from office. State ex rel. Battle v. City of Rocky Mount, 156 N.C. 329, 72 S.E. 354 (1911).

History of Section. — See State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

Effect of Section on Common-Law Crime of Official Oppression. — It is futile to attempt to mark the extent, if any, the common-law crime of official oppression has been modified or superseded by this section, as there is no exact common-law definition of official oppression, and the possible acts which may constitute the crime are as many and varied as the forms of corruption that may exist in public office. State v. Lackey, 271 N.C. 171, 155 S.E.2d 465 (1967).

An essential difference between a public office and mere employment is the fact that the duties of the incumbent of an office shall involve the exercise of some portion of the sovereign power. State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

Willful Neglect and Injury to Public Required. — It is to be observed that the essentials of the crime as prescribed are: first, a willful neglect in the discharge of official duty; and second, injury to the public. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929).

Liability for Honest Errors. — It is so well settled that there is nothing to the contrary that an officer who has to exercise his judgment or discretion is not liable criminally for any error which he commits, provided he acts honestly. State v. Powers, 75 N.C. 281 (1876).

If the illegal act be done mala fide, then it becomes a crime, and the officer liable both civilly and criminally, but if free of any wicked intent, then he is civilly liable only. State v. Snuggs, 85 N.C. 541 (1881).

Accused Must Show Good Faith. — Where a public officer is indicted for failure to perform a duty required by law, the law raises a presumption that such failure is willful, and makes it incumbent upon him to rebut the presumption. State v. Heaton, 77 N.C. 505 (1877).

And Public Will Be Protected Against Carelessness. — However honest the defendants may be (and their honesty is not called in question) the public have a right to be protected against the wrongful conduct of their servants, if there is carelessness amounting to a willful want of care in the discharge of their official duties, which injuries the public. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929).

A duly appointed policeman of a city is an officer of such city within the meaning of this section. State v. Fesperman, 264 N.C. 160, 141 S.E.2d 255 (1965); State v. Teeter, 264 N.C. 162, 141 S.E.2d 253 (1965); State v. Stogner, 264 N.C. 163, 141 S.E.2d 248 (1965); State v. Fesperman, 264 N.C. 168, 141 S.E.2d 252 (1965).

As Is Chief of Police. — A chief of police as well as a policeman is an officer of the municipality which engages his services, within the meaning of the provisions of this section. State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965).

And Captain of Detectives. — A captain of detectives of a police department of a city is an officer of such city within the meaning of this section. State v. McCall, 264 N.C. 165, 141 S.E.2d 250 (1965).

Proceedings of Forfeiture under § 1-515. — Forfeiture cannot be enforced by judgment of a motion from office as a part of the punishment, where the clerk has been convicted of a misdemeanor, under this section in willfully neglecting to discharge the duties of his office, but proceedings of forfeiture must be under § 1-515. State v. Norman, 82 N.C. 687 (1880).

Sufficiency of Bill of Indictment. — See State v. Hord, 264 N.C. 149, 141 S.E.2d 241 (1965); State v. Teeter, 264 N.C. 162, 141 S.E.2d 253 (1965); State v. Stogner, 264 N.C. 163, 141 S.E.2d 248 (1965); State v. McCall, 264 N.C. 165, 141 S.E.2d 250 (1965).

It is required that the indictment under this section sufficiently charge the offense of which such officer is accused; and where the action is against the superintendent of a State hospital for the insane, and the indictment charges that he removed or caused to be removed patients to his private farm and caused them to be worked thereon, without allegation of injury to the public or to the patients, or of personal gain to the defendant, the indictment fails to charge facts sufficient to constitute an offense under the statute, and defendant's motion in arrest of judgment should be allowed. State v. Anderson, 196 N.C. 771, 147 S.E. 305 (1929).

Allegation of Corrupt Intent Not Necessary. — It is not necessary to allege corrupt intent in a bill of indictment against county

commissioners for neglect of duty in providing a necessary courthouse, and it is sufficient if the words of the statute are followed. State v. Loeper, 146 N.C. 655, 61 S.E. 585 (1908).

Warrant Falling Short of Alleging Malfeasance in Office in Violation of Section. — See Hawkins v. Reynolds, 236 N.C. 422, 72 S.E.2d 874 (1952).

Applied in State v. Hucks, 264 N.C. 160, 141 S.E.2d 299 (1965).

Cited in Moffitt v. Davis, 205 N.C. 565, 172 S.E. 317 (1934); State v. Davis, 45 N.C. App. 72, 262 S.E.2d 827 (1980); State v. Davis, 48 N.C. App. 526, 269 S.E.2d 291 (1980).

§ 14-231. Failing to make reports and discharge other duties.

If any State or county officer shall fail, neglect or refuse to make, file or publish any report, statement or other paper, or to deliver to his successor all books and other property belonging to his office, or to pay over or deliver to the proper person all moneys which come into his hands by virtue or color of his office, or to discharge any duty devolving upon him by virtue of his office and required of him by law, he shall be guilty of a misdemeanor. (Rev., s. 3576; C. S., s. 4385.)

Cross References. — As to embezzlement by officers, see § 14-92; as to failure of sheriff to make return, see § 14-242; as to liability on official bonds, see, §§ 109-34 — 109-39.

CASE NOTES

Injurious Effect Not Necessary. — The crime exists although no injurious effects result to any individual because of the misconduct of the officer. State v. Glasgow, 1 N.C. 176 (1800).

Honesty of Purpose. — There may be neglect without corruption. Therefore honesty of purpose is not a full defense under this section. Turner v. McKee, 137 N.C. 251, 49 S.E. 330 (1904).

Enforcing Unconstitutional Law. — An officer is not liable for obeying the mandates of an unconstitutional statute. State v. Godwin, 123 N.C. 697, 31 S.E. 221 (1898).

Manager of Elections. — Any conduct of the manager of a primary election for county officials which interferes with the freedom or purity of the election is punishable at common law, and under this section. State v. Cole, 156 N.C. 618, 72 S.E. 221 (1911).

§ 14-232. Swearing falsely to official reports.

If any clerk, sheriff, register of deeds, county commissioner, county treasurer, magistrate or other county officer shall willfully swear falsely to any report or statement required by law to be made or filed, concerning or touching the county, State or school revenue, he shall be guilty of a misdemeanor. (1874-5, c. 151, s. 4; 1876-7, c. 276, s. 4; Code, s. 731; Rev., s. 3605; C. S., s. 4386; 1973, c. 108, s. 6.)

§ 14-233. Making of false report by bank examiners; accepting bribes.

If any bank examiner shall knowingly and willfully make any false or fraudulent report of the condition of any bank, which shall have been examined by him, with the intent to aid or abet the officers, owners, or agents of such bank in continuing to operate an insolvent bank, or if any such examiner shall keep or accept any bribe or gratuity given for the purpose of inducing him not to file any report of examination of any bank made by him, or shall neglect to make an examination of any bank by reason of having received or accepted any bribe or gratuity, he shall be punished as a Class H felon. (1903, c. 275, s. 24; Rev., s. 3324; 1921, c. 4, s. 79; C. S., s. 4387; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1; as to bank examiners making false reports, see also § 53-124.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and upon conviction thereof shall be imprisoned in the State prison for not less than four months nor more than ten years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-234. Director of public trust contracting for his own benefit; participation in business transaction involving public funds; exemptions.

(a) If any person appointed or elected a commissioner or director to discharge any trust wherein the State or any county, city or town may be in any manner interested shall become an undertaker, or make any contract for his own benefit, under such authority, or be in any manner concerned or interested in making such contract, or in the profits thereof, either privately or openly, singly or jointly with another, he shall be guilty of a misdemeanor. Provided, that this section shall not apply to public officials transacting business with banks or banking institutions or savings and loan associations or public utilities regulated under the provisions of Chapter 62 of the General Statutes in regular course of business: Provided further, that such undertaking or contracting shall be authorized by said governing board by specific resolution on which such public official shall not vote.

(b) Nothing in this section nor in any general principle of common law shall render unlawful the acceptance of remuneration from a governmental board, agency or commission for services, facilities, or supplies furnished directly to needy individuals by a member of said board, agency or commission under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by such board, agency or commission; provided, however, that such programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; and provided further that the board, agency or commission, nor any of its employees or agents, shall have no control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance, and that the remuneration for such services, facilities or supplies shall be in the same amount as would be paid to any other provider; and provided further that, although the board, agency or commission member may participate in making determinations of eligibility of needy persons to receive the assistance, he shall take no part in approving his own bill or claim for remuneration.

(c) No director, board member, commissioner, or employee of any State department, agency, or institution shall directly or indirectly enter into or otherwise participate in any business transaction involving public funds with any firm, corporation, partnership, person or association which at any time during the preceding two-year period employed or otherwise had a financial association with such director, board member, commissioner or employee.

(d) The provisions of subsection (c) shall not apply to any transactions meeting the requirements of Article 3, Chapter 143 of the General Statutes or any other transaction specifically authorized by the Advisory Budget Commission.

(d1) The first sentence of subsection (a) shall not apply to (i) any elected official or person appointed to fill an elective office of a village, town, or city

having a population of no more than 7,500 according to the most recent official federal census, (ii) any elected official or person appointed to fill an elective office of a county within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census, (iii) any elected official or person appointed to fill an elective office on a city board of education in a city having a population of no more than 7,500 according to the most recent official federal census, (iv) any elected official or person appointed to fill an elective office as a member of a county board of education in a county within which there is located no village, town or city with a population of more than 7,500 according to the most recent official federal census, and (v) any physician, pharmacist, or dentist appointed to a county social services board, local health board, or area mental health board serving one or more counties within which there is located no village, town, or city with a population of more than 7,500 according to the most recent official federal census if:

(1) The undertaking or contract or series of undertakings or contracts between the village, town, city, county, county social services board, county or city board of education, local health board or area mental health, mental retardation, and substance abuse board and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting, and recorded in its minutes and the amount does not exceed ten thousand dollars ($10,000) for medically related services and five thousand dollars ($5,000) for other goods or services within a 12-month period; and

(2) The official entering into the contract or undertaking with the unit or agency does not in his official capacity participate in any way or vote; and

(3) The total annual amount of undertakings or contracts with each official, shall be specifically noted in the audited annual financial statement of the village, town, city, or county; and

(4) The governing board of any village, town, city, county, county social services board, county or city board of education, local health board, or area mental health, mental retardation, and substance abuse board which undertakes or contracts with any of the officials of their governmental unit shall post in a conspicuous place in its village, town, or city hall, or courthouse, as the case may be, a list of all such officials with whom such undertakings or contracts have been made, briefly describing the subject matter of the undertakings or contracts and showing their total amounts; this list shall cover the preceding 12 months and shall be brought up-to-date at least quarterly.

(d2) The provision of subsection (d1) shall not apply to contracts required by Article 8 of Chapter 143 of the General Statutes, Public Building Contracts.

(e) Anyone violating this section shall be guilty of a misdemeanor. (1825, c. 1269, P. R.; 1826, c. 29; R. C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C. S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761; 1979, c. 720; 1981, c. 103, ss. 1, 2, 5.)

Local Modification. — Northhampton: 1973, c. 865; 1977, 2nd Sess., c. 1152, City of Greensboro: 1951, c. 707, s. 3.

Cross References. — As to conflicts of interest within the Department of Transportation, see § 136-14.

Effect of Amendments. — The 1981 amendment, in subdivision (d1) designated former clause (iii) of the introductory paragraph as clause (v) and added present clauses (iii) and (iv) and inserted "county or city board of education," near the beginning of subdivision (1) and near the beginning of subdivision (4). The amendment also added subdivision (d2).

CASE NOTES

Public Policy of State. — The General Assembly in adopting this section made the condemnation of the transactions embraced within its terms a part of the public policy of the State so as to remove from public officials the temptation to take advantage of their official positions to "feather their own nests" by letting to themselves or to firms or corporations in which they are interested contracts for services, materials, supplies, or the like. Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

Effect of Special Validating Act. — Although municipal bonds were sold to a corporation controlled by the mayor, an act passed by the legislature expressly confirming and validating the sale removes all objections based upon the violation of the provisions of this section. Starmount Co. v. Ohio Sav. Bank & Trust Co., 55 F.2d 649 (4th Cir. 1932).

Denial of Recovery on Quantum Meruit Basis. — The courts not only will declare void and unenforceable any contract between a public official, or a board of which he is a member, and himself, or a company in which he is financially interested, whereby he stands to gain by the transaction, but it will also deny recovery on a quantum meruit basis. Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

Officer of Both City and Corporation. — The prohibition of this section extends to an officer of a corporation in making contracts between the corporation and the city of which he is commissioner or alderman. State v. Williams, 153 N.C. 595, 68 S.E. 900 (1910); Lexington Insulation Co. v. Davidson County, 243 N.C. 252, 90 S.E.2d 496 (1955).

Contracts with city when an alderman is an employee of the other contracting party are not covered by the section. State v. Weddell, 153 N.C. 597, 68 S.E. 897 (1910).

Sale to Corporation Organized by Advisor to Municipality. — Under this statute a contract of sale does not become void because the purchasing corporation was organized through the efforts of a person who had a merely advisory relationship to a municipal corporation. Tonkins v. City of Greensboro, 276 F.2d 890 (4th Cir. 1960).

Contracts for Benefit of County. — A sheriff is not guilty of a misdemeanor where he purchases county claims at less than their value, but for the benefit of the county, at the instance of the county commissioners. State v. Garland, 134 N.C. 749, 47 S.E. 426 (1904).

Service to Body of Which Officer is a Member. — A member of the board of county commissioners cannot recover for services rendered the board in inspecting a bridge. Davidson v. Guilford County, 152 N.C. 436, 67 S.E. 918 (1910).

OPINIONS OF ATTORNEY GENERAL

Deposit of Funds by County ABC Board in Bank Whose President Is Chairman of Such Board Not a Violation. — See opinion of Attorney General to Mr. Cameron S. Weeks, 40 N.C.A.G. 559 (1969).

Mayor May Not Be Hired as Town Superintendent with Separate Salary. — See opinion of Attorney General to Mr. Bobby F. Jones, Elm City Town Attorney, 40 N.C.A.G. 563 (1969).

Pembroke State University May Not Employ Member of its Board of Trustees. — See opinion of Attorney General to Mr. Terry R. Hutchins, 40 N.C.A.G. 566 (1969).

Inapplicable When Company by which Local School Board Member is Employed Contracts with State Board of Education. — See opinion of Attorney General to Mr. Bobby R. Stott, 40 N.C.A.G. 217 (1970).

Officers and Employees of City Selling Property Not Prohibited from Buying at Sale. — See opinion of Attorney General to Mr. E. Murray Tate, Jr., 41 N.C.A.G. 276 (1971).

When County Commissioners Who Run Grocery Stores May Authorize Food Stamp Program. — County commissioners who run grocery stores may authorize food stamp program if the specifics from the exemption from this section for public assistance programs are complied with. Opinion of Attorney General to Mr. Clifford L. Moore, Jr., 41 N.C.A.G. 530 (1971).

Member of County Board of Elections May Not Serve as Executive Secretary of That Board. — See opinion of Attorney General to Honorable Ed McKnight, N.C. House of Representatives, 41 N.C.A.G. 577 (1971).

Services Donated as County Employee Do Not Create a Conflict of Interest Where the Same Person Is a County Commissioner. — See opinion of Attorney General to Honorable Charles H. Taylor, N.C. General Assembly, 41 N.C.A.G. 765 (1972).

When County Director of Social Services May Serve on Board of Nonprofit Corporation Administering CETA Funds. — A conflict of interest does not arise if a county director of social services serves as a member of the board of directors of a nonprofit corporation organized for the purpose of administering

federal funds under the Comprehensive Employment and Training Act (29 USC, Ch. 17; Pub. L. 93-203 (1973); Pub. L. 95-524 (1978)), when: (a) The nonprofit corporation will administer federal funds through community programs to which the county department of social services may refer social services clients; (b) The county department of social services is a potential recipient, through the nonprofit corporation, of federal funds, of services by employees of the nonprofit corporation and of training of social service employees; (c) The director, as a member of the board of the nonprofit corporation, will approve, or establish policy for entering into, contracts, including contracts with the county department of social services; and (d) Neither the county director of social services nor any member of his immediate family will realize any direct or indirect benefits by reason of any contractual or other relationship between the county department of social services and the nonprofit corporation. See opinion of Attorney General to Robert H. Ward, Director, Division of Social Services, Dep't of Human Resources and William W. Ivey, County Att'y for Randolph County, 49 N.C.A.G. 102 (1980).

Or When Person May Be Member of Two Nonprofit Corporations. — A conflict of interest does not arise if an individual, who is not a public official, serves as a member of the board of directors of a nonprofit corporation organized for the purpose of administering federal funds under CETA and at the same time serves as a member of the board of directors of another nonprofit corporation organized for the purpose of administering programs for the aging (Ch. 143B, Art. 3, Part 14, N.C.G.S.; 42 USC, Ch. 35; Pub. L. 89-73, as amended), when the circumstances and relationships between the corporations will be similar to those required for directors of social services serving on board of nonprofit corporation administering CETA funds. See opinion of Attorney General to Robert H. Ward, Director, Div. of Social Services, Dep't of Human Resources and William W. Ivey, County Att'y for Randolph County, 49 N.C.A.G. 102 (1980).

This section does prohibit a person from serving both on the Hyde County Board of Health and the Hyde Rural Health Corporation Board of Directors. See opinion of Attorney General to Cliff Swindell, County Manager, Hyde County, 50 N.C.A.G. 12 (1980).

A prohibited conflict of interest may occur when a funeral home in which the chairman of the county board of social services holds a pecuniary interest enters into a contract with the county department of social services to provide funeral and burial services for a ward or juvenile under the jurisdiction or custody of the county department of social services. See opinion of Attorney General to Timothy W. Howard, Attorney for Sampson County Department of Social Services, 49 N.C.A.G. 108 (1980).

§ 14-235. Speculating in claims against towns, cities and the State.

If any clerk, sheriff, register of deeds, county treasurer or other county, city, town or State officer shall engage in the purchasing of any county, city, town or State claim, including teacher's salary voucher, at a less price than its full and true value or at any rate of discount thereon, or be interested in any speculation on any such claim, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1868-9, c. 260; Code, s. 1009; Rev., s. 3575; C. S., s. 4389; 1923, c. 136, s. 208; 1969, c. 1224, s. 6.)

§ 14-236. Acting as agent for those furnishing supplies for schools and other State institutions.

If any member of any board of directors, board of managers, board of trustees of any of the educational, charitable, eleemosynary or penal institutions of the State, or any member of any board of education, or any county or district superintendent or examiner of teachers, or any trustee of any school or other institution supported in whole or in part from any of the public funds of the State, or any officer, agent, manager, teacher or employee of such boards, shall have any pecuniary interest, either directly or indirectly, proximately or remotely in supplying any goods, wares or merchandise of any nature or kind whatsoever for any of said institutions or schools; or if any of such officers, agents, managers, teachers or employees of such institution or school or State

or county officer shall act as agent for any manufacturer, merchant, dealer, publisher or author for any article of merchandise to be used by any of said institutions or schools; or shall receive, directly or indirectly, any gift, emolument, reward or promise of reward for his influence in recommending or procuring the use of any manufactured article, goods, wares or merchandise of any nature or kind whatsoever by any of such institutions or schools, he shall be forthwith removed from his position in the public service, and shall upon conviction be deemed guilty of a misdemeanor and fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00) and be imprisoned, in the discretion of the court.

This section shall not apply to members of any board of education which is subject to and complies with the provisions of G.S. 14-234(d1). (1897, c. 543; 1899, c. 732, s. 73; Rev., s. 3833; C. S., s. 4390; 1981, c. 103, s. 3.)

Effect of Amendments. — The 1981 amendment added the second paragraph.

CASE NOTES

Purchase of Property from Company Owned by Wife. — A member of the board of education of a county is not guilty under this section for voting as such member for the purchase of school buses from a company selling them owned by his wife, and in which he had no pecuniary interest and for which he worked upon a salary, when the sale was made by other agents of the company upon a commission basis. State v. Debnam, 196 N.C. 740, 146 S.E. 857 (1929).

OPINIONS OF ATTORNEY GENERAL

Inapplicable When Company by which Local School Board Member Is Employed Contracts with State Board of Education. — See opinion of Attorney General to Mr. Bobby R. Stott, 40 N.C.A.G. 217 (1970).

Applicable to County Board of Education Purchasing from Company of Which Member Is Partner. — See opinion of Attorney General to Mr. Garrett Dixon Bailey, 42 N.C.A.G. 180 (1973).

§ 14-237. Buying school supplies from interested officer.

If any county board of education or school committee shall buy school supplies in which any member has a pecuniary interest, the members of such board shall be removed from their positions in the public service and shall, upon conviction, be deemed guilty of a misdemeanor.

This section shall not apply to members of any board of education which is subject to and complies with the provisions of G.S. 14-234(d1). (1901, c. 4, s. 69; Rev., s. 3835; C. S., s. 4391; 1981, c. 103, s. 4.)

Effect of Amendments. — The 1981 amendment added the second paragraph.

§ 14-238. Soliciting during school hours without permission of school head.

No person, agent, representative or salesman shall solicit or attempt to sell or explain any article of property or proposition to any teacher or pupil of any public school on the school grounds or during the school day without having first secured the written permission and consent of the superintendent, principal or person actually in charge of the school and responsible for it.

Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1933, c. 220; 1969, c. 1224, s. 8.)

CASE NOTES

Quoted in Eastern Carolina Tastee-Freez, Inc. v. Raleigh, 256 N.C. 208, 123 S.E.2d 632 (1962).

§ 14-239. Allowing prisoners to escape; burden of proof.

If any person charged with a crime or sentenced by the court upon conviction of any offense shall be legally committed to any sheriff, or jailer, or shall be arrested by any sheriff, deputy sheriff or coroner acting as sheriff, by virtue of any capias issuing on a bill of indictment, information or other criminal proceeding, and such sheriff, deputy sheriff, coroner, or jailer, willfully or negligently, shall suffer such person, so charged or sentenced and committed, to escape out of his custody, the sheriff, deputy sheriff, coroner, or jailer so offending, being thereof convicted, shall be removed from office, and shall be fined or imprisoned, or both, at the discretion of the court before whom the trial may be had; and in all such cases it shall be sufficient, in support of the indictment against such sheriff or other officer, to prove that the person so charged or sentenced was committed to his custody, and it shall lie upon the defendant to show that such escape was not by his consent or negligence, but that he had used all legal means to prevent the same, and acted with proper care and diligence: Provided, that such removal of a sheriff shall not affect his duty or power as a collector of the public revenue, but he shall proceed on such duty and be accountable as if such conviction and removal had not been had. (1791, c. 343, s. 1, P. R.; R. C., c. 34, s. 35; Code, s. 1022; 1905, c. 350; Rev., s. 3577; C. S., s. 4393; 1973, c. 108, s. 7.)

Cross References. — As to permitting escape of or maltreating hired convicts, see § 14-257; as to liability for escape under civil process, see § 162-21.

CASE NOTES

General Consideration. — This is a common-law offense. State v. Ritchie, 107 N.C. 857, 12 S.E. 251 (1890). The statute contemplates two offenses — negligently permitting or willfully promoting the escape — but charging negligence alone will suffice. State v. McLain, 104 N.C. 894, 10 S.E. 518 (1889). The section changes theordinary rule of the burden of proof by shifting such burden to the defendant. State v. Hunter, 94 N.C. 829 (1886); State v. Lewis, 113 N.C. 622, 18 S.E. 69 (1893). The question of good faith and diligence of the officer is for the jury. State v. Blackley, 131 N.C. 726, 42 S.E. 569 (1902).

Right to Kill to Prevent Escape. — The guard has no authority to kill one convicted of a misdemeanor while fleeing to escape, without his offering resistance or showing any menace or show of force in doing so, or, anything that would suggest danger to the person of the guard. Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).

Where the escape is due to the negligence of an assistant the only question presented is whether the defendant has exercised due care in his selection. State v. Lewis, 113 N.C. 622, 18 S.E. 69 (1893).

Example of Specific Language Shifting Burden of Proof. — This section provides an example of specific language used by the legislature when it intended to shift the burden of proof to a defendant. State v. Cooke, 270 N.C. 644, 155 S.E.2d 165 (1967).

Cited in Sutton v. Williams, 199 N.C. 546, 155 S.E. 160 (1930).

§ 14-240. District attorney to prosecute officer for escape.

It shall be the duty of district attorneys, when they shall be informed or have knowledge of any felon, or person otherwise charged with any crime or offense against the State, having within their respective districts escaped out of the custody of any sheriff, deputy sheriff, coroner, or jailer, to take the necessary measures to prosecute such sheriff or other officer so offending. (1791, c. 343, s. 2, P. R.; R. C., c. 34, s. 36; Code, s. 1023; Rev., s. 2822; C. S., s. 4394; 1973, c. 47, s. 2; c. 108, s. 8.)

§ 14-241. Disposing of public documents or refusing to deliver them over to successor.

It shall be the duty of the clerk of the superior court of each county, and every other person to whom the acts of the General Assembly, appellate division reports or other public documents are transmitted or deposited for the use of the county or the State, to keep the same safely in their respective offices; and if any such person having the custody of such books and documents, for the uses aforesaid, shall negligently and willfully dispose of the same, by sale or otherwise, or refuse to deliver over the same to his successor in office, he shall be guilty of a misdemeanor, and shall be punished by a fine or imprisonment, or both, at the discretion of the court. (1881, c. 151; Code, s. 1073; Rev., s. 3598; C. S., s. 4395; 1969, c. 44, s. 26.)

§ 14-242. Failing to return process or making false return.

If any sheriff, constable or other officer, whether State or municipal, or any person who shall presume to act as any such officer, not being by law authorized so to do, refuse or neglect to return any precept, notice or process, to him tendered or delivered, which it is his duty to execute, or make a false return thereon, he shall forfeit and pay to anyone who will sue for the same one hundred dollars ($100.00), and shall moreover be guilty of a misdemeanor. (1818, c. 980, s. 3, P. R.; 1827, c. 20, s. 4; R. C., c. 34, s. 118; Code, s. 1112; Rev., s. 3604; C. S., s. 4396.)

Cross References. — As to duty to execute process and penalty for false return, see § 162-14 and note thereto.

Legal Periodicals. — For a survey of 1977 law on torts, see 56 N.C.L. Rev. 1136 (1978).

CASE NOTES

Civil Process. — This section applies to failure to return civil as well as criminal process. State v. Berry, 169 N.C. 371, 85 S.E. 387 (1915); Piedmont Mfg. Co. v. Buxton, 105 N.C. 74, 11 S.E. 264 (1890).

Process That Could Not Be Served. — An officer is not subject to the penalty under this section for declining to receive process which, at the time it was tendered, he could not have executed. Fentress v. Brown, 61 N.C. 373 (1867).

Quoted in Rollins v. Gibson, 293 N.C. 73, 235 S.E.2d 159 (1977).

Cited in State v. Brown, 119 N.C. 825, 25 S.E. 820 (1896).

§ 14-243. Failing to surrender tax list for inspection and correction.

If any sheriff or tax collector shall refuse or fail to surrender his tax list for inspection or correction upon demand by the authorities imposing the tax, or their successors in office, he shall be guilty of a misdemeanor, and shall be imprisoned not more than five years, and fined not exceeding one thousand

dollars ($1,000), at the discretion of the court. (1870-1, c. 177, s. 2; Code, s. 3823; Rev., s. 3788; C. S., s. 4397.)

§ 14-244. Failing to file report of fines or penalties.

If any officer who is by law required to file any report or statement of fines or penalties with the county board of education shall fail so to do at or before the time fixed by law for the filing of such report, he shall be guilty of a misdemeanor. (1901, c. 4, s. 62; Rev., s. 3579; C. S., s. 4398.)

§ 14-245: Repealed by Session Laws 1973, c. 108, s. 9.

§ 14-246. Failure of ex-magistrate to turn over books, papers and money.

If any magistrate, on expiration of his term of office, or if any personal representative of a deceased magistrate shall, after demand upon him by the clerk of the superior court, willfully fail and refuse to deliver to the clerk of the superior court all dockets, all law and other books, all money, and all official papers which came into his hands by virtue or color of his office, he shall be guilty of a misdemeanor. (Code, ss. 828, 829; 1885, c. 402; Rev., s. 3578; C. S., s. 4399; 1973, c. 108, s. 10.)

CASE NOTES

Cited in Bailey v. Hester, 101 N.C. 538, 8 S.E. 164 (1888); Whitehurst v. Merchants & Farmers Transp. Co., 109 N.C. 342, 13 S.E. 937 (1891).

§ 14-247. Private use of publicly owned vehicle.

It shall be unlawful for any officer, agent or employee of the State of North Carolina, or of any county or of any institution or agency of the State, to use for any private purpose whatsoever any motor vehicle of any type or description whatsoever belonging to the State, or to any county, or to any institution or agency of the State. It is not a private purpose to drive a permanently assigned state-owned motor vehicle between one's official work station and one's home as provided in G.S. 143-341(8)i7a.

It shall be unlawful for any person to violate a rule or regulation adopted by the Department of Administration and approved by the Governor and the Advisory Budget Commission concerning the control of all state-owned passenger motor vehicles as provided in G.S. 143-341(8)i with the intent to defraud the State of North Carolina. (1925, c. 239, s. 1; 1981, c. 859, ss. 52, 53.)

Local Modification. — Mecklenburg: 1971, c. 302; city of Charlotte: 1971, c. 220.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added the second sentence of the first paragraph, and added the second paragraph.

Session Laws 1981, c. 859, s. 97, contains a severability clause.

CASE NOTES

Elements of Offense. — The elements of the offense created by §§ 14-247 and 14-252 are (1) the use of a vehicle belonging to the State or one of the political subdivisions named in the statute (2) by a public official or employer answering to the statutory description (3) for a private purpose. A warrant which fails to charge that the use of a police car by a policeman of a municipality was for a private purpose, is insufficient to charge the offense. Hawkins v. Reynolds, 236 N.C. 422, 72 S.E.2d 874 (1952).

§ 14-248. Obtaining repairs and supplies for private vehicle at expense of State.

It shall be unlawful for any officer, agent or employee to have any privately owned motor vehicle repaired at any garage belonging to the State or to any county, or any institution or agency of the State, or to use any tires, oils, gasoline or other accessories purchased by the State, or any county, or any institution or agency of the State, in or on any such private car. (1925, c. 239, s. 2.)

§ 14-249: Repealed by Session Laws 1981, c. 268, s. 1.

Cross References. — As to authority of the Secretary of Administration to make rules and regulations prescribing the manner in which passenger vehicles shall be purchased, see § 143-60, subdivision (6).

§ 14-250. Publicly owned vehicle to be marked.

It shall be the duty of the executive head of every department of the State government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State, or by any county, or by any institution or agency of the State, a statement that such car belongs to the State or to some county, or institution or agency of the State. Provided, however, that no automobile used by any officer or official in any county in the State for the purpose of transporting, apprehending or arresting persons charged with violations of the laws of the State of North Carolina, shall be required to be lettered. Provided, further, that in lieu of the above method of marking motor vehicles owned by any agency or department of the State government, it shall be deemed a compliance with the law if such vehicles have imprinted on the license tags thereof, above the license number, the words "State Owned" and that such vehicles have affixed to the front thereof a plate with the statement "State Owned." Provided, further, the Council of State shall have authority to authorize exemptions from the provisions of this section with respect to any state-owned vehicle when they find that it is in the public interest to do so because of the use to be made of the vehicle. Such exemptions shall be perfected and effective upon the filing with the Secretary of State of a notice of exemption identifying the vehicle, stating the use to be made of it, the individual or department to which assigned, and the period of the exemption, which may not exceed 12 months. Provided, further, that in lieu of the above method of marking vehicles owned by any county, it shall be deemed a compliance with the law if such vehicles have painted or affixed on the side thereof a circle not less than eight inches in diameter showing a replica of the seal of such county. (1925, c. 239, s. 4; 1929, c. 303, s. 1; 1945, c. 866; 1957, c. 1249; 1961, c. 1195; 1965, c. 1186; 1971, c. 3.)

OPINIONS OF ATTORNEY GENERAL

Application of Section. — This section does not apply to vehicles owned by an area mental health, mental retardation and substance abuse authority. See opinion of Attorney General to Dr. Sarah T. Morrow, Secretary, Department of Human Resources, Oct. 10, 1979.

§ 14-251. Violation made misdemeanor.

Any person, firm or corporation violating any of the provisions of G.S. 14-247 to 14-250 shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars ($100.00) and not more than five hundred dollars ($500.00), imprisonment for not more than six months, or both such fine and imprisonment. Nothing in G.S. 14-247 through 14-251 shall apply to the purchase, use or upkeep or expense account of the car for the executive mansion and the Governor. (1925, c. 239, s. 5; 1969, c. 1224, s. 16.)

§ 14-252. Five preceding sections applicable to cities and towns.

General Statutes 14-247 through 14-251 in every respect shall also apply to cities and incorporated towns. (1931, c. 31.)

Local Modification. — City of Charlotte: 1971, c. 220.

CASE NOTES

Elements of Offense. — See note to § 14-247.

ARTICLE 32.

Misconduct in Private Office.

§ 14-253. Failure of certain railroad officers to account with successors.

If the president and directors of any railroad company, and any person acting under them, shall, upon demand, fail or refuse to account with the president and directors elected or appointed to succeed them, and to transfer to them forthwith all the money, books, papers, choses in action, property and effects of every kind and description belonging to such company, they shall be guilty of a felony, and shall be punished by imprisonment in the State's prison for not less than one nor more than five years, and be fined at the discretion of the court. All persons conspiring with any such president, directors or their agents to defeat, delay or hinder the execution of this section shall be guilty of a misdemeanor, and shall be punished in like manner. The Governor is hereby authorized, at the request of the president, directors and other officers of any railroad company, to make requisition upon the governor of any other state for the apprehension of any such president failing to comply with this section. (1870-1, c. 72, ss. 1-3; Code, ss. 2001, 2002; Rev., s. 3760; C. S., s. 4400.)

CASE NOTES

Not Applicable to Tax Bond. — As this section has reference only to money, books, choses, etc., an indictment cannot be sustained against a former president of a railroad, for refusing to transfer to his successor in office certain special tax bonds. State v. Jones, 67 N.C. 210 (1872).

§ 14-254. Malfeasance of corporation officers and agents.

(a) If any president, director, cashier, teller, clerk or agent of any corporation shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the corporation, or shall, without authority from the directors, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or make any false entry in any book, report or statement of the corporation with the intent in either case to injure or defraud or to deceive any person, or if any person shall aid and abet in the doing of any of these things, he shall be punished as a Class G felon.

(b) For purposes of this section, "person" means a natural person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (1903, c. 275, s. 15; Rev., s. 3325; C. S., s. 4401; 1977, c. 809, ss. 1, 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1; as to misapplication of funds by bank officers, see § 53-129.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class G felon" for "guilty of a felony, and upon conviction shall be imprisoned in the State's prison for not less than four months nor more than 15 years, and likewise fined, at the discretion of the court" at the end of subsection (a). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For a survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

CASE NOTES

Indictments Quashed. — Indictments charging the defendant with corporate malfeasance in violation of this section must be quashed where they allege an intent "to defraud or to deceive the said Housing Authority of the City of Lumberton, North Carolina," since this section requires that they allege an accompanying intent to injure, defraud, or deceive an officer of the corporation. State v. Hill, 45 N.C. App. 136, 263 S.E.2d 14 (1980).

Applied in State v. Chapman, 26 N.C. App. 66, 214 S.E.2d 789 (1975).

Cited in State v. Hardin, 38 N.C. App. 558, 248 S.E.2d 458 (1978).

ARTICLE 33.

Prison Breach and Prisoners.

§ 14-255. Escape of hired prisoners from custody.

If any prisoner, who shall be removed from the prison of the respective counties, cities and towns under the law providing for the hiring out of prisoners by counties and towns, shall escape from the person or company having him in custody, he shall be guilty of a misdemeanor, and shall be imprisoned at hard labor not more than 30 days, or fined not more than fifty dollars ($50.00). (1876-7, c. 196, s. 4; Code, s. 3455; Rev., s. 3658; C. S., s. 4403.)

Cross References. — As to power of counties, cities and towns to hire our prisoners, see §§ 153-191 through 153-193.

CASE NOTES

Two Classes of Escape. — There are two classes of escape from the State prison system. One is a felonious escape and the other is a misdemeanor. A defendant who has committed an escape is entitled to have his case submitted to the jury on question of whether he was imprisoned while serving a sentence imposed for a felony or for a misdemeanor. State v. Ledford, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

No Evidence that Defendant Was Hired out under this Section. — A defendant's contention that he should have been tried for escape under this section rather than under § 148-45 was without merit where the evidence showed that, when he escaped, defendant was in the custody of the State Department of Correction and was under the supervision of a foreman for the State Highway Department, and there was no evidence that defendant was being hired out by a county, city or town under the provisions of this section. State v. Ledford, 9 N.C. App. 245, 175 S.E.2d 605 (1970).

§ 14-256. Prison breach and escape from county or municipal confinement facilities or officers.

If any person shall break any prison, jail or lockup maintained by any county or municipality in North Carolina, being lawfully confined therein, or shall escape from the lawful custody of any superintendent, guard or officer of such prison, jail or lockup, he shall be guilty of a misdemeanor. (1 Edw. II, st. 2d; R. C., c. 34, s. 19; Code, s. 1021; Rev., s. 3657; 1909, c. 872; C. S., s. 4404; 1955, c. 279, s. 1.)

Cross References. — As to penalty for escaping or assisting in an escape from the State prison, see § 148-45.

Editor's Note. — The 1955 amendatory act provided in § 4: "The provisions of this act shall be construed to be mandatory rather than directive."

CASE NOTES

Common Law. — The offense of breaking jail was a felony at common law, but by this section, all cases, no matter what the person is confined for, are reduced to a misdemeanor. State v. Brown, 82 N.C. 585 (1880).

Escape from Officer Not Included. — This section applies only to breaking prison or escaping therefrom and does not, because of its wording, include escape from an officer before being confined to prison. State v. Brown, 82 N.C. 585 (1880).

A juvenile detention home or center is not a "prison, jail, or lockup" within the meaning of this section. State v. Puckett, 43 N.C. App. 596, 259 S.E.2d 310 (1979).

Cost of Recapture May Not Be Recovered from Prisoner. — The State may not recover of a prisoner moneys expended by it to recapture

him after escape from custody, since the escape does not invade any property right of the State, but the expenditure of the sums is voluntary and made by it for the protection of the people of the State in preserving the integrity of a penal system. State Highway & Pub. Works Comm'n v. Cobb, 215 N.C. 556, 2 S.E.2d 565 (1939).

Applied in State v. Abernathy, 1 N.C. App. 625, 162 S.E.2d 114 (1968); State v. Whitt, 2 N.C. App. 601, 163 S.E.2d 531 (1968).

Cited in Holloway v. Moser, 193 N.C. 185 S.E. 375 (1927); State v. Jordan, 247 N.C. 253, 100 S.E.2d 497 (1957).

§ 14-257. Permitting escape of or maltreating hired convicts.

If any person charged in any way with the control or management of convicts, hired for service outside of the State's prison, shall negligently permit them to escape, or shall maltreat them, he shall be guilty of a misdemeanor; but this provision shall not be held to relieve any person from any other criminal liability. (1881, c. 127, s. 2; Code, s. 3450; Rev., s. 3659; C. S., s. 4405; 1947, c. 781.)

Cross References. — As to escape of prisoners from negligent officer's custody, see § 14-239.

CASE NOTES

Negligence Test of Guilt. — Officers and public agents will not be held to the rigorous common-law rule of responsibility for the custody of convicts employed in labors outside of the penitentiary, actual negligence being the test of guilt. State v. Johnson, 94 N.C. 924 (1886).

Negligence Implied. — It is not necessary to prove negligence of the person having lawful custody of prisoners, for it is implied, unless occasioned by the act of God, or irresistible adverse force. State v. Johnson, 94 N.C. 924 (1886).

Cited in State v. Sneed, 94 N.C. 806 (1886).

§ 14-258. Conveying messages and weapons to or trading with convicts and other prisoners.

If any person shall convey to or from any convict any letters or oral messages, or shall convey to any convict or person imprisoned, charged with crime and awaiting trial any weapon or instrument by which to effect an escape, or that will aid him in an assault or insurrection, or shall trade with a convict for his clothing or stolen goods, or shall sell to him any article forbidden him by prison rules, he shall be guilty of a misdemeanor: Provided, that when a murder, an assault or an escape is effected with the means furnished, the person convicted of furnishing the means shall be punished as a Class H felon. (1873-4, c. 158; s. 12; Code, s. 3441; Rev., s. 3662; 1911, c. 11; C. S., s. 4406; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "sentenced to not less than four years hard labor in the State's prison" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-258.1. Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or alcoholic beverages to inmates of charitable, mental or penal institutions or local confinement facilities.

(a) If any person shall give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, or if any person shall combine, confederate, conspire, aid, abet, solicit, urge, investigate, counsel, advise, encourage, attempt to procure, or procure another or others to give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, any deadly weapon, or any cartridge or ammunition for firearms of any kind, or any controlled substances included in Schedules I through VI contained in Article 5 of Chapter 90 of the General Statutes except under the general supervision of a practitioner, poison or poisonous substance, except upon the prescription of a physician, he shall be punished as a Class H felon; and if he be an officer or employee of any institution of the State, or of any local confinement facility, he shall be dismissed from his position or office.

(b) Any person who shall knowingly give or sell any alcoholic beverages to any inmate of any State mental or penal institution, or to any inmate of any local confinement facility, except for medical purposes as prescribed by a duly licensed physician; or any person who shall combine, confederate, conspire, procure, or procure another or others to give or sell any alcoholic beverages to any inmate of any such State institution or local confinement facility, except for medical purposes as prescribed by a duly licensed physician; or any person who shall bring into the buildings, grounds or other facilities of such institution any alcoholic beverages, except for medical purposes as prescribed by a duly licensed physician, shall be guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned, in the discretion of the court. If such person is an officer or employee of any institution of the State, such person shall be dismissed from office. (1961, c. 394, s. 2; 1969, c. 970, s. 6; 1971, c. 929; 1973, c. 1093; 1975, c. 804, ss. 1, 2; 1979, c. 760, s. 5; 1981, c. 412, s. 4; c. 747, s. 66.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and upon conviction thereof shall be fined or imprisoned in the State's prison for not more than 10 years in the discretion of the court" near the end of subsection (a). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

The 1981 amendments, effective Jan. 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" in three places in subsection (b).

§ 14-258.2. Possession of dangerous weapon by prisoner.

Any person while in the custody of the Division of Prisons, or any person under the custody of any local confinement facility as defined in G.S. 153A-217, who shall have in his possession without permission or authorization a weapon capable of inflicting serious bodily injuries or death, or who shall fabricate or create such a weapon from any source, shall be guilty of a misdemeanor; and any person who commits any assault with such weapon and thereby inflicts

bodily injury or by the use of said weapon effects an escape or rescue from imprisonment shall be punished as a Class H felon. (1975, c. 316, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony punishable by a fine or imprisonment not to exceed 10 years" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-258.3. Taking of hostage, etc., by prisoner.

Any prisoner in the custody of the Department of Correction, including persons in the custody of the Department of Correction pending trial or appellate review or for presentence diagnostic evaluation, or any prisoner in the custody of any local confinement facility (as defined in G.S. 153A-217), or any person in the custody of any local confinement facility (as defined in G.S. 153A-217) pending trial or appellate review or for any lawful purpose, who by threats, coercion, intimidation or physical force takes, holds, or carries away any person, as hostage or otherwise, shall be punished as a Class I felon. The provisions of this section apply to: (i) violations committed by any prisoner in the custody of the Department of Correction, whether inside or outside of the facilities of the North Carolina Department of Correction; (ii) violations committed by any prisoner or by any other person lawfully under the custody of any local confinement facility (as defined in G.S. 153A-217), whether inside or outside the local confinement facilities (as defined in G.S. 153A-217). (1975, c. 315; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony and shall be punished as provided in G.S. 14-2" at the end of the first sentence. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-259. Harboring or aiding escaped prisoners.

It shall be unlawful for any person knowing, or having reasonable cause to believe, that any other person has escaped from any prison, jail, reformatory, or from the criminal insane department of any State hospital, or from the custody of any peace officer who had such person in charge, or that such person is a convict or prisoner whose parole has been revoked, to conceal, hide, harbor, feed, clothe, or offer aid and comfort in any manner to any such person.

Every person who shall conceal, hide, harbor, feed, clothe, or offer aid and comfort to any other person in violation of this section shall be guilty of a felony, if such other person has been convicted of, or was in custody upon the charge of a felony, and shall be punished as a Class I felon; and shall be guilty

of a misdemeanor, if such other person had been convicted of, or was in custody upon a charge of a misdemeanor, and shall be punished in the discretion of the court.

The provisions of this section shall not apply to members of the immediate family of such escapee. For the purposes of this section "immediate family" shall be defined to be the mother, father, brother, sister, wife, husband and child of said escapee. (1939, c. 72; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Legal Periodical. — For comment on this enactment, see 17 N.C.L. Rev. 348.

CASE NOTES

Indictment Fatally Defective. — An indictment charging that the defendant unlawfully, willfully, and feloniously harbored an escapee who was serving a sentence of imprisonment when he escaped, is fatally defective in omitting the words "knowing or having reasonable cause to believe that said person was an escapee." State v. Kirkman, 272 N.C. 143, 157 S.E.2d 716 (1976).

Cited in State v. Dix, 282 N.C. 490, 193 S.E.2d 897 (1973).

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class I felon" for "and shall be punished by imprisonment in the State prison for not more than five years" near the middle of the second paragraph. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-260. Injury to prisoner by jailer.

If the keeper of a jail shall do, or cause to be done, any wrong or injury to the prisoners committed to his custody, contrary to law, he shall not only pay treble damages to the person injured, but shall be guilty of a misdemeanor. (1795, c. 433, s. 6, P. R.; R. C., c. 87, s. 8; Code, s. 3463; Rev., s. 3661; C. S., s. 4407.)

Cross References. — As to the degree of protection against violence allowed the jailer in the State prison system, see § 148-46.

CASE NOTES

Evidence Sufficient for Jury. — Evidence that the plaintiff's thumb had inadvertently been placed against the door jamb when jailer started to close the door of a cell, and that when the plaintiff pushed against the door to release his thumb the jailer pushed the door shut with his shoulder, thereby cutting off plaintiff's thumb, is sufficient to be submitted to the jury on the issue of the jailer's negligent injury to the plaintiff. Davis v. Moore, 215 N.C. 449, 2 S.E.2d 336, overruled on other grounds, 215 N.C. 449, 2 S.E.2d 366 (1939), and Dunn v. Swanson, 217 N.C. 279, 7 S.E.2d 563 (1940).

Cited in Threatt v. North Carolina, 221 F. Supp. 858 (W.D.N.C. 1963).

§ 14-261. Confining prisoners to improper apartments.

If the sheriff or jailer shall wantonly or unnecessarily confine those committed to his custody in any apartment, other than that provided and designated by law for persons of the description of the prisoner, he shall be guilty of a misdemeanor. (1795, c. 433, s. 4; R. C., c. 87, s. 16; Code, s. 3471; Rev., s. 3660; C. S., s. 4408.)

§ 14-262: Repealed by Session Laws 1975, c. 402.

§ 14-263: Repealed by Session Laws 1979, c. 760, s. 4, effective July 1, 1981.

Editor's Note. — Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Session Laws 1979, 2nd Sess., c. 1316, s. 47, amended Session Laws 1979, c. 760, s. 6, so as to postpone the effective date of the repeal to March 1, 1981.

§ 14-264. Record to be kept; items of record.

The superintendent or other person having charge of prisoners shall keep a record showing, the name, age, date of sentence, length of sentence, crime for which convicted, home address, next of kin, and the conduct of each prisoner received. (1927, c. 178, s. 2.)

§ 14-265: Repealed by Session Laws 1977, c. 711, s. 33.

ARTICLE 34.

Custodial Institutions.

§ 14-266. Persuading inmates to escape.

It shall be unlawful for any parent, guardian, brother, sister, uncle, aunt, or any person whatsoever to persuade or induce to leave, carry away, or accompany from any State institution, except with the permission of the superintendent or other person next in authority, any boy or girl, man or woman, who has been legally committed or admitted under suspended sentence to said institution by juvenile, recorder's, superior or any other court of competent jurisdiction. (1935, c. 307, s. 1; 1937, c. 189, s. 1.)

§ 14-267. Harboring fugitives.

It shall be unlawful for any person to harbor, conceal, or give succor to, any known fugitive from any institution whose inmates are committed by court or are admitted under suspended sentence. (1935, c. 307, s. 2; 1937, c. 189, s. 2.)

§ 14-268. Violation made misdemeanor.

Any person violating the provisions of this Article shall be guilty of a misdemeanor, and fined or imprisoned, in the discretion of the court. (1935, c. 307, s. 3.)

SUBCHAPTER IX. OFFENSES AGAINST THE PUBLIC PEACE.

ARTICLE 35.

Offenses against the Public Peace.

§ 14-269. Carrying concealed weapons.

If anyone, except when on his own premises, shall willfully and intentionally carry concealed about his person any bowie knife, dirk, dagger, sling shot, loaded cane, brass, iron or metallic knuckles, razor, pistol, gun or other deadly weapon of like kind, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties, provided, however, full-time sworn law-enforcement officers may carry a concealed weapon when off-duty in jurisdiction where assigned if so authorized by written regulations of the law-enforcement unit, which must be filed with the clerk of court in the county where the law-enforcement unit is located, provided further, that no such regulation shall permit the carrying of a concealed weapon while the officer is consuming or under the influence of alcoholic beverages. (Code, s. 1005; Rev., s. 3708; 1917, c. 76; 1919, c. 197, s. 8; C. S., s. 4410; 1923, c. 57; Ex. Sess. 1924, c. 30; 1929, cc. 51, 224; 1947, c. 459; 1949, c. 1217; 1959, c. 1073, s. 1; 1965, c. 954, s. 1; 1969, c. 1224, s. 7; 1977, c. 616; 1981, c. 412, s. 4; c. 747, s. 66.)

Local Modification. — Caswell: 1941, c. 90; Halifax: 1943, c. 34.

Cross References. — As to counties still governed by former subdivision (b) of this section, which was eliminated by the 1965 amendment, see note to § 14-269.1. As to tramps carrying weapons, see § 14-339. As to going armed on Sunday, see § 103-2.

Effect of Amendments. — The 1981 amendments, effective Jan. 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" at the end of the section.

Legal Periodicals. — For note on control of firearms, see 35 N.C.L. Rev. 149 (1956).

CASE NOTES

I. General Consideration.
II. Elements of the Offense.
III. Persons Excepted.
IV. Illustrative Cases.
V. Practice and Procedure.

I. GENERAL CONSIDERATION.

Purpose. — The purpose of this section is to reduce the likelihood a concealed weapon may be resorted to in a fit of anger. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

Applied in State v. Ratliff, 281 N.C. 397, 189 S.E.2d 179 (1972); State v. Patton, 18 N.C. App. 266, 196 S.E.2d 560 (1973); State v. McZorn, 288 N.C. 417, 219 S.E.2d 201 (1975).

Stated in State v. Burgess, 2 N.C. App. 677, 163 S.E.2d 662 (1968).

Cited in State v. Divine, 98 N.C. 778, 4 S.E. 477 (1887); State v. Barrett, 138 N.C. 630, 50 S.E. 506 (1905); State v. Sauls, 199 N.C. 193, 154 S.E. 28 (1930); State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Streeter, 283 N.C. 203, 195 S.E.2d 502 (1973).

II. ELEMENTS OF THE OFFENSE.

Elements Generally. — In order to be guilty of violating this section the accused must be off his own premises, carrying a deadly weapon, and the weapon must be concealed about his person. State v. Williamson, 238 N.C. 652, 78 S.E.2d 763 (1953).

Concealment Is Gist of Offense. — The mischief provided against is the practice of wearing weapons concealed about the person to be used upon any emergency. State v. Broadnax, 91 N.C. 543 (1884).

Concealment of the weapon must be shown. State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 878 (1974).

If the weapon is carried openly the defendant could not be guilty under this section. State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

And Is Question for Jury. — Whether, in a given case, the weapon is concealed from the public and such presumption of guilty intent is rebutted by the mode of carrying the weapon, are questions for the jury. State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897). See State v. Lilly, 116 N.C. 1049, 21 S.E. 563 (1895).

Prima Facie Evidence of Concealment. — The fact that defendant had a pistol about his person, off of his own premises, was prima facie evidence of concealment, which shifted the burden upon the defendant to rebut or disprove. State v. McManus, 89 N.C. 555 (1883); State v. Lilly, 116 N.C. 1049, 21 S.E. 563 (1895); State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897); State v. Hamby, 126 N.C. 1066, 35 S.E. 614 (1900).

The possession of a pistol by one on the premises of another is not alone sufficient to convict of carrying a concealed weapon in violation of this section, although the statute makes such possession prima facie evidence of the concealment thereof. State v. Vanderburg, 200 N.C. 713, 158 S.E. 248 (1931).

Affirmative Showing Required in Rebuttal. — To rebut the statutory presumption arising from the concealment, the absence of intent to conceal must be affirmatively found. State v. Gilbert, 87 N.C. 527 (1882); State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

Intent Required. — The intent to carry, not the intent to use, determines the guilt. State v. Reams, 121 N.C. 556, 27 S.E. 1004 (1897).

To conceal a weapon means something more than the mere act of having it where it may not be seen. It implies an assent of the mind and a purpose to so carry it that in may not be seen. State v. Gilbert, 87 N.C. 527 (1882).

Defense of No Intent to Conceal. — The question is as to the manner of carrying, whether concealed or not, and it might be shown, in defense, that there was no intent to conceal it. State v. Brown, 125 N.C. 704, 34 S.E. 549 (1899).

When Intent Immaterial. — But if from defendant's own testimony it appears that he necessarily knew that he was carrying it concealed intent is immaterial. State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).

"About His Person". — The language is not "concealed on his person," but "concealed about his person"; that is, concealed near, in close proximity to him, and within his convenient control and easy reach, so that he could promptly use it, if prompted to do so by any violent motive. It makes no difference how it is concealed, so it is on or near to and within the reach and control of the person charged. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

The language of the statute is, not "concealed on his person," but "concealed about his person," and hence, if the weapon be within reach and control of the defendant, it is sufficient to bring the case within the meaning of the statute. State v. McManus, 89 N.C. 555 (1883).

To be criminal, the weapon must be concealed, not necessarily on the person of the accused, but in such position as gives him ready access to it. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

Carrying on Own Premises. — That defendant was not on his own premises when discovered carrying a concealed weapon is an element of this section. State v. Stanfield, 19 N.C. App. 622, 199 S.E.2d 741 (1973), appeal dismissed, 284 N.C. 622, 201 S.E.2d 692 (1974).

The use of the words, "on his own premises," and not being "on his own lands," in this section, shows an intention to restrict the right to carry concealed weapons to those who are in the privacy of their own premises and not likely to be thrown into contact with the public, nor tempted, on a sudden quarrel, to use the great advantage a concealed weapon gives. State v. Perry, 120 N.C. 580, 26 S.E.2d 915, 1008 (1897).

Time Not Essence of Offense. — Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. State v. Spencer, 185 N.C. 765, 117 S.E. 803 (1923).

Apprehension of Assault No Defense. — Carrying concealed weapons in reasonable apprehension of deadly assaults is not justification of a violation of the statutory offense, but in aggravation thereof, and may be considered by the trial judge in imposing the sentence, according to the discretion given him therein by this section. State v. Woodlief, 172 N.C. 885, 90 S.E. 137 (1916).

Nor Is Acting upon Advice of Attorney. — A person acting in ignorance of the law in good faith and upon advice of the clerk of the court or of an attorney, but in violation of this section, is not excused. State v. Simmons, 143 N.C. 613, 56 S.E. 701 (1907).

III. PERSONS EXCEPTED.

Night Watchman. — A private night watchman is not guilty of carrying a concealed weapon, under this section, while on duty upon the premises he is employed to watch. State v. Anderson, 129 N.C. 521, 39 S.E. 824 (1901).

Officials of Transportation Companies. — The exception in this section does not apply to the officials of corporations, such as turnpikes, railroads and others, which invite the public to use their lines of travel. State v. Perry, 120 N.C. 580, 26 S.E. 915, 1008 (1897).

United States Mail Carrier. — A United States mail carrier is indictable under this section for carrying a concealed weapon while carrying the mail and while returning to his home after delivering the mail. State v. Boone, 132 N.C. 1107, 44 S.E. 595 (1903).

IV. ILLUSTRATIVE CASES.

Butcher Knife. — This section making it indictable for one to carry concealed about his person any pistol, bowie knife, razor or other deadly weapon of like kind, embraces a butcher's knife. State v. Erwin, 91 N.C. 545 (1884).

Revolver in Bag in Back Seat. — Where police officers stopped defendant's car to make a routine driver's license check and defendant removed revolver from a bag in the back seat, the police properly arrested him without a warrant inasmuch as they had reasonable ground to believe defendant was committing a misdemeanor — carrying a concealed weapon in violation of this section — in their presence. State v. White, 18 N.C. App. 31, 195 S.E.2d 576 (1973), appeal dismissed, 283 N.C. 587, 196 S.E.2d 811 (1973).

Pistol in Coat on Shoulder. — Upon evidence tending to show that the defendant had a pistol with the butt end projecting above his hip pocket, and with his coat off and carried upon his shoulder, it is sufficient for the determination of the jury, upon the issue of defendant's guilt in having carried a concealed weapon in violation of this section. State v. Mangum, 187 N.C. 477, 121 S.E. 765 (1924).

Carrying Pistol to Deliver to Another. — One is not guilty of a violation of this section where it appears that he had a pistol in his pocket for the purpose of delivering it to the owner who had sent him for it. State v. Broadnax, 91 N.C. 543 (1884).

Persons Not "On Premises". — A superintendent or overseer of a department of a cotton mill, is not, while therein, "on his premises," within the meaning of this section. State v. Bridgers, 169 N.C. 309, 84 S.E. 689 (1915).

A person in his own automobile on a public highway is not on his own premises within the meaning of this section. State v. Gainey, 273 N.C. 620, 160 S.E.2d 685 (1968).

A mere servant or hireling who carries concealed weapons on the premises of his employer is indictable. State v. Deyton, 119 N.C. 880, 26 S.E. 159 (1896).

V. PRACTICE AND PROCEDURE.

Warrant Must State Defendant Carried Weapon Off His Own Premises. — In prosecution for carrying a concealed weapon, the warrant is held fatally defective in failing to embrace in the charge the essential element of the offense that the weapon was carried cancealed by defendant off his own premises, the warrant itself excluding the charge that the weapon was carried off the premises by charging that defendant carried an unconcealed weapon off his premises. State v. Bradley, 210 N.C. 290, 186 S.E. 240 (1936).

Information Held Sufficient. — An information charging that defendant, on a specified date, unlawfully and willfully carried a concealed weapon, to wit, a pistol, about his person, the defendant not being at the time on his own premises, is an accurate and sufficient charge of violating this section. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

Former Conviction of Assault. — A conviction of assault with a deadly weapon will not sustain a plea of former conviction in a subsequent trial for carrying a concealed weapon. State v. Robinson, 116 N.C. 1046, 21 S.E. 701 (1895).

Punishment. — When the punishment does not exceed the limits fixed by this section, it cannot be considered cruel and unusual punishment in a constitutional sense. State v. Caldwell, 269 N.C. 521, 153 S.E.2d 34 (1967).

OPINIONS OF ATTORNEY GENERAL.

Possession of an Unconcealed Pistol in an Automobile Not Violation of Statute. — See opinion of Attorney General to Honorable Albert Jackson, Sheriff of Henderson County, 41 N.C.A.G. 207 (1971).

§ 14-269.1. Confiscation and disposition of deadly weapons.

Upon conviction of any person for violation of G.S. 14-269 or any other offense involving the use of a deadly weapon of a type referred to in G.S. 14-269, the deadly weapon with reference to which the defendant shall have been convicted shall be ordered confiscated and disposed of by the presiding judge at the trial in one of the following ways in the discretion of the presiding judge.

(1) By ordering the weapon returned to its rightful owner, but only when such owner is a person other than the defendant and has filed a petition for the recovery of such weapon with the presiding judge at the time of the defendant's conviction, and upon a finding by the presiding judge that petitioner is entitled to possession of same and that he was unlawfully deprived of the same without his consent.

(2) By ordering the weapon turned over to a law-enforcement agency in the county of trial for the official use of such agency, but only upon the written request by the head or chief of such agency. The clerk of the superior court of such county shall maintain a record of such weapons and the law-enforcement agency receiving them.

(3) By ordering the weapon turned over to the sheriff of the county in which the trial is held to be sold as herein provided. Under the direction of the sheriff, the weapon shall be sold at public auction after one advertisement in a newspaper having general circulation in the county which advertisement shall be at least seven days prior to sale. The proceeds of such sale shall go to the general fund of the county in which such weapons are sold. The sheriff shall maintain a record and inventory of all such weapons received and sold by him. Sales of such weapons by the sheriff shall be held at least once each year.

(4) By ordering such weapon turned over to the sheriff of the county in which the trial is held or his duly authorized agent to be destroyed. The sheriff shall maintain a record of the destruction thereof. (1965, c. 954, s. 2; 1967, c. 24, s. 3.)

Certain Counties Governed by Former § 14-269 (b). — Harnett, Pamlico, Perquimans, Rockingham, Scotland and Warren Counties were excepted from the provisions of this section by Session Laws 1965, c. 954, s. 2½, as amended by Session Laws 1969, c. 30½, Session Laws 1973, c. 1399, and Session Laws 1981, c. 279. Session Laws 1969, c. 1117, amended the 1965 act by adding to s. 2½ the following sentence: "The provisions of G.S. 14-269 (b) prior to amendment by this Act shall be effective as to these counties." Former § 14-269 (b) provided:

"(b) If the deadly weapon with reference to which the defendant shall have been convicted is a bowie knife, dirk, dagger, slung shot, loaded cane, brass, iron or metallic knuckles, razor or weapon of like kind, the same shall be destroyed. However, pistols or guns may be confiscated and ordered turned over to the sheriff of the county in which the trial is held by the judge presiding at the trial. Under the direction of said sheriff the weapon shall be sold after one advertisement in a newspaper having a general circulation in the county, at public auction, which shall be held at least once a year. The proceeds of the sale of the weapon or weapons shall go to the general fund of the county in which the weapon or weapons were confiscated and sold. The sheriff shall keep a record and inventory of all weapons received by him and sold under his direction; provided, however, that in any case the presiding judge may, if the facts so justify, order any pistol or gun returned to the defendant."

In former § 14-269 (b) as set out above, the word "sheriff" was substituted for the words "clerk of the superior court" in three places by Session Laws 1959, c. 1073, the intent of the amendatory act being to transfer to the sheriffs the duties theretofore performed by the clerks of the superior court in disposing of confiscated weapons. Of the counties presently governed by former § 14-269 (b), the following are excepted from the application of the 1969 amendment: Perquimans, Rockingham and Warren. (Harnett and Pamlico, originally among those excepted, were brought under the 1959 act by Session Laws 1967, cc. 470 and 6, respectively.) As to the counties excepted from the 1969 act, the word "sheriff" in former § 14-469 (b) as set out above should be read "clerk of the superior court."

Former § 14-269 (b) was also modified, as to two of the counties in which it remains

applicable, as follows: Rockingham: 1957, c. 939; Scotland: 1955, c. 569.

§ 14-269.2. Weapons on campus or other educational property.

It shall be unlawful for any person to possess, or carry, whether openly or concealed, any gun, rifle, pistol, dynamite cartridge, bomb, grenade, mine, powerful explosive as defined in G.S. 14-284.1, bowie knife, dirk, dagger, slungshot, leaded cane, switch-blade knife, blackjack, metallic knuckles or any other weapon of like kind, not used solely for instructional or school sanctioned ceremonial purposes, in any public or private school building or bus, on any public or private school campus, grounds, recreation area, athletic field, or other property owned, used or operated by any board of education, school, college, or university board of trustees or directors for the administration of any public or private educational institution. For the purpose of this section a self-opening or switch-blade knife is defined as a knife containing a blade or blades which open automatically by the release of a spring or a similar contrivance, and the above phrase "weapon of like kind" includes razors and razor blades (except solely for personal shaving) and any sharp pointed or edged instrument except unaltered nail files and clips and tools used solely for preparation of food, instruction and maintenance. This section shall not apply to the following persons: Officers and enlisted personnel of the armed forces of the United States when in discharge of their official duties as such and acting under orders requiring them to carry arms or weapons, civil officers of the United States while in the discharge of their official duties, officers and soldiers of the militia and the national guard when called into actual service, officers of the State, or of any county, city, or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties, any pupils who are members of the Reserve Officer Training Corps and who are required to carry arms or weapons in the discharge of their official class duties, and any private police employed by the administration or board of trustees of any public or private institution of higher education when acting in the discharge of their duties.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court by fine or imprisonment or by both such fine and imprisonment, not to exceed five hundred dollars ($500.00) fine or six months imprisonment. (1971, c. 241, ss. 1, 2; c. 1224.)

CASE NOTES

Applied in In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

OPINIONS OF ATTORNEY GENERAL.

Faculty Member May Have Gun in Own Home Located on Campus. — See opinion of Attorney General to Mr. Pritchard C. Smith, 41 N.C.A.G. 466 (1971).

§ 14-269.3. Carrying weapons into assemblies and establishments where alcoholic beverages are sold and consumed.

(a) It shall be unlawful for any person to carry any gun, rifle, or pistol into any assembly where a fee has been charged for admission thereto, or into any establishment in which alcoholic beverages are sold and consumed. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court by fine or imprisonment or by both.

(b) This section shall not apply to the following:

(1) A person exempted from the provisions of G.S. 14-269;

(2) The owner or lessee of the premises or business establishment;

(3) A person participating in the event, if he is carrying a gun, rifle, or pistol with the permission of the owner, lessee, or person or organization sponsoring the event; and

(4) A person registered or hired as a security guard by the owner, lessee, or person or organization sponsoring the event. (1977, c. 1016, s. 1; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1981 amendments, effective Jan. 1, 1982, substituted "alcoholic beverages" for "intoxicating liquors" in the first sentence of subsection (a).

§ 14-269.4. Weapons on State property.

It shall be unlawful for any person to possess, or carry, whether openly or concealed, any deadly weapon, not used solely for instructional or officially sanctioned ceremonial purposes in the State Capitol Building, the Executive Mansion, the Western Residence of the Governor, or on the grounds of any of these buildings.

This section shall not apply to:

(1) Officers and enlisted personnel of the armed forces when in the discharge of their official duties as such and acting under orders requiring them to carry arms and weapons,

(2) Civil officers of the United States while in the discharge of their official duties,

(3) Officers and soldiers of the militia and the State guard when on duty or called into service,

(4) Officers or employees of the State, or any county, city, or town charged with the execution of the laws of the State, when acting in the discharge of their official duties if authorized by law to carry weapons,

(5) State-owned rest areas, rest stops along the highways, and state-owned hunting and fishing reservations.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished in the discretion of the court by fine or imprisonment or by both such fine and imprisonment. (1981, c. 646.)

§ 14-270. Sending, accepting or bearing challenges to fight duels.

If any person shall send, accept or bear a challenge to fight a duel, though no death ensue, he, and all such as counsel, aid and abet him, shall be guilty of a misdemeanor, and shall, moreover, be ineligible to any office of trust, honor or profit in the State, any pardon or reprieve notwithstanding. Any person violating any provision of this section shall be punishable by a fine not to

exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1802, c. 608, s. 1, P. R.; R. C., c. 34, s. 48; Code, s. 1012; Rev., s. 3628; C. S., s. 4411; 1969, c. 1224, s. 9.)

Cross References. — As to killing adversary in duel, see § 14-20.

CASE NOTES

Duel Defined. — Webster's International Dictionary defines "duel" to be a combate between two persons, fought with deadly weapons by agreement. State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

Common Law. — Dueling was an offense at common law, 4 Bl. Com., 145; State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

Use of Deadly Weapons. — In 2 Bishop New Criminal Law, § 313(2), it is doubted whether the use of deadly weapons is essential to a duel, but the fighting must at least be upon such mutual agreement as permits one combatant to take the life of the other. State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

Challenge to Fight with Fists and Hands. — A challenge to fight a fair fight with fists and hands, without the use of any deadly weapons, is not dueling within the statute. State v. Fritz, 133 N.C. 725, 45 S.E. 957 (1903).

Challenge to Fight Out of State. — A challenge to fight a duel out of State is indictable under this section. State v. Farrier, 8 N.C. 487 (1821).

Form of Indictment. — An indictment for sending a challenge, in the form of a letter, to fight a duel, need not set out the words of the letter, nor the substance thereof. State v. Farrier, 8 N.C. 487 (1821).

§ 14-271. Engaging in and betting on prize fights.

If any two or more persons engage in a prize fight, sparring match or glove or fist contest for money or other valuable prize or stake; or if any person bet or lay a wager on the result thereof or advise, aid or abet in any way whatever in promoting the same, he shall be fined not less than five hundred dollars ($500.00), or imprisoned in the State's prison or jail for not less than one year nor more than five years, or both, in the discretion of the court. (1895, c. 28, ss. 1-4; Rev., s. 3707; C. S., s. 4412.)

Local Modification. — Carteret: 1947, c. 174; Cumberland: 1977, c. 437; Durham: 1953, c. 1287; Pitt: 1977, c. 437; 1981, c. 813; Robeson: Pub. Loc. 1925, c. 270; Vance: Pub. Loc. 1927, c. 497; Wake: 1977, c. 437; 1981, c. 813; city of Asheville: 1981, c. 71; city of Greensboro: 1981, c. 62.

Cross References. — As to power of the Governor to prevent prizefights, see § 147-12, subdivision (6).

§ 14-272. Disturbing picnics, entertainments and other meetings.

If any person shall willfully interrupt or disturb any picnic, excursion party, school entertainment, political meeting, or any meeting or other organization whatsoever lawfully and peaceably held, either at, within or without the place where such picnic, excursion party, school entertainment, political meeting or other meeting or organization is held, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1897, c. 213; Rev., s. 3704; C. S., s. 4413; 1969, c. 1224, s. 3.)

CASE NOTES

Section applies to disturbing Sunday school. State v. Branner, 149 N.C. 559, 63 S.E. 169 (1908).

And to Disturbing Family Reunions. — See State v. Starnes, 151 N.C. 724, 66 S.E. 347 (1909).

§ 14-273. Disturbing schools and scientific and temperance meetings; injuring property of schools and temperance societies.

If any person shall willfully interrupt or disturb any public or private school or temperance society or organization or any meeting lawfully and peacefully held for the purpose of literary and scientic improvement, or for the discussion of temperance or question of moral reform, either within or without the place where such meeting or school is held, or injure any school building, or deface any school furniture, apparatus or other school property, or property of any temperance society or organization, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (Code, s. 2592; 1885, c. 140; 1901, c. 4, s. 28; Rev., s. 3838; C. S., s. 4414; 1959, c. 555, s. 2; 1969, c. 1224, s. 3.)

CASE NOTES

Constitutionality. — Neither the enactment of this section nor its enforcement against certain defendants violated the law of the land clause of N.C. Const., Art. I, § 17. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

This section is not discriminatory upon its face. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

This section does not undertake censorship of speech or protest. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

This section does not have the objectionable quality of vagueness and overbreadth. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

This section is not susceptible of sweeping and improper application so as to prevent the advocacy of unpopular ideas and criticisms of public schools or public officials. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

Elements of Offense. — The elements of the offense punishable under this section are: (1) some act or course of conduct by the defendant, within or without the school; (2) an actual, material interference with, frustration of or confusion in, part or all of the program of a public or private school for the instruction or training of students enrolled therein and in attendance thereon, resulting from such act or conduct; and (3) the purpose of intent on the part of the defendant that his act or conduct have that effect. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968); State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

"Interrupt" means "to break the uniformity or continuity of; to break in upon an action." State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

"Disturb" means "to throw into disorder." State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

When the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean to a person of ordinary intelligence a substantial interference with, disruption of, and confusion of the operation of the school in its program of instruction and training of students there enrolled. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 2d 285 (1968).

Motive No Defense. — Nothing else appearing, the defendant's motive for doing willfully an act forbidden by this section is no defense to the charge of violation of such section. State v. Wiggins, 272 N.C. 147, 158 S.E.2d 37 (1967), cert. denied, 390 U.S. 1028, 88 S. Ct. 1418, 20 L. Ed. 285 (1968).

Preventing Use of School Building. — To take possession of a schoolhouse when there are no pupils present, and forbid the teacher to use the building, though the school is thereby prevented from assembling, is not a violation of this section. State v. Spray, 113 N.C. 686, 18 S.E. 700 (1893).

Evidence Sufficient for Jury. — In a prosecution charging that defendants unlawfully and willfully interrupted a public school in violation of this section, the issue of defendants' guilt was properly submitted to the jury, where the State's evidence tended to show that (1) the defendants entered the office of the secretary to the principal and told her that they were going to interrupt the school that day; (2) the defendants locked the secretary out of her office, moved furniture about, scattered papers, and dumped books on the floor; (3) the secretary and several teachers were kept away from their jobs or classes by these actions; (4) the defendants also occupied the principal's office and operated the bells that normally signalled the change of classes; and (5) the principal, as a result of the commotion, was forced to dismiss school prior to the regular closing hour. State v. Midgett, 8 N.C. App. 230, 174 S.E.2d 124 (1970).

Reduction of Sentence. — In a school disturbance prosecution the Court of Appeals, in the exercise of its supervisory powers, reduced the defendants' sentences of imprisonment from 12 months to six months, where the amendment to this section mitigating the punishment for the offense had become effective on the day defendants were sentenced. State v. Evans, 8 N.C. App. 469, 174 S.E.2d 680 (1970).

Applied in State v. Guthrie, 265 N.C. 659, 144 S.E.2d 891 (1965); In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); In re Johnson, 32 N.C. App. 492, 232 S.E.2d 486 (1977).

§ 14-274. Disturbing students at schools for women.

It shall be unlawful for any male person to willfully disturb, annoy or harass the students of any boarding school or college for women situated anywhere in North Carolina by rude conduct or by persistent unnecessary presence on or near the property of the school or college; or by the willful addressing or communicating orally or otherwise with said students while on school property, or while elsewhere when in charge of a teacher, officer or student of said school. The violation of this section shall be deemed a misdemeanor punishable by a fine of not less than five dollars ($5.00) nor more than fifty dollars ($50.00), or by imprisonment not to exceed 30 days. (1925, c. 189, s. 1.)

Legal Periodicals. — For a criticism of the wisdom and necessity for this law, see 3 N.C.L. Rev. 143.

§ 14-275. Disturbing religious congregations.

If any person shall be intoxicated or shall be guilty of any rude and disorderly conduct at any place where people are accustomed to meet for divine worship, and while the people are there assembled for such worship, whether such worship should have begun or not, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1901, c. 738; Rev., s. 3706; C. S., s. 4415; 1969, c. 1224, s. 3.)

CASE NOTES

People Must Be Collected. — In order to render indictable the disturbance of persons assembled for divine worship, the people, or some considerable number, must be collected at or about the time when worship is about to commence, and in the place where it is to be celebrated. State v. Bryson, 82 N.C. 576 (1880).

But the congregation need not be engaged in the act of worship. State v. Ramsey, 78 N.C. 448 (1878).

The indictment will not lie after the congregation has dispersed. State v. Davis, 126 N.C. 1059, 35 S.E. 600 (1900).

The act itself must disturb the congregation — information of the act, for example that a fight is in progress, will not suffice. State v. Kirby, 108 N.C. 772, 12 S.E. 1045 (1891).

Persistent speaking in church after remonstrance from the minister has been held sufficient to sustain a verdict under this section (see State v. Ramsey, 78 N.C. 448 (1878)).

Persistence in singing off the key where the intention is not to disturb is not sufficient to sustain a verdict under this section. State v. Linkhaw, 69 N.C. 214 (1873).

Disturbing Sunday School. — See note to § 14-272.

Disturbing Family Gathering. — See State v. Starnes, 151 N.C. 724, 66 S.E. 347 (1909).

Indictment. — The indictment should charge that the assembly had met "for divine worship," "divine service," "religious worship or service," or something of the same import. State v. Fisher, 25 N.C. 111 (1842).

Where the charge against the defendant is disturbing a congregation actually engaged in divine worship, it is variance to show merely the disturbance of parties assembled for such worship. State v. Bryson, 82 N.C. 576 (1880).

Stated in State v. Fenner, 263 N.C. 694, 140 S.E.2d 349 (1965).

§ 14-275.1. Disorderly conduct at bus or railroad station or airport.

Any person shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days, in the discretion of the court, if such person while at, or upon the premises of,

(1) Any bus station, depot or terminal, or
(2) Any railroad passenger station, depot or terminal, or
(3) Any airport or air terminal used by any common carrier, or
(4) Any airport or air terminal owned or leased, in whole or in part, by any county, municipality or other political subdivision of the State, or privately owned airport

shall

(1) Engage in disorderly conduct, or
(2) Use vulgar, obscene or profane language, or
(3) On any one occasion, without having necessary business there, loiter and loaf upon the premises after being requested to leave by any peace officer or by any person lawfully in charge of such premises. (1947, c. 310.)

Editor's Note. — The title of the act inserting this section refers only to airports and airport terminals.

§ 14-276: Repealed by Session Laws 1971, c. 357.

§ 14-276.1. Impersonation of firemen or emergency medical services personnel.

It is a misdemeanor, punishable by imprisonment not to exceed 30 days, for any person, with intent to deceive, to impersonate a fireman or any emergency medical services personnel, whether paid or voluntary, by a false statement, display of insignia, emblem, or other identification on his person or property, or any other act, which indicates a false status of affiliation, membership, or level of training or proficiency, if:

(1) The impersonation is made with intent to impede the performance of the duties of a fireman or any emergency medical services personnel, or
(2) Any person reasonably relies on the impersonation and as a result suffers injury to person or property.

For purposes of this section, emergency medical services personnel means an ambulance attendant, emergency medical technician, emergency medical technician intermediates, emergency medical technician paramedics, or other

member of a rescue squad or other emergency medical organization. (1981, c. 432, s. 1.)

Editor's Note. — Session Laws 1981, c. 432, s. 2, makes the act effective Oct. 1, 1981.

§ 14-277. Impersonation of peace officers.

It shall be unlawful for any person other than duly authorized peace officers or officers of the court to represent to any person that they are duly authorized peace officers, and acting upon such representation to arrest any person, search any building, or in any way impersonate a peace officer or act in accordance with the authority delegated to duly authorized peace officers. Nothing in this section shall be construed to prohibit a private citizen in whose presence a felony has been committed from arresting such person or persons participating in the commission of said felony when such arrest is deemed necessary, or to prohibit any private citizen in whose presence an act, which would constitute a breach of the peace and for which an indictment would lie, is committed from arresting such person or persons committing said breach of the peace when such arrest is deemed necessary. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction may be fined or imprisoned at the discretion of the court. (1927, c. 229.)

CASE NOTES

Elements of the Offense. — The offense defined by this section consists of two material elements, both of which must be made to appear before the person charged can be convicted. He must have made a false representation that he is a duly authorized peace officer, and acting upon such representation he must have arrested some person, searched a building, or done some act in accordance with the authority delegated to duly authorized officers. State v. Church, 242 N.C. 230, 87 S.E.2d 256 (1955).

When Nonsuit Proper. — Where the defendant made no oral representation that he was a peace officer, but merely exhibited a courtesy card, which the witness examined, but was not misled, and the defendant used no words or action which would indicate he intended or attempted to arrest him, a motion for judgment as of nonsuit should have been allowed. State v. Church, 242 N.C. 230, 87 S.E.2d 256 (1955).

§ 14-277.1. Communicating threats.

(a) A person is guilty of a misdemeanor if without lawful authority:

(1) He willfully threatens to physically injure the person or damage the property of another;

(2) The threat is communicated to the other person, orally, in writing, or by any other means;

(3) The threat is made in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and

(4) The person threatened believes that the threat will be carried out.

(b) A violation of this section is punishable by a fine of not more than five hundred dollars ($500.00), imprisonment of not more than six months, or both. (1973, c. 1286, s. 11.)

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

Conditional Threats. — A defendant may be held liable under this section for conditional threats where the condition is one which she had no right to impose. State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978).

Defendant's threat to hit the victim with a rock did not become lawful merely because defendant indicated she had no intention to strike if the victim did not "come any closer." While the threat gave the victim the power to avoid the threatened consequences by simply complying with the condition imposed by defendant, the condition was one which defendant had no right to impose. State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978).

Threatening language can amount to an offer to injure a person even though it is a conditional offer. State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978).

No Requirement that Threat Be Carried Out. — The conduct proscribed by this section is the making and communicating of the threat in the manner described in the statute, with no requirement that the threat be carried out. State v. Roberson, 37 N.C. App. 714, 247 S.E.2d 8 (1978).

Defendant Not Subjected to Double Jeopardy. — Where the defendant was charged with communicating threats and assault by pointing a gun, he was not subjected to double jeopardy, even though the charges arose out of the same incident, since the elements of the two offenses differed. State v. Evans, 40 N.C. App. 730, 253 S.E.2d 590, appeal dismissed, 297 N.C. 456, 256 S.E.2d 809 (1979).

Instructions. — In a prosecution for communicating a threat, the trial court did not err in instructing that the threat must be proven to have been communicated orally and in failing to instruct the jury that the threat could be communicated by any other means. State v. Evans, 40 N.C. App. 730, 253 S.E.2d 590, appeal dismissed, 297 N.C. 456, 256 S.E.2d 809 (1979).

Applied in State v. Zigler, 42 N.C. App. 148, 256 S.E.2d 479 (1979).

Cited in In re Williamson, 36 N.C. App. 362, 244 S.E.2d 189 (1978).

§ 14-277.2. Weapons at parades, etc., prohibited.

(a) It shall be unlawful for any person participating in, affiliated with, or present as a spectator at any parade, funeral procession, picket line, or demonstration upon any public place owned or under the control of the State or any of its political subdivisions to willfully or intentionally possess or have immediate access to any dangerous weapon. Violation of this subsection shall be a misdemeanor. It shall be presumed that any rifle or gun carried on a rack in a pickup truck does not violate the terms of this act.

(b) For the purposes of this section the term "dangerous weapon" shall include those weapons specified in G.S. 14-269, 14-269.2, 14-284.1, or 14-288.8 or any other object capable of inflicting serious bodily injury or death when used as a weapon.

(c) The provisions of this section shall not apply to persons authorized by State or federal law to carry dangerous weapons in the performance of their duties or to any person who obtains a permit to carry a dangerous weapon at a parade, funeral procession, picket line, or demonstration from the sheriff or police chief, whichever is appropriate, of the locality where such parade, funeral procession, picket line, or demonstration is to take place. (1981, c. 684, s. 1.)

Editor's Note. — Session Laws 1981, c. 684, s. 2, makes the act effective Oct. 1, 1981.

SUBCHAPTER X. OFFENSES AGAINST THE PUBLIC SAFETY.

ARTICLE 36.

Offenses against the Public Safety.

§ 14-278. Willful injury to property of railroads.

If any person shall unlawfully and willfully, with intent to cause injury to any person passing over the railroad or damage to the equipment traveling on such road, put or place any matter or thing upon, over or near any railroad track, or destroy, injure, tamper with, or remove the roadbed, or any part thereof, or any rail, sill or other part of the fixtures appurtenant to or constituting or supporting any portion of the track of such railroad, the person so offending shall be punished as a Class H felon. (1838, c. 38; R. C., c. 34, ss. 99, 100; 1879, c. 255, s. 2; Code, s. 1098; Rev., s. 3754; 1911, c. 200; C. S., s. 4417; 1967, c. 1082, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and shall be imprisoned in the State's prison not less than four months nor more than 10 years, or fined, or both" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Cited in State v. Freeman, 230 N.C. 725, 55 S.E.2d 500 (1949); State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954).

§ 14-279. Unlawful injury to property of railroads.

If any person shall unlawfully, but without intent to cause injury to any person or damage to equipment, commit any of the acts referred to in G.S. 14-278, he shall be guilty of a misdemeanor. (R. C., c. 34, s. 101; Code, s. 1099; Rev., s. 3755; C. S., s. 4418; 1967, c. 1082, s. 2.)

§ 14-279.1. Unlawful impairment of operation of railroads.

Any person who, without authorization of the affected railroad company, shall willfully do or cause to be done any act to railroad engines, equipment, or rolling stock so as to impede or prevent movement of railroad trains or so as to impair the operation of railroad equipment shall be guilty of a misdemeanor. (1979, c. 387, s. 1.)

§ 14-280. Shooting or throwing at trains or passengers.

If any person shall willfully and unlawfully cast, throw or shoot any stone, rock, bullet, shot, pellet or other missile at, against, or into any railroad car, locomotive or train, or any person thereon, while such car or locomotive shall be in progress from one station to another, or while such car, locomotive or

train shall be stopped for any purpose, the person so offending shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment in the county jail or State's prison, at the discretion of the court. (1876-7, c. 4; Code, s. 1100; 1887, c. 19; Rev., s. 3763; 1911, c. 179; C. S., s. 4419.)

CASE NOTES

Intent a Question for Jury. — Where a defendant was indicted for shooting at a train with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. State v. Barbee, 92 N.C. 820 (1885).

Proof that Gun Was Unloaded. — If a gun be unloaded and this is relied on as a defense, in an action for shooting at a train, the fact must be shown by the defendant. State v. Hinson, 82 N.C. 597 (1880).

Proof of Conspiracy. — Upon trial for throwing stones at a train, it is not necessary to show a conspiracy, it appearing that the several defendants were not only present, but threw stones at different coaches of the same train. State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

Indictment. — Upon a trial for throwing stones at a train, a charge in the bill that it was done "from one station to another" follows the form set out in the statute, and is not void vagueness and uncertainty. It is not necessary that the indictment contain the word "feloniously." State v. Holder, 153 N.C. 606, 69 S.E. 66 (1910).

But it must charge that the train was in actual motion or stopped for a temporary purpose. State v. Boyd, 86 N.C. 634 (1882).

§ 14-281. Operating trains and streetcars while intoxicated.

Any train dispatcher, telegraph operator, engineer, fireman, flagman, brakeman, switchman, conductor, motorman, or other employee of any steam, street, suburban or interurban railway company, who shall be intoxicated while engaged in running or operating, or assisting in running or operating, any railway train, shifting-engine, or street or other electric car, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1871-2, c. 138, s. 38; Code, s. 1972; 1891, c. 114; Rev., s. 3758; 1907, c. 330; C. S., s. 4420; 1969, c. 1224, s. 3.)

§ 14-281.1. Throwing, dropping, etc., objects at sporting events.

It shall be unlawful for any person to throw, drop, pour, release, discharge, expose or place in an area where an athletic contest or sporting event is taking place any substance or object that shall be likely to cause injury to persons participating in or attending such contests or events or to cause damage to animals, vehicles, equipment, devices, or other things used in connection with such contests or events. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than one hundred dollars ($100.00) or imprisoned not more than 30 days, or both, in the discretion of the court. (1977, c. 772, s. 1.)

§ 14-282. Displaying false lights on seashore.

If any person shall make or display, or cause to be made or displayed, any false light or beacon on or near the seacoast, for the purpose of deceiving and misleading masters of vessels, and thereby putting them in danger of shipwreck, he shall be guilty of a Class H felony. (1831, c. 42; R. C., c. 34, s. 58; Code, s. 1024; Rev., s. 3430; C. S., s. 4421; 1979, 2nd Sess., c. 1316, s. 16.)

Effect of Amendments. — The 1979, 2nd sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class H felony" for

"felony, and shall be imprisoned in the State's prison for not less than four months nor more more than ten years" at the end of the section. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

§ 14-283. Exploding dynamite cartridges and bombs.

If any person shall fire off or explode, or cause to be fired off or exploded, except for mechanical purposes in a legitimate business, any dynamite cartridge, bomb or other explosive of a like nature, he shall be guilty of a misdemeanor. (1887, c. 364, s. 53; Rev., s. 3794; C. S., s. 4423.)

Cross References. — As to burglary with explosives, see § 14-57. As to willful injury with explosives, see § 14-49.

§ 14-284. Keeping for sale or selling explosives without a license.

If any dealer or other person shall sell or keep for sale any dynamite cartridges, bombs or other combustibles of a like kind, without first having obtained from the board of commissioners of the county where such person or dealer resides a license for that purpose, he shall be guilty of a misdemeanor. (1887, c. 364, ss. 1, 4; Rev., s. 3817; C. S., s. 4425.)

Local Modification. — Mecklenburg: 1981, c. 117, s. 1.

§ 14-284.1. Regulation of sale of explosives; reports; storage.

(a) No person shall sell or deliver any dynamite or other powerful explosives as hereinafter defined without being satisfied as to the identity of the purchaser or the one to receive such explosives and then only upon the written application signed by the person or agent of the person purchasing or receiving such explosive, which application must contain a statement of the purpose for which such explosive is to be used.

(b) All persons delivering or selling such explosives shall keep a complete record of all sales or deliveries made, including the amounts sold and delivered, the names of the purchasers or the one to whom the deliveries were made, the dates of all such sales or such deliveries and the use to be made of such explosive, and shall preserve such record and make the same available to any law-enforcement officer during business hours for a period of 12 months thereafter.

(c) All persons having dynamite or other powerful explosives in their possession or under their control shall at all times keep such explosives in a safe and secure manner, and when such explosives are not in the course of being used they shall be stored and protected against theft or other unauthorized possession.

(d) As used in this section, the term "powerful explosives" includes, but shall not be limited to, nitroglycerin, trinitrotoluene, and blasting caps, detonators and fuses for the explosion thereof.

(e) Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

(f) The provisions of this section are intended to apply only to sales to those who purchase for use. Nothing herein contained is intended to apply to a sale made by a manufacturer, jobber, or wholesaler to a retail merchant for resale by said merchant.

(g) Nothing herein contained shall be construed as repealing any law now prohibiting the sale of firecrackers or other explosives; nor shall this section be construed as authorizing the sale of explosives now prohibited by law. (1953, c. 877; 1969, c. 1224, s. 6.)

CASE NOTES

Applicability of Section to United States. — See Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

Only the highest degree of care is commensurate with the dangerous nature of dynamite. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Such Care Is Required by Common Law and Statutes. — Both the common law and the statutes of North Carolina require persons having possession and control of dynamite to use the highest degree of care to keep the explosive safe and secure and to guard others against injury from it. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Violation as Negligence. — A violation of a statute enacted for safety and protection of the general public, such as this section, is negligence per se. Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

A person in North Carolina who has explosives under his control or in his possession must take adequate precautions to insure that no person, and especially children, are able to gain possession of these dangerous devices. If the person fails to take such precautions, under North Carolina law he is negligent. Duvall v. United States, 312 F. Supp. 625 (E.D.N.C. 1970).

Discarding Dynamite Cap Is Negligence. — To discard or leave a dynamite cap where either a child or unversed adult might pick it up and cause it to explode is positive negligence. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

Dynamite Must Be Shown to Have Been Defendant's Property. — To hold a defendant liable for injury caused by dynamite there must be evidence, direct or circumstantial, sufficient to support a finding that it was his property, or property he had abandoned; otherwise, the verdict is a mere guess, which cannot be permitted. Tayloe v. Southern Bell Tel. & Tel. Co., 258 N.C. 766, 129 S.E.2d 512 (1963).

§ 14-284.2. Dumping of toxic substances.

(a) It shall be unlawful to deposit, place, dump, discharge, spill, release, burn, incinerate, or otherwise dispose of any toxic substances as defined in this section or radioactive material as defined in G.S. 104E-5 into the atmosphere, in the waters, or on land, except where such disposal is conducted pursuant to federal or State law, regulation, or permit. Any person who willfully violates the provisions of this section shall be guilty of a Class H felony. The fine authorized by G.S. 14-1.1(a)(8) for a conviction under this section may include a fine of up to one hundred thousand dollars ($100,000) per day of violation.

(b) Within the meaning of this section, toxic substances are defined as the following heavy metals and halogenated hydrocarbons:

(1) Heavy metals: mercury, plutonium, selenium, thallium and uranium;

(2) Halogenated hydrocarbons: polychlorinated biphenyls, kepone.

(c) Within the meaning of this section, the phrase "law, regulation or permit" includes controls over equipment or machinery that emits substances into the atmosphere, in waters, or on land (such as federal or State controls over motor vehicle emissions) and controls over sources of substances that are publicly consumed (such as drinking water standards), as well as controls over substances directly released into the atmosphere, in waters, or on land (such as pesticide controls and water pollution controls).

(d) Within the meaning of this section the term "person" includes any individual, firm, partnership, limited partnership, corporation or association. (1979, c. 981, s. 2; 1979, 2nd Sess., c. 1316, s. 17.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class H felony" for "felony, punishable upon conviction by a fine of not more than one hundred thousand dollars per day of violation, or by imprisonment, or by both, in the discretion of the court" at the end of the second sentence in subsection (a) and added the third sentence of subsection (a). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 14-285. Failing to enclose marl beds.

If any person shall open any marl bed without surrounding it with a lawful fence, he shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days: Provided, this shall not apply to any person whose marl bed is situated inside his own enclosure. (1887, cc. 235, 268; Rev., s. 3796; C. S., s. 4426.)

§ 14-286. Giving false fire alarms; molesting fire-alarm, fire-detection or fire-extinguishing system.

It shall be unlawful for any person or persons to wantonly and willfully give or cause to be given, or to advise, counsel, or aid and abet anyone in giving, a false alarm of fire, or to break the glass key protector, or to pull the slide, arm, or lever of any station or signal box of any fire-alarm system, except in case of fire, or willfully misuse or damage a portable fire extinguisher, or in any way to willfully interfere with, damage, deface, molest, or injure any part or portion of any fire-alarm, fire-detection, smoke-detection or fire-extinguishing system. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1921, c. 46; C. S., s. 4426(a); 1961, c. 594; 1969, c. 1224, s. 5; 1975, c. 346.)

§ 14-286.1. Making false ambulance request.

It shall be unlawful for any person to willfully summon an ambulance or willfully report that an ambulance is needed when such person does not have good cause to believe that the services of an ambulance are needed. Every person convicted of willfully violating this section shall upon conviction be punished by a fine not to exceed fifty dollars ($50.00) or imprisonment not to exceed 30 days or both such fine and imprisonment. (1967, c. 343, s. 6.)

§ 14-287. Leaving unused well open and exposed.

It shall be unlawful for any person, firm or corporation, after discontinuing the use of any well, to leave said well open and exposed; said well, after the use of same has been discontinued, shall be carefully and securely filled: Provided, that this shall not apply to wells on farms that are protected by curbing or board walls. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1923, c. 125; C. S., s. 4426(c); 1969, c. 1224, s. 5.)

CASE NOTES

Cited in Wellons v. Sherrin, 217 N.C. 534, 8 S.E.2d 820 (1940).

§ 14-288. Unlawful to pollute any bottles used for beverages.

It shall be unlawful for any person, firm or corporation having custody for the purpose of sale, distribution or manufacture of any beverage bottle, to place, cause or permit to be placed therein turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material, or to send, ship, return and deliver or cause or permit to be sent, shipped, returned or delivered to any producer of beverages, any bottle used as a container for beverages, and containing any turpentine, varnish, wood alcohol, bleaching water, bluing, kerosene, oils, or any unclean or foul substance, or other offensive material. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined on the first offense, one dollar ($1.00) for each bottle so defiled, and for any subsequent offense not more than ten dollars ($10.00) for each bottle so defiled. (1929, c. 324, s. 1.)

Cross References. — As to destruction or taking of soft drink bottles, see § 14-86.

ARTICLE 36A.

Riots and Civil Disorders.

§ 14-288.1. Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this Article:

(1) "Chairman of the board of county commissioners": The chairman of the board of county commissioners or, in case of his absence or disability, the person authorized to act in his stead. Unless the governing body of the county has specified who is to act in lieu of the chairman with respect to a particular power or duty set out in this Article, the term "chairman of the board of county commissioners" shall apply to the person generally authorized to act in lieu of the chairman.

(2) "Dangerous weapon or substance": Any deadly weapon, ammunition, explosive, incendiary device, radioactive material or device, as defined in G.S. 14-288.8(c)(5), or any instrument or substance designed for a use that carriers a threat of serious bodily injury or destruction of property; or any instrument or substance that is capable of being used to inflict serious bodily injury, when the circumstances indicate a probability that such instrument or substance will be so used; or any part or ingredient in any instrument or substance included above, when the circumstances indicate a probability that such part or ingredient will be so used.

(3) "Declared state of emergency": A state of emergency found and proclaimed by the Governor under the authority of G.S. 14-288.15, by any mayor or other municipal official or officials under the authority of G.S. 14-288.12, by any chairman of the board of commissioners of any county or other county official or officials under the authority of

G.S. 14-288.13, by any chairman of the board of county commissioners acting under the authority of G.S. 14-288.14, by any chief executive official or acting chief executive official of any county or municipality acting under the authority of any other applicable statute or provision of the common law to preserve the public peace in a state of emergency, or by any executive official or military commanding officer of the United States or the State North Carolina who becomes primarily responsible under applicable law for the preservation of the public peace within any part of North Carolina.

(4) "Disorderly conduct": As defined in G.S. 14-288.4(a).

(5) "Law-enforcement officer": Any officer of the State of North Carolina or any of its political subdivisions authorized to make arrests; any other person authorized under the laws of North Carolina to make arrests and either acting within his territorial jurisdiction or in an area in which he has been lawfully called to duty by the Governor or any mayor or chairman of the board of county commissioners; any member of the armed forces of the United States, the North Carolina national guard, or the State defense militia called to duty in a state of emergency in North Carolina and made responsible for enforcing the laws of North Carolina or preserving the public peace; or any officer of the United States authorized to make arrests without warrant and assigned to duties that include preserving the public peace in North Carolina.

(6) "Mayor": The mayor or other chief executive official of a municipality or, in case of his absence or disability, the person authorized to act in his stead. Unless the governing body of the municipality has specified who is to act in lieu of the mayor with respect to a particular power or duty set out in this Article, the word "mayor" shall apply to the person generally authorized to act in lieu of the mayor.

(7) "Municipality": Any active incorporated city or town, but not including any sanitary district or other municipal corporation that is not a city or town. An "active" municipality is one which has conducted the most recent election required by its charter or the general law, whichever is applicable, and which has the authority to enact general police-power ordinances.

(8) "Public disturbance": Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

(9) "Riot": As defined in G.S. 14-288.2(a).

(10) "State of emergency": The condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent. (1969, c. 869, s. 1; 1975, c. 718, s. 5.)

CASE NOTES

Constitutionality. — The statutory scheme of this Article is not unconstitutional in contravention of the First, Fourth, Ninth and Fourteenth Amendment to the U.S. Constitution and N.C. Const., Art. I, § 19. State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970), aff'd, 277 N.C. 484, 178 S.E.2d 449 (1971).

Action in Federal Court Attacking Constitutionality of Article. — The rule is that in addition to facial unconstitutionality of a statute, not susceptible of a limiting state court construction, involving fundamental constitutional rights, federal courts must abstain unless there is a showing of bad faith or harassment, and a showing that the enforcement of the statute will result in irreparable harm that is both great and immediate; a "chilling effect" on first amendment rights will not by itself justify intervention. Therefore, where there was no showing of a bad faith use of this article or that it had been used in a threatening or harassing manner against the plaintiffs or anyone else, and a voluntary dismissal was taken in the State court suit for injunctive relief, which relief had been granted pursuant to § 14-288.18, and there was no evidence that any of the plaintiffs had been arrested or threatened since they were charged with violating the article, an action attacking its constitutionality was dismissed. Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

Subdivision (8) Not Essential Part of § 14-288.4(a)(4)a. — See State v. Strickland, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

Applied in State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975); State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322 (1980).

Quoted in State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971); United States v. Chalk, 441 F.2d 1277 (4th Cir. 1971); State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214 (1974).

Cited in State v. Underwood, 283 N.C. 154, 195 S.E.2d 489 (1973).

§ 14-288.2. Riot; inciting to riot; punishments.

(a) A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property.

(b) Any person who willfully engages in a riot is guilty of a misdemeanor punishable as provided in G.S. 14-3(a).

(c) Any person who willfully engages in a riot is guilty of a Class I felony, if:

(1) In the course and as a result of the riot there is property damage in excess of fifteen hundred dollars ($1,500) or serious bodily injury; or

(2) Such participant in the riot has in his possession any dangerous weapon or substance.

(d) Any person who willfully incites or urges another to engage in a riot, so that as a result of such inciting or urging a riot occurs or a clear and present danger of a riot is created, is guilty of a misdemeanor punishable as provided in G.S. 14-3(a).

(e) Any person who willfully incites or urges another to engage in a riot, and such inciting or urging is a contributing cause of a riot in which there is property damage in excess of fifteen hundred dollars ($1,500) or serious bodily injury, shall be punished as a Class H felon. (1969, c. 869, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "Class I felony" for "felony punishable by a fine not to exceed ten thousand dollars or imprisonment for not more than five years, or both such fine and imprisonment" near the end of the introductory paragraph in subsection (c) and substituted "shall be punished as a Class H felon" for "is guilty of a felony punishable as provided in G.S. 14-2" at the end of subsection (e). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess.,

c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

This section is constitutionally valid. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

The scope of this section in no way infringes upon the freedom of nonviolent assemblage. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The reach of this section is not so pervasive as to include activity protected by the First Amendment. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The fact that correct application of this section requires a cross reference through interlocking statutory descriptions does not make this section so complex and imprecise as to be unconstitutional. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

This section is not unconstitutionally vague. State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322, appeal dismissed, 300 N.C. 201, 269 S.E.2d 627 (1980).

There is no federal law restraining prosecutions for riot. Frinks v. North Carolina, 333 F. Supp. 169 (E.D.M.C. 1971), aff'd, 468 F.2d 639 (4th Cir. 1972), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973).

The 1964 Federal Civil Rights Act does not in any sense void the antiriot laws of North Carolina. Frinks v. North Carolina, 468 F.2d 639 (4th Cir. 1972), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973).

The key words of the statutory definition of riot are "three persons," "violent conduct," and "clear and present danger of injury or damage." State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The words of this section are not words so vague and imprecise that men of common intelligence and understanding must guess at their meanings. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

One purpose for codifying riot as an offense was to simplify the common law by setting out in concrete form the essential elements that constitute this crime. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The State has a paramount duty to maintain order not only in the streets but in schools, hospitals and other public places. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The advocacy of imminent lawless action is not protected by the First Amendment. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Advocacy of imminent lawless action is the only type of speech that can come within the purview of this section. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Damage or Injury or Threat Thereof. — A public disturbance involving three or more people, no matter how noisy or boisterous, cannot, under the statutory definition, be a riot unless violence or the threat of immediate violence which poses a clear and present danger to persons or property is present. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Under subsection (a) the capacity of members of the assemblage to inflict injury or damage to persons or property or to create the clear and present danger of such injury or damage is material to the crime of riot and is relevant to establish the proposition defendant was engaged in a riot. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

The component elements that constitute the crime of riot are: (1) public disturbance; (2) assemblage; (3) three or more persons; (4) disorderly and violent conduct, or the imminent threat of such conduct; and (5) results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975); State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322, appeal dismissed, 300 N.C. 201, 269 S.E.2d 627 (1980).

The common-law crime of unlawful assembly, which is a component element of common-law riot, contains the following elements: (1) the participation of three or more persons; (2) a common intent to attain a purpose which will interfere with the rights of others by committing disorderly acts; and (3) a purpose to commit acts in such manner as would cause firm persons to apprehend a breach of peace. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Involuntariness Does Not Negate Fact of Assemblage. — While an assemblage of prison inmates is involuntary, the involuntariness does not negate the fact of an assemblage within the meaning of subsection (a) of this section. State v. Riddle, 45 N.C. App. 34, 262 S.E.2d 322, appeal dismissed, 300 N.C. 201, 269 S.E.2d 627 (1980).

Warrant charging "engaging in a riot" states a proper cause of action. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Failure of Warrant to State Crime. — Warrant charging that defendant did unlawfully, willfully incite a riot by urging three or more persons to congregate at Prospect School, Robeson County, North Carolina, thereby creating a clear and present danger of a riot fails to state the commission of any criminal offense, much less the offense of inciting a riot. State v. Brooks, 287 N.C. 392, 215 S.E.2d 111 (1975).

Petition for Removal of Prosecution to Federal Court. — Where defendants, charged with inciting and/or engaging in a riot, alleged in their petition for removal to the United States District Court that they were peaceably exercising their rights to public accommodations, removal under 28 U.S.C. § 1443(1) was not required simply by reason of an artfully drafted petition. Nor was an evidentiary hearing required because the petition alleged a peaceful exercise of civil rights. Frinks v. North Carolina, 333 F. Supp. 169 (E.D.N.C. 1971), aff'd, 468 F.2d 639 (4th Cir. 1972), cert. denied, 411 U.S. 920, 93 S. Ct. 1552, 36 L. Ed. 2d 314 (1973).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

§ 14-288.3. Provisions of Article intended to supplement common law and other statutes.

The provisions of this Article are intended to supersede and extend the coverage of the common-law crimes of riot and inciting to riot. To the extent that such common-law offenses may embrace situations not covered under the provisions of this Article, however, criminal prosecutions may be brought for such crimes under the common law. All other provisions of the Article are intended to be supplementary and additional to the common law and other statutes of this State and, except as specifically indicated, shall not be construed to abrogate, abolish, or supplant other provisions of law. In particular, this Article shall not be deemed to abrogate, abolish, or supplant such common-law offenses as unlawful assembly, rout, conspiracy to commit riot or other criminal offenses, false imprisonment, and going about armed to the terror of the populace and other comparable public-nuisance offenses. (1969, c. 869, s. 1.)

CASE NOTES

Applied in State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535 (1975).

§ 14-288.4. Disorderly conduct.

(a) Disorderly conduct is a public disturbance intentionally caused by any person who:

(1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence; or

(2) Makes or uses any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation and thereby cause a breach of the peace; or

(3) Takes possession of, exercises control over, or seizes any building or facility of any public or private educational institution without the specific authority of the chief administrative officer of the institution, or his authorized representative; or

(4) Refuses to vacate any building or facility of any public or private educational institution in obedience to:

a. An order of the chief administrative officer of the institution, or his authorized representative; or

b. An order given by any fireman or public health officer acting within the scope of his authority; or

c. If a state of emergency is occurring or is imminent within the institution, an order given by any law-enforcement officer acting within the scope of his authority; or

(5) Shall, after being forbidden to do so by the chief administrative officer, or his authorized representative, of any public or private educational institution;

a. Engage in any sitting, kneeling, lying down, or inclining so as to obstruct the ingress or egress of any person entitled to the use of any building or facility of the institution in its normal and intended use; or

b. Congregate, assembly, form groups or formations (whether organized or not), block, or in any manner otherwise interfere with the operation or functioning of any building or facility of the institution so as to interfere with the customary or normal use of the building or facility; or

(6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

As used in this section the term "building or facility" includes the surrounding grounds and premises of any building or facility used in connection with the operation or functioning of such building or facility.

(b) Any person who willfully engages in disorderly conduct is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months. (1969, c. 869, s. 1; 1971, c. 668, s. 1; 1973, c. 1347; 1975, c. 19, s. 4.)

Editor's Note. — Section 2, c. 668, Session Laws 1971, provides: "Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit."

CASE NOTES

Former Provisions Held Unconstitutional. — Former subdivision (a)(3) and a portion of subdivision (a)(2) as it stood before the 1971 amendment, which proscribed offensively coarse utterances and acts such as to alarm and disturb persons present, were unconstitutionally vague and overbroad. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

Fighting or Insulting Words May Constitutionally Be Prevented and Punished. — There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been though to raise any constitutional problem. These include the insulting or "fighting" words which by their very utterance tend to incite an immediate breach of the peace. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

There can be no doubt that the General Assembly intended to prohibit "fighting words," words tending to cause an immediate breach of the peace willfully spoken in a public place, and that such an interpretation accurately expresses the legislative purpose. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972); State v. Orange, 22 N.C. App. 220, 206 S.E.2d 377, appeal dismissed, 285 N.C. 762, 208 S.E.2d 380 (1974), cert. denied, 420 U.S. 996, 95 S. Ct. 1431, 43 L. Ed. 2d 675 (1975).

Illustration — Words Not Protected by First Amendment. — When the defendant was informed that the black doctor, whom he had demended, was not immediately available he began shouting profanities, cursing all whites, and loudly voicing unfounded complaints. Such words and mode of communication in a hospital emergency room are not protected by the First Amendment. State v. Summrell, 282 N.C. 157, 192 S.E.2d 569 (1972).

Behavior Not Rising to Disorderly Conduct. — The allegation that defendant created a "little bit of disturbance" earlier in a bar does not demonstrate sufficiently provocative behavior to rise to the level of disorderly conduct under this section. State v. Sanders, 295 N.C. 361, 245 S.E.2d 674 (1978), rev'd on other

grounds, 298 N.C. 512, 259 S.E.2d 258 (1979).

Vague Language in Warrant Disregarded as Surplusage. — Unconstitutionally vague and overly broad language in a warrant for disorderly conduct could be disregarded as surplusage and the conviction under the warrant upheld where, absent the unconstitutional language, the warrant still alleged all the essential elements of subdivision (a)(2). State v. Cunningham, 34 N.C. App. 72, 237 S.E.2d 334 (1977).

Constitutionality of Subsection (a)(4)a. — Subsection (a)(4)a makes it clear that a violation of the statute occurs when a person intentionally refuses to vacate any building or facility of any public or private educational institution after having been ordered to do so by the chief administrative officer of the institution or his authorized representative, and the statute is not unconstitutionally vague. State v. Strickland, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

Legislative Guidelines Not Needed. — The validity of subsection (a)(4)a making it a misdemeanor to refuse to vacate an educational institution building after having been ordered to do so by the chief administrative officer of the institution or his representative does not depend upon the enactment by the legislature of detailed guidelines for the guidance of the specified school officials in the exercise of their responsibility to control the use of the buildings and facilities under their care. State v. Strickland, 27 N.C. App. 40, 217 S.E.2d 758, cert. denied, 288 N.C. 512, 219 S.E.2d 348 (1975).

Where the trial judge inadvertently failed to note the 1971 amendment to this section in his instructions to the jury and in so doing charged concerning disorderly conduct in the language of subdivisions (1) and (2) of subsection (a) as those subdivisions were originally enacted in 1969, the court's charge failed to limit the definition of disorderly conduct to embrace only actions and words likely to bring on an immediate breach of the peace, as would be required by the 1971 amendment. For this error in the charge, defendant is entitled to a new trial in the case charging him with failing to comply with a lawful order to disperse. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Applied in State v. Carroll, 21 N.C. App. 530, 204 S.E.2d 908 (1974); State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974); State v. Butts, 22 N.C. App. 504, 206 S.E.2d 806 (1974); State v. McLoud, 26 N.C. App. 297, 215 S.E.2d 872 (1975).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

OPINIONS OF ATTORNEY GENERAL

Applicability to Nonriot Situation. — See opinion of Attorney General to Mr. G. Patrick Hunter, Jr., Charlotte Police Attorney, 40 N.C.A.G. 166 (1970).

§ 14-288.5. Failure to disperse when commanded a misdemeanor; prima facie evidence.

(a) Any law-enforcement officer or public official responsible for keeping the peace may issue a command to disperse in accordance with this section if he reasonably believes that a riot, or disorderly conduct by an assemblage of three or more persons, is occurring. The command to disperse shall be given in a manner reasonably calculated to be communicated to the assemblage.

(b) Any person who fails to comply with a lawful command to disperse is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months.

(c) If any person remains at the scene of any riot, or disorderly conduct by an assemblage of three or more persons, following a command to disperse and after a reasonable time for dispersal has elapsed, it is prima facie evidence that the person so remaining is willfully engaging in the riot or disorderly conduct, as the case may be. (1969, c. 869, s. 1.)

CASE NOTES

This section is constitutional. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Failure to Disperse Where No Disorderly Conduct was Occurring. — Under this section the failure to disperse when commanded by an officer would be an offense where no disorderly conduct was occurring so long as it is shown on trial that the officer had reasonable grounds to believe that disorderly conduct was occurring by an assemblage of three or more persons. State v. Orange, 22 N.C. App. 220, 206 S.E.2d 377, appeal dismissed, 285 N.C. 762, 208 S.E.2d 380 (1974), cert. denied, 420 U.S. 996, 95 S. Ct. 1431, 43 L. Ed. 2d 675 (1975).

Evidence Required. — It was necessary under this section for the State to present evidence of defendant's failure to disperse on command to do so and that the officer had reasonable ground to believe that disorderly conduct was occurring by an assemblage of three or more persons. State v. Thomas, 28 N.C. App. 495, 221 S.E.2d 749 (1976).

Evidence sufficient to support jury's finding that defendant was guilty of charge of failing to comply with lawful command to disperse. State v. Brooks, 24 N.C. App. 338, 210 S.E.2d 535, aff'd in part, 287 N.C. 392, 215 S.E.2d 111 (1975).

Applied in State v. Clark, 22 N.C. App. 81, 206 S.E.2d 252 (1974).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

§ 14-288.6. Looting; trespass during emergency.

(a) Any person who enters upon the premises of another without legal justification when the usual security of property is not effective due to the occurrence or aftermath of riot, insurrection, invasion, storm, fire, explosion, flood, collapse, or other disaster or calamity is guilty of the misdemeanor of trespass during emergency and is punishable as provided in G.S. 14-3(a).

(b) Any person who commits the crime of trespass during emergency and, without legal justification, obtains or exerts control over, damages, ransacks, or destroys the property of another is guilty of the felony of looting and shall be punished as a Class I felon. (1969, c. 869, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class I felon" for "is punishable by a fine not to exceed ten thousand dollars or imprisonment for not more than five years, or both such fine and imprisonment" at the end of subsection (b). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-288.7. Transporting dangerous weapon or substance during emergency; possessing off premises; exceptions.

(a) Except as otherwise provided in this section, it is unlawful for any person to transport or possess off his own premises any dangerous weapon or substance in any area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a riot is occurring.

(b) This section does not apply to persons exempted from the provisions of G.S. 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

(c) Any person who violates any provision of this section is guilty of a misdemeanor punishable as provided in G.S. 14-3(a). (1969, c. 869, s. 1.)

CASE NOTES

Penalty Not Limited to that Prescribed by Ordinance. — Since this section itself makes the possession of a disassembled shotgun and the shotgun shells in the area in question a criminal offense and specifies the penalty therefor, and since the warrant relating to this offense was founded upon the statute, not the ordinance, the sentence imposable in this case was not limited to the penalty prescribed for such conduct by the ordinance. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Applied in State v. Dobbins, 9 N.C. App. 452, 176 S.E.2d 353 (1970).

§ 14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction; exceptions.

(a) Except as otherwise provided in this section, it is unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction.

(b) This section does not apply to:

(1) Persons exempted from the provisions of G.S. 14-269 with respect to any activities lawfully engaged in while carrying out their duties.

(2) Importers, manufacturers, dealers, and collectors of firearms, ammunition, or destructive devices validly licensed under the laws of the United States or the State of North Carolina, while lawfully engaged in activities authorized under their licenses.

(3) Persons under contract with the United States, the State of North Carolina, or any agency of either government, with respect to any activities lawfully engaged in under their contracts.

(4) Inventors, designers, ordnance consultants and researchers, chemists, physicists, and other persons lawfully engaged in pursuits designed to enlarge knowledge or to facilitate the creation, development, or manufacture of weapons of mass death and destruction intended for use in a manner consistent with the laws of the United States and the State of North Carolina.

(c) The term "weapon of mass death and destruction" includes:

(1) Any explosive, incendiary, poison gas or radioactive material:

a. Bomb; or

b. Grenade; or

c. Rocket having a propellant charge of more than four ounces; or

d. Missile having an explosive or incendiary charge of more than one-quarter ounce; or

e. Mine; or

f. Device similar to any of the devices described above; or

(2) Any type of weapon (other than a shotgun or a shotgun shell of a type particularly suitable for sporting purposes) which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrell with a bore of more than one-half inch in diameter; or

(3) Any semiautomatic firearm capable of firing 31 rounds or more without reloading, any firearm capable of fully automatic fire, any

shotgun with a barrel of less than 18 inches in length or an overall length of less than 26 inches; or

(4) Any combination of parts either designed or intended for use in converting any device into any weapon described above and from which a weapon of mass death and destruction may readily be assembled;

(5) Radioactive material, which means any solid, liquid or gas which emits or may emit ionizing radiation spontaneously or which becomes capable of producing radiation or nuclear particles when controls or triggering mechanisms of any associated device are operable.

The term "weapon of mass death and destruction" does not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of Title 10 of the United States Code; or any other device which the Secretary of the Treasurer finds is not likely to be used as a weapon, is an antique, or is a rifle which the owner intends to use solely for sporting purposes, in accordance with Chapter 44 of Title 18 of the United States Code.

(d) Any person who violates any provision of this section is guilty of a misdemeanor punishable as provided in G.S. 14-3(a). (1969, c. 869, s. 1; 1975, c. 718, ss. 6, 7; 1977, c. 810.)

§ 14-288.9. Assault on emergency personnel; punishments.

(a) An assault upon emergency personnel is an assault upon any person coming within the definition of "emergency personnel" which is committed in an area:

(1) In which a declared state of emergency exists; or

(2) Within the immediate vicinity of which a riot is occurring or is imminent.

(b) The term "emergency personnel" includes law-enforcement officers, firemen, ambulance attendants, utility workers, doctors, nurses, and other persons lawfully engaged in providing essential services during the emergency.

(c) Any person who commits an assault upon emergency personnel is guilty of a misdemeanor punishable as provided in G.S. 14-3(a). Any person who commits an assault upon emergency personnel with or through the use of any dangerous weapon or substance shall be punished as a Class I felon. (1969, c. 869, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class I felon" for "is guilty of a felony punishable by a fine not to exceed ten thousand dollars or imprisonment for not more than five years, or both such fine and imprisonment" at the end of subsection (c). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Applied in State v. Chavis, 24 N.C. App. 148, 210 S.E.2d 555 (1974).

§ 14-288.10. Frisk of persons during violent disorders; frisk of curfew violators.

(a) Any law-enforcement officer may frisk any person in order to discover any dangerous weapon or substance when he has reasonable grounds to believe that the person is or may become unlawfully involved in an existing riot and when the person is close enough to such riot that he could become immediately involved in the riot. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession.

(b) Any law-enforcement officer may frisk any person he finds violating the provisions of a curfew proclaimed under the authority of G.S. 14-288.12, 14-288.13, 14-288.14, or 14-288.15 or any other applicable statutes or provisions of the common law in order to discover whether the person possesses any dangerous weapon or substance. The officer may also at that time inspect for the same purpose the contents of any personal belongings that the person has in his possession. (1969, c. 869, s. 1.)

§ 14-288.11. Warrants to inspect vehicles in riot areas or approaching municipalities during emergencies.

(a) Notwithstanding the provisions of Article 4 of Chapter 15, any law-enforcement officer may, under the conditions specified in this section, obtain a warrant authorizing inspection of vehicles under the conditions and for the purpose specified in subsection (b).

(b) The inspection shall be for the purpose of discovering any dangerous weapon or substance likely to be used by one who is or may become unlawfully involved in a riot. The warrant may be sought to inspect:

(1) All vehicles entering or approaching a municipality in which a state of emergency exists; or

(2) All vehicles which might reasonably be regarded as being within or approaching the immediate vicinity of an existing riot.

(c) The warrant may be issued by any judge or justice of the General Court of Justice.

(d) The issuing official shall issue the warrant only when he has determined that the one seeking the warrant has been specifically authorized to do so by the head of the law-enforcement agency of which the affiant is a member, and:

(1) If the warrant is being sought for the inspection of vehicles entering or approaching a municipality, that a state of emergency exists within the municipality; or

(2) If the warrant being sought is for the inspection of vehicles within or approaching the immediate vicinity of a riot, that a riot is occurring within that area.

Facts indicating the basis of these determinations must be stated in an affidavit and signed by the affiant under oath or affirmation.

(e) The warrant must be signed by the issuing official and must bear the hour and date of its issuance.

(f) The warrant must indicate whether it is for the inspection of vehicles entering or approaching a municipality or whether it is for the inspection of

vehicles within or approaching the immediate vicinity of a riot. In either case, it must also specify with reasonable precision the area within which it may be exercised.

(g) The warrant shall become invalid 24 hours following its issuance and must bear a notation to that effect.

(h) Warrants authorized under this section shall not be regarded as search warrants for the purposes of application of Article 4 of Chapter 15.

(i) Nothing in this section is intended to prevent warrantless frisks, searches, and inspections to the extent that they may be constitutional and consistent with common law and governing statutes. (1969, c. 869, s. 1.)

Editor's Note. — Article 4 of Chapter 15, referred to in this section, has been repealed. See now § 15A-241 et seq.

CASE NOTES

Search of Automobile without Warrant is Reasonable. — Because of its mobility, a search of an automobile without a warrant is reasonable if it is based on probable cause. United States v. Chalk, 441 F.2d 1277 (4th Cir.) cert. denied, 404 U.S. 943, 92 Ct. 294, 30 L. Ed. 2d 258 (1971).

Search May Be Conducted After Automobile Transported to Police Station. — If there is probable cause to search the automobile at the place where it was stopped, it matters not that the search is conducted sometime later after the automobile has been transported to the police station. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

§ 14-288.12. Powers of municipalities to enact ordinances to deal with states of emergency.

(a) The governing body of any municipality may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency.

(b) The ordinances authorized by this section may permit prohibitions and restrictions:

(1) Of movements of people in public places;

(2) Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate;

(3) Upon the possession, transportation, sale, purchase, and consumption of intoxicating liquors;

(4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, and gasoline; and

(5) Upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

The ordinances may delegate to the mayor of the municipality the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

(c) This section is intended to supplement and confirm the powers conferred by G.S. 160-52, 160-200(7), and all other general and local laws authorizing municipalities to enact ordinances for the protection of the public health and safety in times of riot or other grave civil disturbance or emergency.

(d) Any ordinance of a type authorized by this section promulgated prior to June 19, 1969 shall, if otherwise valid, continue in full force and effect without reenactment.

(e) Any person who violates any provision of an ordinance or a proclamation enacted or proclaimed under the authority of this section is guilty of a misdemeanor punishable as provided in G.S. 14-4. (1969, c. 869, s.1.)

Cross References. — See note to § 14-288.13.

Editor's Note. — Sections 160-52 and 160-200, referred to in this section, have been repealed. For the general ordinance-making power of municipalities, see now § 160A-174.

CASE NOTES

Constitutionality. — The contention that this statute is unconstitutionally vague in that it fails to provide a standard for the exercise of the discretion conferred is clearly without merit State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Freedom of Travel May Be Limited. — The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Freedom of travel like freedom of speech may be subject to reasonable limitations as to time and place. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Incidental Restriction on Freedom of Speech May Be No Greater than Essential to Government Interest. — The standard that has developed where regulation of conduct has an incidental effect on speech is that the incidental restriction of First Amendment freedoms can be no greater than is essential to the furtherance of the government interest which is being protected. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Control of Civil Disorders Is Within Police Power. — Control of civil disorders that may threaten the very existence of the State is certainly within the police power of government. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Section Delegates Portion of Police Power to Municipalities. — By this section, the State has delegated a portion of its police power to its municipalities. This statute authorizes the city to enact an ordinance prohibiting the movement of people in public places "during a state of emergency" as defined in § 14-288.1(10). State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

The "state of emergency" is the condition precedent to the exercise of this power by the city. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Only when local law-enforcement is no longer able to maintain order and and protect lives and property may the emergency powers be invoked. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Maintenance of Public Order Is Duty of Executive. — The responsibility for maintaining public peace on a day-to-day basis is lodged with the executive branch of government. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Public peace in our cities may be suddenly breached by massive civil disorder. Dealing with such an emergency situation requires an immediacy of action that is not possible for judges. It would be highly inappropriate for the court, removed from the primary responsibility for maintaining order and with the benefit of time for reflection not available to the mayor, to substitute its judgment of necessity for his. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Precise Definition Would Destroy Executive's Broad Discretion. — Attempting to precisely define under what specific conditions each of the authorized restrictions might be imposed would destroy the "broad discretion" necessary for the executive to deal with an emergency situation. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Mayor's Power Subject to Definite Standard. — The mayor's power to impose the restraints enumerated in this section and Asheville City Ordinance No. 613 is subject to a narrow, objective, and definite standard. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Standard Is that which Applies to Executive's Use of Military. — The standard is essentially the same as that which applies to the executive's inherent power to restore order through the use of the military. United States v. Chalk, 441 F.2d 1277 (4th Cir.) cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Mayor's Actions Subject to Judicial Review. — The executive's decision that civil control has broken down to the point where emergency measures are necessary is not conclusive or free from judicial review, but the scope of review must be limited to a determination of whether the mayor's actions were taken in good faith and whether there is some factual basis for his decision that the restrictions he imposed were necessary to maintain order. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Where actual violence, good faith, and a relation between means and ends are shown, an executive's finding of necessity will be upheld in court. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Declaration of State of Emergency Must Be Necessary to Preserve Order. — The declaration of a state of emergency and the restrictions imposed pursuant to it must appear to have been reasonably necessary for the preservation of order. United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943, 92 S. Ct. 294, 30 L. Ed. 2d 258 (1971).

Imposition of Curfew is Proper Exercise of Police Power. — Whatever the cause, given the fact of widespread riotous conditions and criminal activities, the restoration of "domestic tranquility" becomes, not alone a constitutional right, but a constitutional obligation. The temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Prohibiting Use of Public Parks at Night and Forbidding Transportation of Arms. — The restrictions imposed by a proclamation which only prohibited use of the public parks at night or forbade transportation of dangerous arms or substances were clearly among those authorized by subsection (b) of this section. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Arrest without Warrant Lawful. — The presence of the defendant and his driver upon the streets, while the curfew was in effect, was a violation of the ordinance, declared thereby to be a misdemeanor, unless they were traveling for an excepted purpose. The arresting officer having at least reasonable ground to believe that the defendant had committed a misdemeanor in his presence, the arrest without a warrant was lawful. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Search Incident to Arrest. — The search of the defendant's person was incidental to such arrest and, consequently, the four shotgun shells found tucked in the tops of his boots were properly admitted in evidence. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

Burden of Proof. — The defendant's contention that the burden was on the State to prove that his presence on the streets was for a purpose other than those excepted by the ordinance and by the curfew proclamation is without merit. State v. Dobbins, 277 N.C. 484 178 S.E.2d 449 (1971).

A defendant, charged with the crime, who seeks protection by reason of the exception has the burden of proving that he comes within the same. State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971).

§ 14-288.13. Powers of counties to enact ordinances to deal with states of emergency.

(a) The governing body of any county may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency.

(b) The ordinances authorized by this section may permit the same prohibitions and restrictions to be imposed as enumerated in G.S. 14-288.12(b). The ordinances may delegate to the chairman of the board of county commissioners the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

(c) No ordinance enacted by a county under the authority of this section shall apply within the corporate limits of any municipality, or within any area of the county over which the municipality has jurisdiction to enact general police-power ordinances, unless the municipality by resolution consents to its application.

(d) Any person who violates any provision of an ordinance or a proclamation enacted or proclaimed under the authority of this section is guilty of a misdemeanor punishable as provided in G.S. 14-4. (1969, c. 869, s. 1.)

CASE NOTES

Constitutionality. — The limited delegation of the State's police power which the legislature deemed wise to grant by this Article to local governmental units in order to assist them in maintaining public peace and order during periods of emergency is constitutional. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Responsibilities and Powers of Local Executive Officials. — This Article wisely provides for placing in local executive officials, whose first and primary duty it is to maintain public order, powers adequate to their responsibilities and the initial decision as to whether a "state of emergency" in fact exists must be made by those who bear primary responsibility and who are closest to the scene. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

The local official may not act arbitrarily or without some factual basis to support his determination that a state of emergency in fact exists, and the prohibitions and restrictions which he imposes must be among those authorized by this section. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

And His Decision Is Subject to Review. — The decision of the responsible local official as to whether a "state of emergency" in fact exists, while entitled to great respect, is not conclusive or entirely free from judicial review. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

The scope of judicial review. in cases reviewing the validity of of a proclamation is limited to the type of review which traditionally is for the judge, and not for the jury, to perform. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Proclamation Need Not Make Reference to Section. — That a proclamation makes no reference to this section in no way affects its validity; the existence of the statute, not reference to it in the proclamation, is all that matters. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724 (1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

Uniform Enforcement. — That the activities of an organization may have been a major factor in bringing on the conditions which prompted declaration of the state of emergency furnishes no valid support for the contention that that organization and its members were unfairly discriminated against, if once the proclamation was issued, it was uniformly enforced as to all. State v. Allred, 21 N.C. App. 229, 204 S.E.2d 214, appeal dismissed, 285 N.C. 591, 205 S.E.2d 724), cert. denied, 419 U.S. 1127, 95 S. Ct. 814, 42 L. Ed. 2d 828 (1975).

§ 14-288.14. Power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality.

(a) The chairman of the board of commissioners of any county who has been requested to do so by a mayor may by proclamation extend the effect of any one or more of the prohibitions and restrictions imposed in that mayor's municipality pursuant to the authority granted in G.S. 14-288.12. The chairman may extend such prohibitions and restrictions to any area within his county in which he determines it to be necessary to assist in controlling the state of emergency within the municipality. No prohibition or restriction extended by proclamation by the chairman under the authority of this section shall apply within the limits of any other municipality, or within any area of the county over which the municipality has jurisdiction to enact general police-power ordinances, unless that other municipality by resolution consents to its application.

(b) Whenever any chairman of the board of county commissioners extends the effect of municipal prohibitions and restrictions under the authority of this section to any area of the county, it shall be deemed that a state of emergency has been validly found and declared with respect to such area of the county.

(c) Any chairman of a board of county commissioners extending prohibitions and restrictions under the authority of this section must take reasonable steps to give notice of its terms to those likely to be affected. The chairman of the board of commissioners shall proclaim the termination of any prohibitions and restrictions extended under the authority of this section upon:

(1) His determination that they no longer necessary; or

(2) The determination of the board of county commissioners that they are no longer necessary; or

(3) The termination of the prohibitions and restrictions within the municipality.

(d) The powers authorized under this section may be exercised whether or not the county has enacted ordinances under the authority of G.S. 14-288.13. Exercise of this authority shall not preclude the imposition of prohibitions and restrictions under any ordinances enacted by the county under the authority of G.S. 14-288.13.

(e) Any person who violates any provision of any prohibition or restriction extended by proclamation under the authority of this section is guilty of a misdemeanor punishable by a fine not to exceed fifty dollars ($50.00) or imprisonment for not more than 30 days. (1969, c. 869, s. 1.)

§ 14-288.15. Authority of Governor to exercise control in emergencies.

(a) When the Governor determines that a state of emergency exists in any part of North Carolina, he may exercise the powers conferred by this section if he further finds that local control of the emergency is insufficient to assure adequate protection for lives and property.

(b) Local control shall be deemed insufficient only if:

(1) Needed control cannot be imposed locally because local authorities responsible for preservation of the public peace have not enacted appropriate ordinances or issued appropriate proclamations as authorized by G.S. 14-288.12, 14-288.13, or 14-288.14; or

(2) Local authorities have not taken implementing steps under such ordinances or proclamations, if enacted or proclaimed, for effectual control of the emergency that has arisen; or

(3) The area in which the state of emergency exists has spread across local jurisdictional boundaries and the legal control measures of the jurisdictions are conflicting or uncoordinated to the extent that efforts to protect life and property are, or unquestionably will be, severely hampered; or

(4) The scale of the emergency is so great that it exceeds the capability of local authorities to cope with it.

(c) The Governor when acting under the authority of this section may:

(1) By proclamation impose prohibitions and restrictions in all areas affected by the state of emergency; and

(2) Give to all participating State and local agencies and officers such directions as may be necessary to assure coordination among them. These directions may include the designation of the officer or agency responsible for directing and controlling the participation of all public agencies and officers in the emergency. The Governor may make this designation in any manner which, in his discretion, seems most likely to be effective. Any law-enforcement officer participating in the control of a state of emergency in which the Governor is exercising control under this section shall have the same power and authority as a sheriff throughout the territory to which he is assigned.

(d) The Governor in his discretion, as appropriate to deal with the emergency then occuring or likely to occur, may impose any one or more or all of the types of prohibitions and restrictions enumerated in G.S. 14-288.12(b), and may amend or rescind any prohibitions and restrictions imposed by local authorities.

(e) Any person who violates any provision of a proclamation of the Governor issued under the authority of this section is guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months. (1969, c. 869, s. 1.)

§ 14-288.16. Effective time, publication, amendment, and recision of proclamations.

(a) This section applies to proclamations issued under the authority of G.S. 14-288.12, 14-288.13, 14-288.14, and 14-288.15, and any other applicable statutes and provisions of the common law.

(b) All prohibitions and restrictions imposed by proclamation shall take effect immediately upon publication of the proclamation in the area affected unless the proclamation sets a later time. For the purpose of requiring compliance, publication may consist of reports of the substance of the prohibitions and restrictions in the mass communications media serving the affected area or other effective methods of disseminating the necessary information quickly. As soon as practicable, however, appropriate distribution of the full text of any proclamation shall be made. This subsection shall not be governed by the provisions of G.S. 1-597.

(c) Prohibitions and restrictions may be extended as to time or area, amended, or rescinded by proclamation. Prohibitions and restrictions imposed by proclamation under the authority of G.S. 14-288.12, 14-288.13, and 14-288.14 shall expire five days after their last imposition unless sooner terminated under G.S. 14-288.14(c)(3), by proclamation, or by the governing body of the county or municipality in question. Prohibitions and restrictions imposed by proclamation of the Governor shall expire five days after their last imposition unless sooner terminated by proclamation of the Governor. (1969, c. 869, s. 1.)

§ 14-288.17. Municipal and county ordinances may be made immediately effective if state of emergency exists or is imminent.

(a) Notwithstanding any other provision of law, whether general or special, relating to the promulgation or publication of ordinances by any municipality or county, this section shall control with respect to any ordinances authorized by G.S. 14-288.11 and 14-288.12.

(b) Upon proclamation by the mayor or chairman of the board of county commissioners that a state of emergency exists within the municipality or the county, or is imminent, any ordinance enacted under the authority of this article shall take effect immediately unless the ordinance sets a later time. If the effect of this section is to cause an ordinance to go into effect sooner than it otherwise could under the law applicable to the municipality or county, the mayor or chairman of the board of county commissioners, as the case may be, shall take steps to cause reports of the substance of any such ordinance to be disseminated in a fashion that such substance will likely be communicated to the public in general, or to those who may be particularly affected by the ordinance if it does not affect the public generally. As soon as practicable thereafter, appropriate distribution or publication of the full text of any such ordinance shall be made. (1969, c. 869, s. 1.)

§ 14-288.18. Injunction to cope with emergencies at public and private educational institutions.

(a) The chief administrative officer, or his authorized representative, of any public or private educational institution may apply to any superior court judge for injunctive relief if a state of emergency exists or is imminent within his institution. For the purposes of this section, the superintendent of any city or county administrative school unit shall be deemed the chief administrative officer of any public elementary or secondary school within his unit.

(b) Upon a finding by a superior court judge, to whom application has been made under the provisions of this section, that a state of emergency exists or is imminent within a public or private educational institution by reason of riot, disorderly conduct by three or more persons, or the imminent threat of riot, the judge may issue an injunction containing provisions appropriate to cope with the emergency then occurring or threatening. The injunction may be addressed to named persons or named or described groups of persons as to whom there is satisfactory cause for believing that they are contributing to the existing or imminent state of emergency, and ordering such persons or groups of persons to take or refrain or desist from taking such various actions as the judge finds it appropriate to include in his order. (1969, c. 869, s. 1.)

CASE NOTES

This section envisions an action in the nature of a civil action for a permanent injunction, in which the parties to be enjoined are named or described with at least a modicum of particularity. State ex. rel. Moore v. John Doe, 19 N.C. App. 131, 198 S.E.2d 236, appeal dismissed, 284 N.C. 121, 199 S.E.2d 663 (1973).

Cited in Fuller v. Scott, 328 F. Supp. 842 (M.D.N.C. 1971).

§ 14-288.19. Governor's power to order evacuation of public building.

(a) When it is determined by the Governor that a great public crisis, disaster, riot, catastrophe, or any other similar public emergency exists, or the occurrence of any such condition is imminent, and, in the Governor's opinion it is necessary to evacate any building owned or controlled by any department, agency, institution, school, college, board, division, commission or subdivision of the State in order to maintain public order and safety or to afford adequate protection for lives or property, the Governor is hereby authorized to issue an order of evacuation directing all persons within the building to leave the building and its premises forthwith. The order shall be delivered to any law-enforcement officer or officer of the national guard, and such officer shall, by a suitable public address system, read the order to the occupants of the building and demand that the occupants forthwith evacuate said building within the time specified in the Governor's order.

(b) Any person who willfully refuses to leave the building as directed in the Governor's order shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00) or imprisonment for not more than six months, or both, in the discretion of the court. (1969, c. 1129.)

§ 14-288.20. Certain weapons at civil disorders.

(a) The definitions in G.S. 14-288.1 do not apply to this section. As used in this section:

(1) The term "civil disorder" means any public disturbance involving acts or violence by assemblages of three or more persons, which causes an immediate danger of damage or injury to the property or person of any other individual or results in damage or injury to the property or person of any other individual.

(2) The term "firearm" means any weapon which is designed to or may readily be converted to expel any projectile by the action of an explosive; or the frame or receiver of such a weapon.

(3) The term "explosive or incendiary device" means (i) dynamite and all other forms of high explosives, (ii) any explosive bomb, grenade, missile, or similar device, and (iii) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed or any material which, when ignited, is capable of igniting that flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

(4) The term "law-enforcement officer" means any officer of the United States, any state, any political subdivision of a state, or the District of Columbia charged with the execution of the laws thereof; civil officers of the United States; officers and soldiers of the organized militia and state guard of any state or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and members of the armed forces of the United States.

(b) A person is guilty of a Class I felony, if he:

(1) Teaches or demonstrates to any other person the use, application, or making of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, a civil disorder or

(2) Assembles with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons, intending to employ unlawfully the training, practicing, instruction, or technique for use in, or in furtherance of, a civil disorder.

(c) Nothing contained in this section shall make unlawful any act of any law-enforcement officer which is performed in the lawful performance of his official duties. (1981, c. 880, ss. 1, 2.)

Editor's Note. — Session Laws 1981, c. 880, s. 3, makes the act effective Oct. 1, 1981.

SUBCHAPTER XI. GENERAL POLICE REGULATIONS.

ARTICLE 37.

Lotteries and Gaming.

§ 14-289. Advertising lotteries.

Except in connection with a lawful raffle as provided in G.S. 14-292.1, if anyone by writing or printing or by circular or letter or in any other way, advertise or publish an account of a lottery, whether within or without this State, stating how, when or where the same is to be or has been drawn, or what are the prizes therein or any of them, or the price of a ticket or any share or interest

therein, or where or how it may be obtained, he shall be guilty of a misdemeanor. (1887, c. 211; Rev., s. 3725; C. S., s. 4427; 1979, c. 893, s. 3.)

Local Modification. — (As to Article 37) Carteret: 1971, c. 221; Cleveland: 1971, c. 627; Jones: 1971, c. 627; 1977, c. 157; Lincoln: 1971, c. 627; 1977, c. 66; Onslow: 1973, c. 1080; 1977, 2nd Sess., c. 1169, repealing; Pamlico: 1971, c. 627; 1977, c. 157; Polk: 1971, c. 627; Rutherford: 1971, c. 627; Union: 1971, c. 627; 1977, c. 157.

Legal Periodicals. — See the discussion in 5 N.C.L. Rev. 31.

§ 14-290. Dealing in lotteries.

Except in connection with a lawful raffle as provided in G.S. 14-292.1, if any person shall open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known; or if any person shall, by such way and means, expose or set to sale any house, real estate, goods, chattels, cash, written evidence of debt, certificates of claims or any other thing of value whatsoever, every person so offending shall be guilty of a misdemeanor, and shall be fined not exceeding two thousand dollars ($2,000) or imprisoned not exceeding six months, or both, in the discretion of the court. Any person who engages in disposing of any species of property whatsoever, including money and evidences of debt, or in any manner distributes gifts or prizes upon tickets, bottle crowns, bottle caps, seals on containers, other devices or certificates sold for that purpose, shall be held liable to prosecution under this section. Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section. (1834, c. 19, s. 1; R. C., c. 34, s. 69; 1874-5, c. 96; Code, s. 1047; Rev., s. 3726; C. S., s. 4428; 1933, c. 434; 1937, c. 157; 1979, c. 893, s. 4.)

CASE NOTES

In General. — A lottery may be defined as any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. State v. Lipkin, 169 N.C. 265, 84 S.E. 340 (1915). Statutes, such as this section, regulating such schemes violate neither the State nor federal Constitution. They are remedial and should be liberally construed. And the fact that the device is an advertising scheme of an otherwise legitimately run business concern does not prevent the section from applying. Brevard Mfg. Co. v. Benjamin & Sons, 172 N.C. 53, 89 S.E. 797 (1916). See State v. Lumsden, 89 N.C. 572 (1883).

This section refers to persons who promote, make or draw, publicly or privately, a lottery, by whatever name, while § 14-291.1, deals only with those persons who shall "sell, barter or cause to be sold or bartered, any ticket, token, certificate or order," etc. Thus it is apparent that the two statutes not only act upon different persons and serve purposes which are not the same but also they deal with different conditions. One inveighs against trafficking in lottery tickets and the other is designed to affect those persons engaged in promoting a particular kind of lottery. State v. Robinson, 224 N.C. 412, 30 S.E.2d 320 (1944).

Section Not Applicable To Purchaser. — This section does not embrace persons who buy lottery tickets. State v. Bryant, 74 N.C. 207 (1876).

Lottery Privilege Not a Contract. — A right, conferred in the charter of a corporation, to dispose of property by means of lottery tickets, is not a contract between the corporation and the State, but a mere privilege or license, and is revocable at will by the legislative power. State v. Morris, 77 N.C. 512 (1877).

Note for Lottery Contract Unenforceable. — Notes given in pursuance of a contract prohibited by this section are for an illegal consideration, and collection thereof is not enforcible in the courts of the State. Brevard Mfg. Co. v. Benjamin & Sons, 172 N.C. 53, 89 S.E. 797 (1916).

Surety to Lottery Contract. — A bond guaranteeing the performance of a "trade expansion contract" which is contrary to this section, is as unenforceable against the surety thereon as the contract upon which it is founded. Basnight v. American Mfg. Co., 174 N.C. 206, 93 S.E. 734 (1917).

Amendment of 1933 Creating Presumption From Possession of Tickets Is Valid. — The 1933 amendment to this section which makes the possession of tickets, etc., used in the operating of a lottery prima facie evidence of violation of the section, is constitutional and valid, the presumption being a rational one. State v. Fowler, 205 N.C. 608, 172 S.E. 191 (1934).

Actual Physical Possession of Tickets Unnecessary. — The possession of lottery tickets sufficient to raise prima facie evidence of the violation of this section, need not be actual physical possession, and they need not be found on defendant's person, it being sufficient if they are found in his place of business under his control. State v. Jones, 213 N.C. 640, 197 S.E. 152 (1938).

Admissibility of Evidence. — In establishing the promotion of the lottery by circumstantial evidence it was permissible for the State to show the association of the defendants together with their financial relation and transactions. The declaration of one defendant as to the other's participation in the enterprise and as to their protection if they were caught was also competent. State v. Ingram, 204 N.C. 557, 168 S.E. 837 (1933).

In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously like tickets had been found in defendant's home, was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. State v. Bryant, 231 N.C. 106, 55 S.E.2d 922 (1949).

Sufficiency of Evidence. — Evidence that numerous lottery tickets and lottery ticket books were found in the store operated by defendant is sufficient to be submitted to the jury in a prosecution under this section, and defendant's contention that there was no evidence that he was in charge of the store is untenable when the record discloses that several witnesses referred to the locus in quo as defendant's place of business. State v. Jones, 213 N.C. 640, 197 S.E. 152 (1938).

Evidence that officers apprehended defendant with lottery tickets in his possession and that upon seeing the officers he tried to dispose of same, is sufficient to be submitted to the jury in prosecution for operating a lottery and for illegal possession of lottery tickets, the evidence being sufficient to make out a prima facie case under the provisions of this section. State v. Powell, 219 N.C. 220, 13 S.E.2d 232 (1941).

Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

Circumstantial evidence of defendant's guilt of conspiracy or participation in lottery held insufficient. State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1953).

Applied in State v. Blanton, 207 N.C. 872, 180 S.E. 81 (1935); State v. King, 224 N.C. 329, 30 S.E.2d 230 (1944).

Cited in State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

§ 14-291. Selling lottery tickets and acting as agent for lotteries.

Except in connection with a lawful raffle as provided in G.S. 14-292.1, if any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a misdemeanor, and shall be punished as provided for in G.S. 14-290. (1834, c. 19, s. 2; R. C., c. 34, s. 70; Code, s. 1048; Rev., s. 3727; C. S., s. 4429; 1979, c. 893, s. 5.)

CASE NOTES

Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945).

§ 14-291.1. Selling "numbers" tickets; possession prima facie evidence of violation.

Except in connection with a lawful raffle as provided in G.S. 14-292.1, if any person shall sell, barter or cause to be sold or bartered, any ticket, token, certificate or order for any number or shares in any lottery, commonly known as the numbers or butter and egg lottery, or lotteries of similar character, to be drawn or paid within or without the State, such person shall be guilty of a misdemeanor and shall be punished by fine or imprisonment, or both, in the discretion of the court. Any person who shall have in his possession any tickets, tokens, certificates or orders used in the operation of any such lottery shall be guilty under this section, and the possession of such tickets shall be prima facie evidence of the violation of this section. (1943, c. 550; 1979, c. 893, s. 6.)

CASE NOTES

In General. — See note under § 14-290.

Lottery Defined. — A lottery is any scheme for the distribution or prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles him to receive a larger or smaller value, or nothing, as some formula of chance may determine. State v. Walker, 25 N.C. App. 157, 212 S.E.2d 528, modified on other grounds, 27 N.C. App. 295, 219 S.E.2d 76, cert. denied, 287 N.C. 264, 214 S.E.2d 436, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975).

"Barter" and "sell" are not used as synonyms in this section. Barter is a contract by which parties exchange one commodity for another. It differs from a sale, in that the latter is a transfer of goods for a specified price, payable in money. This being so, an accused may violate this section in four distinct ways. He may sell the illegal articles, or he may barter them, or he may cause another to sell them, or he may cause another to barter them. State v. Albarty, 238 N.C. 130, 76 S.E.2d 381 (1953).

Warrant Sufficient. — Warrant charging the defendant with the sale of tickets and tokens to be used in a numbers "lottery" omits none of the essential elements of the offense. State v. Walker, 25 N.C. App. 157, 212 S.E.2d 528, modified on other grounds 27 N.C. App. 295, 219 S.E.2d 76, cert. denied, 287 N.C. 264, 214 S.E.2d 436, 423 U.S. 894, 96 S. Ct. 193, 46 L. Ed. 2d 126 (1975).

Admissibility of Evidence. — In a prosecution for possession of lottery tickets, testimony that on another occasion a short time previously, like tickets had been found in defendant's home, was held competent as tending to show intent, guilty knowledge, system, purposeful possession of the tickets charged, and as supporting the State's view that defendant was engaged in operating a lottery. State v. Bryant, 231 N.C. 106, 55 S.E.2d 922 (1949).

Sufficiency of Evidence. — Evidence held insufficient to show violation of this section. State v. Heglar, 225 N.C. 220, 34 S.E.2d 76 (1945); State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

Circumstantial evidence of defendant's guilt of conspiracy or participation in lottery held insufficient. State v. Smith, 236 N.C. 748, 73 S.E.2d 901 (1953).

Instructions. — In a prosecution for possession of lottery tickets, the trial court properly instructed the jury that the State had the burden of proving that the defendant knew that the pieces of paper with the numbers on them were lottery tickets, but the court erred in instructing that, "under our law unless the defendant introduces evidence of lack of knowledge, this element may be presumed." State v. Mayo, 27 N.C. App. 336, 219 S.E.2d 255 (1975).

In a prosecution for possession of certificates, tickets and orders used in the operation of a numbers lottery, where the court instructed the jury that before it could find defendant guilty of violating the statute it must find from the evidence and beyond a reasonable doubt that (1) the defendant possessed the tickets and orders and (2) that such tickets, orders and paraphernalia were used in a numbers lottery, the charge, when considered contextually as a whole, complied with the requirements of the statute requiring the judge to declare and explain the law arising on the evidence given in the case. State v. Roberson, 29 N.C. App. 152, 223 S.E.2d 551 (1976).

Punishment. — A sentence and fine imposed upon conviction of violating this section are in personam; an order of confiscation entered under § 14-299 is in rem and is no part of the personal judgment against the accused. State v. Richardson, 228 N.C. 426, 45 S.E.2d 536 (1947). See note to § 14-299.

Applied in State v. Upchurch, 267 N.C. 417, 148 S.E.2d 259 (1966).

Cited in State v. Gibson, 233 N.C. 691, 65 S.E.2d 508 (1951); State v. Scoggin, 236 N.C. 19, 72 S.E.2d 54 (1952); State v. Helms, 247 N.C. 740, 102 S.E.2d 241 (1958); State v. Bryant, 251 N.C. 423, 111 S.E.2d 591 (1959).

§ 14-291.2. Pyramid and chain schemes prohibited.

(a) Any person who shall establish, promote, operate or participate in any pyramid distribution plan, program, device or scheme whereby a participant pays a valuable consideration for the opportunity or chance to receive a fee or compensation upon the introduction of other participants into the program, whether or not such opportunity or chance is received in conjunction with the purchase of merchandise, shall be deemed to have participated in a lottery and shall be punished as provided for in G.S. 14-290.

(b) "Pyramid distribution plan" means any program utilizing a pyramid or chain process by which a participant gives a valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program;

"Compensation" does not mean payment based on sales of goods or services to persons who are not participants in the scheme, and who are not purchasing in order to participate in the scheme; and

"Promotes" shall mean inducing one or more other persons to become a participant.

(c) Any judge of the superior court shall have jurisdiction, upon petition by the Attorney General of North Carolina or district attorney of the superior court, to enjoin, as an unfair or deceptive trade practice, the continuation of the scheme described in subsection (a); in such proceeding the court may assess a civil penalty against any defendant found to have engaged in the willful promotion of such a scheme with knowledge that such conduct violated this section, in an amount not to exceed two thousand dollars ($2,000) which shall be for the benefit of the general fund of the State of North Carolina as reimbursement for expenses incurred in the institution and prosecution of the action; and the court may appoint a receiver to secure and distribute assets obtained by any defendant through participation in any such scheme.

(d) Any contract hereafter created for which a part of the consideration consisted of the opportunity or chance to participate in a program described in subsection (a) is hereby declared to be contrary to public policy and therefore void and unenforceable. (1971, c. 875, s. 1; 1973, c. 47, s. 2.)

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Injunctive Relief at Instance of State. — Even though individual remedies may exist, the statutes provide for injunctive relief at the instance of the State. To hold otherwise would cripple the legislative intent to provide an effective means of curbing illegitimate business schemes and protecting the consumers of our State. State ex rel. Morgan v. Dare to Be Great, Inc., 15 N.C. App. 275, 189 S.E.2d 802 (1972).

§ 14-292. Gambling.

Except as provided in G.S. 14-292.1, any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, shall be guilty of a misdemeanor. (1891, c. 29; Rev., s. 3715; C. S., s. 4430; 1979, c. 893, s. 1.)

Cross References. — As to gaming contracts, see § 16-1 et seq.

Legal Periodicals. For reference to acts legalizing pari-mutuel racetrack betting, see 11 N.C.L. Rev. 248.

CASE NOTES

In General. — Betting is essential to the offense; playing without betting is not indictable. State v. Brannen, 53 N.C. 208 (1860). The section does not apply to prizes given for skill — here is no betting. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895). Tenpins is not a game of chance. State v. King, 113 N.C. 631, 18 S.E. 169 (1893).

All who engage in gambling are principals. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895). A defendant may be indicted for keeping a gaming house and playing for money, without misjoinder. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Games of Chance and Games of Skill. — A game of chance is one in which the element of chance predominates over the element of skill, and a game of skill is one in which the element of skill predominates over the element of chance. State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953). State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

"The universal acceptation of 'a game of chance' is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance." State v. Gupton, 30 N.C. 271 (1848), quoted in State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

For illustrations of games of chance and games of skill, see State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

Whether blackjack was a game of chance or one of skill was a question for the jury to decide from the evidence. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

Horse racing is included in the category of "gaming" or "gambling." The word "game" is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid on the chance of a game, and it is gaming. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Betting on horse racing, or on any other sort of race, in an offense against the criminal law. The fact that the race itself is one of skill and endurance on the part of the jockey and his mount does not confer immunity upon those who wager on its result. State v. Brown, 221 N.C. 301, 20 S.E.2d 286 (1942).

Betting on dog races under a pari-mutuel system having no other purpose than that of providing the facilities by means of tickets, machines, etc., for placing bets, calculating odds, determining winnings, if any, constitutes gambling within the meaning of this section. State ex rel. Taylor v. California Racing Ass'n, 241 N.C. 80, 84 S.E.2d 390 (1954).

Calling Transaction a Raffle Does Not Change its Character. — Where several parties each put up a piece of money and then decide, by throwing dice, who shall have the aggregate sum or "pool," the game is one of chance and the fact that the aggregate sum so put up is exchanged for a turkey and the transaction is denominated a "raffle" does not change the character of the game. State v. DeBoy, 117 N.C. 702, 23 S.E. 167 (1895).

Ordinances as to Gambling Void. — Gambling being an offense under the general law, a city ordinance covering the same subject is void. State v. McCoy, 116 N.C. 1059, 21 S.E. 690 (1895).

Sufficiency of Indictment. — An indictment charging defendant with keeping and maintaining a gaming house is sufficient, though it is not alleged that the games played there were games of chance, or that they were played at a place or tables where games of chance were played. State v. Morgan, 133 N.C. 743, 45 S.E. 1033 (1903).

Evidence Sufficient. — Evidence as to rules and method of playing "Negro Pool" was held sufficient to be submitted to the jury on the question of whether the game is a game of chance within the purview of this section. State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

Evidence that all defendants wagered money on the results of a game of chance played by some of them was held sufficient to overrule their motions to nonsuit in a prosecution under this section. State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

Court's Ruling on Blackjack Held Not Error. — The court did not err in referring to rule as a matter of law that the game of blackjack is a game of skill. State v. Eisen, 16 N.C. App. 532, 192 S.E.2d 613 (1972).

Instruction. — An instruction that "the object of the gambling statute is to prevent people from getting something for nothing" without defining the term "game of chance" constituting an essential element of the offense charged, was held reversible error. State v. Stroupe, 238 N.C. 34, 76 S.E.2d 313 (1953).

Applied in Greensboro Elks Lodge v. North Carolina Bd. of Alcoholic Control, 27 N.C. App. 594, 220 S.E.2d 106 (1975).

Cited in State v. Felton, 239 N.C. 575, 80 S.E.2d 625 (1954).

§ 14-292.1. Bingo and raffles.

(a) It is lawful for an exempt organization to conduct raffles and bingo games in accordance with the provisions of this section. Any person who conducts a raffle or bingo game in violation of any provision of this section shall be guilty of a misdemeanor under G.S. 14-292 and shall be punished in accordance with G.S. 14-3. Upon conviction such person shall not conduct a raffle or bingo game for a period of one year. It is lawful to participate in a raffle or bingo game conducted pursuant to this section. It shall not constitute a violation of State law to advertise a raffle or bingo game conducted in accordance with this section.

(b) For purposes of this section, the term:

(1) "Exempt organization" means an organization that has been in continuous existence in the county of operation of the raffle or bingo game for at least one year and that is exempt from taxation under sections 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), 501(c)(19), or 501(d) of the Internal Revenue Code or is exempt under similar provisions of North Carolina General Statutes as a bona fide nonprofit charitable, civic, religious, fraternal, patriotic or veterans' organization or as a nonprofit volunteer fire department, or as a nonprofit volunteer rescue squad or a bona fide homeowners' or property owners' association. (If the organization has local branches or chapters, the term "exempt organization" means the local branch or chapter operating the raffle or bingo game);

(2) "Bingo game" means a specific game of chance played with individual cards having randomly numbered squares ranging from one to seventy-five, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers selected at random (but shall not include "instant bingo," which is a game of chance played by the selection of one or more prepacked cards, with winners determined by the appearance of a preselected designation on the card);

(3) "Raffle" means a lottery in which the prize is won by random drawing of the name or number of one or more persons purchasing chances.

(4) "Local law-enforcement agency" means: (i) The county police force; or (ii) The county sheriff's office in a county with no county police force for any raffle or bingo game conducted outside the coporate limits of a municipality or inside the corporate limits of a municipality having no municipal police force. "Local law-enforcement agency" means the municipal police for any raffle or bingo game conducted within the corporate limits of a municipality having a police force.

(c) The exempt organization must prominently display in the specific place or room where the raffle or bingo game is being conducted a determination letter (or a reproduction copy thereof) from the Internal Revenue Service or the North Carolina Department of Revenue that indicates that the organization is an exempt organization.

(d) The exempt organization may expend proceeds derived from a raffle or bingo game only for auditing expenses, prizes, utilities and the purchase of supplies and equipment used in conducting the raffle and in playing bingo, taxes related to raffles and bingo, and the payment of compensation and rent as authorized by subsection (e) of this section. In no event shall the price for purchase of supplies and equipment exceed the fair market value thereof. All proceeds remaining after the above authorized expenditures shall inure to the exempt organization to be used for religious, charitable, civic, scientific, testing for public safety, literary, or educational purposes, or for purchasing, constructing, maintaining, operating or using equipment or land or a building or improvements thereto owned by and for the exempt organization and used for civic purposes or made available by the exempt organization for use by the

general public from time to time, or to foster amateur sports competition or for the prevention of curelty to children or animals, provided that no proceeds shall be used or expended for social functions for the members of the exempt organization.

(e) No person may be compensated for conducting a raffle or bingo game. An exempt organization shall not contract with any person for the purpose of conducting a raffle or bingo game except that an exempt organization may rent space under a written lease agreement for such purpose at a fixed sum not to exceed fair market value. Such leases shall be at a fixed rate not subject to change during the term of the lease and not based on a percentage of receipts or proceeds. The provisions of this subsection notwithstanding, an exempt organization may compensate a person for conducting raffles or bingo games conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes.

(f) The number of sessions of bingo conducted or sponsored by an exempt organization shall be limited to two sessions per week and such sessions must not exceed a period of five hours each per county. No more than two sessions of bingo shall be operated or conducted in any one building, hall or structure during any one calendar week; provided, however, that two exempt organizations may operate up to two sessions of bingo each per week in the same building, hall or structure, if the organizations do not use the same equipment and personnel. Four consecutive nights of bingo may not be held on the same premises during any one calendar week. Raffles shall be limited to one per month per county. This subsection shall not apply to raffles or bingo games conducted at a fair or other exhibition conducted pursuant to Article 45 of Chapter 106 of the General Statutes.

(g) The maximum prize in case or merchandise that may be offered or paid for any one game of bingo is five hundred dollars ($500.00). The maximum aggregate amount of prizes, in cash and/or merchandise, that may be offered or paid at any one session of bingo is one thousand five hundred dollars ($1,500). Provided, however, that if an exempt organization holds only one session of bingo during a calendar week, the maximum aggregate amount of prizes, in cash and/or merchandise, that may be offered or paid at any one session is two thousand five hundred dollars ($2,500). The maximum cash prize that may be offered or paid for any one raffle is five hundred dollars ($500.00).

(h) The operation of raffles or bingo games shall be the direct responsibility of, and controlled by, a special committee selected by the governing body of the exempt organization in the manner provided by the rules of the exempt organization. Upon their selection, the members of the committee shall register with the local law-enforcement agency in whose jurisdiction the raffle or bingo game is to be conducted. The registration shall disclose the identity and address of the members of the committee and the exempt organization.

(i) All funds received in connection with a raffle or bingo game (except funds given as prizes in connection with a particular raffle or bingo game) shall be placed in a separate bank account. No funds may be disbursed from this account except for the purposes authorized by subsection (d) of this section. A separate account shall be kept of all funds received in connection with raffles or bingo games (including the amount of any prize) and the amount and purpose of any disbursement. An audit of the account shall be prepared annually for the period July 1 to June 30 by a public accountant and shall be filed with the local law-enforcement agency in whose jurisdiction the raffle or bingo game is conducted. The audit shall be prepared on a form approved by the Department of Justice and shall include the following information:

(1) The number of raffles or bingo games conducted or sponsored by the exempt organization;

(2) The location and date at which each raffle or bingo game was conducted and the prize awarded;

(3) The gross receipts of each raffle or bingo game;
(4) The cost or amount of any prize given at each raffle or bingo game;
(5) The amount paid in prizes at each session;
(6) The net return to the exempt organization; and
(7) The disbursements from the separate account and the purpose of those disbursements, including the date of each transaction and the name and address of each payee.

Quarterly statements prepared by the special committee which contain an itemized listing of all expenditures and receipts shall also be filed with the local law-enforcement agency together with copies of any leases for rental of space.

Any person who shall willfully furnish, supply, or otherwise give false information in any audit or quarterly statement filed pursuant to this section shall be guilty of a misdemeanor.

All books, papers, records and documents relevant to determining whether an organization has acted or is acting in compliance with this section shall be open to inspection by the sheriff or his designee or the district attorney or his designee at reasonable times and during reasonable hours.

(j) A raffle or bingo game conducted otherwise than in accordance with the provisions of this section is "gambling" within the meaning of G.S. 19-1 et seq., and proceedings against such raffle or bingo game may be instituted as provided for in Chapter 19 of the General Statutes.

(k) Any exempt organization operating a bingo game or raffle which is open to persons other than members of the exempt organization, their spouses, and their children shall make such bingo game or raffle open to the general public.

(l) Nothing in this Article except subsection (k) of this section shall apply to bingo games when the only prize given is ten dollars ($10.00) or less or merchandise that is not redeemable for cash and that has a value of ten dollars ($10.00) or less. G.S. 18A-30(9) and 18A-35(h) shall apply to such games. (1979, c. 893, s. 2; 1981, c. 962, ss. 1-5.)

Editor's Notes.— Session Laws 1979, c. 893, s. 7, provides: "All general or local laws that permit the opeation of raffles or bingo games in counties or towns are repealed."

Session Laws 1979, c. 893, s. 8, contains a severability clause.

Session Laws 1979, c. 893, s. 9, provides: "Nothing contained in this act shall be construed to render lawful any act committed prior to the effective date of this act [September 1, 1979] and unlawful at the time the act occurred; and nothing contained in this act shall be construed to affect any prosecution pending on the effective date of this act."

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, added subdivision (4) to subsection (b), inserted "auditing expenses," in the first sentence and added the second sentence of subsection (d), substituted "rent space under a written lease agreement for such purpose at a fixed sum not to exceed fair market value" for "lease space for such purpose at a fixed sum and not at a percentage of receipts or proceeds" in the second sentence and added "and not based on a percentage of receipts or proceeds" at the end of the third sentence in subsection (e), substituted "local law-enforcement agency in whose jurisdiction" for "sheriff of the county in which" in the second sentence of subsection (h), and rewrote all of subsection (i) following the third sentence in the first paragraph of the subsection.

OPINIONS OF ATTORNEY GENERAL

Raffle Offering Merchandise as Prize. — An exempt organization may legally sponsor a raffle which offers merchandise as a prize; the prize need not be in the form of cash. Only a cash prize is limited in the amount of five hundred dollars ($500). See opinion of Attorney General to Mr. R. Michael Jones, Counsel for the Wilson County School System, Sept. 17, 1979.

Bingo Games With Prizes of $10.00 or Less. — An informal organization such as a Parent Teachers Organization (not an affiiliate of a national or statewide PTA) or a Band Booster Club, may conduct bingo games pursuant to subsection (l) of this section, where the total value of all prizes in cash or merchandise exceeds $10.00 and in which the prize per individual bingo game does not exceed a value of

$10.00. See opinion of Attorney General to William L. Hill, III, Att'y for New Hanover County School Board, 49 N.C.A.G. 131 (1980).

Non-Exempt Organizations. — An organization which is exempt from federal income taxation pursuant to 26 U.S.C. 501(c)(7) and exempt from state taxation pursuant to § 105-130.11(6) does not qualify as an exempt organization for the purposes of conducting bingo games and raffles pursuant to subsections (a) through (k) of this section. See opinion of Attorney General to Captain D.G. Jenkins, Greensboro Police Department, Vice/Narcotics Division, 49 N.C.A.G. 137 (1980).

§ 14-293. Allowing gambling in houses of public entertainment; penalty.

If any keeper of an ordinary or other house of entertainment, or of a house wherein alcoholic beverages are retailed, shall knowingly suffer any game, at which money or property, or anything of value, is bet, whether the same be in stake or not, to be played in any such house, or in any part of the premises occupied therewith; or shall furnish persons so playing or betting either on said premises or elsewhere with drink or other thing for their comfort or subsistence during the time of play, he shall be guilty of a misdemeanor, and shall be fined not less than five hundred dollars ($500.00) and be imprisoned not less than six months. Any person who shall be convicted under this section shall, upon such conviction, forfeit his license to do any of the businesses mentioned in this section, and shall be forever debarred from doing any of such businesses in this State. The court shall embody in its judgment that such person has forfeited his license, and no board of county commissioners, board of town commissioners or board of aldermen shall thereafter have power or authority to grant to such convicted person or his agent a license to do any of the businesses mentioned herein. (1799, c. 526, P. R.; 1801, c. 581, P. R.; 1831, c. 26; R. C., c. 34, s. 76; Code, s. 1043; 1901, c. 753; Rev., s. 3716; C. S., s. 4431; 1967, c. 101, s. 1; 1981, c. 412, s. 4; c. 747, s. 66.)

CASE NOTES

Gambling in Leased Room of Tavern. — Where it appeared that the room, in which the game took place, was a part of the house in which the tavern was kept, but had been leased and was not under the control of the landlord, it was held that the defendant landlord could not be convicted under this section. State v. Keisler, 51 N.C. 73 (1858).

Houses Where Liquor Was Retailed. — For case under this provision, see State v. Terry, 20 N.C. 325 (1839).

Sufficiency of Warrant. — A warrant charging that defendant did operate a house in which various types of gambling "is continuously carried on" and did permit named persons to engage in a game of cards in which money was bet, held sufficient to charge defendant with operating a gambling house. State v. Anderson, 259 N.C. 499, 130 S.E.2d 957 (1963).

Excessive Punishment. — For violation of this section a fine of $2,000 and imprisonment of 30 days, and thereafter until the fine and costs were paid, was held not excessive punishment. State v. Miller, 94 N.C. 904 (1886).

Cited in State v. McHone, 243 N.C. 235, 90 S.E.2d 539 (1955).

§ 14-294. Gambling with faro banks and tables.

If any person shall open, establish, use or keep a faro bank, or a faro table, with the intent that games of chance may be played thereat, or shall play or bet thereat any money, property or other thing of value, whether the same be in stake or not, he shall be guilty of a misdemeanor, and shall be fined at least two hundred dollars ($200.00) and imprisoned not less than three months. (1848, c. 34; R. C., c. 71; 1856-7, c. 25; Code, s. 1044; Rev., s. 3717; C. S., s. 4432.)

Cross References. — As to compelling testimony in cases when this section and §§ 14-295 through 14-297 have been violated, see § 8-55.

CASE NOTES

Cited in State v. Norwood, 94 N.C. 935 (1886); State v. Jones, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

§ 14-295. Keeping gaming tables, illegal punchboards or slot machines, or betting thereat.

If any person shall establish, use or keep any gaming table (other than a faro bank), by whatever name such table may be called, an illegal punchboard or an illegal slot machine, at which games of chance shall be played, he shall on conviction thereof be fined not less than two hundred dollars ($200.00) and shall be imprisoned not less than 30 days; and every person who shall play thereat or thereat bet any money, property or other thing of value, whether the same be in stake or not, shall be guilty of a misdemeanor, and shall be fined not less than ten dollars ($10.00). (1791, c. 336, P. R.; 1798, c. 502, s. 2, P. R.; R. C., c. 34, s. 72; Code, s. 1045; Rev., s. 3718; C. S., s. 4433; 1931, c. 14, s. 2.)

Cross References. — As to gambling generally, see § 14-292.

See Editor's Note, § 14-296.

CASE NOTES

Indictment Sufficient. — An indictment under this section is good, without any averment that the act was done "willfully and unlawfully" or that the games of chance were played at such table for money or other property. State v. Howe, 100 N.C. 449, 5 S.E. 671 (1888).

Indictment Quashed. — A bill of indictment which does not charge that the game played was one of chance, and that it was played at a place or table where games of chance are played, will be quashed. State v. Norwood, 94 N.C. 935 (1886).

Evidence Admissible. — Where defendants admit keeping gaming tables, evidence may be admitted tending to show they were continuously present at the place and tending to show their large share in the receipts of these tables. State v. Galloway, 188 N.C. 416, 124 S.E. 745 (1924).

Cited in State v. Bryant, 74 N.C. 207 (1876); State v. Humphries, 210 N.C. 406, 186 S.E. 473 (1936); State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940); STate v. McHone, 243 N.C. 235, 90 S.E.2d 539 (1955).

§ 14-296. Illegal slot machines and punchboards defined.

An illegal slot machine or punchboard within the contemplation of G.S. 14-295 through 14-298 is defined as one that shall not produce for or give to the person who places coin or money or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. (1931, c. 14, s. 1.)

Editor's Note. — The act from which this section was taken amended §§ 14-295 through 14-298 to make them applicable to illegal slot machines and punchboards. The act expressively provide that it should not have the effect of modifying in any way §§ 14-301 through 14-303 and should be construed as supplemental thereto.

CASE NOTES

Cited in Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938).

§ 14-297. Allowing gaming tables, illegal punchboards or slot machines on premises.

If any person shall knowingly suffer to be opened, kept or used in his house or on any part of the premises occupied therewith, any of the gaming tables prohibited by G.S. 14-289 through 14-300 or any illegal punchboard or illegal slot machine, he shall forfeit and pay to any one who will sue therefor two hundred dollars ($200.00), and shall also be guilty of a misdemeanor and fined and imprisoned. (1798, c. 502, s. 3, P. R.; 1800, c. 5, s. 2, P. R.; R. C., c. 34, s. 73; Code, s. 1046; Rev., s. 3719; C. S., s. 4434; 1931, c. 14, s. 3.)

Cross References. — See Editor's to § 14-296.

CASE NOTES

Evidence Insufficient. — Where the agreed statement of facts in an action to recover the penalty under this section states that defendant kept a slot machine in his store, without a finding that the machine was illegal, the findings are insufficient to support a judgment against defendant. Nivens v. Justice, 210 N.C. 349, 186 S.E. 237 (1936).

Cited in State v. Webster, 218 N.C. 692, 12 S.E.2d 272 (1940).

§ 14-298. Gaming tables, illegal punchboards and slot machines to be destroyed by police officers.

All sheriffs and officers of police are hereby authorized and directed, on information made to them on oath that any gaming table prohibited to be used by G.S. 14-289 through 14-300, or any illegal punchboard or illegal slot machine is in the possession or use of any person within the limits of their jurisdiction, to destroy the same by every means in their power; and they shall call to their aid all the good citizens of the county, if necessary, to effect its destruction. (1791, c. 336, P. R.; 1798, c. 502, s. 2, P. R.; R. C., c. 34, s. 74; Code, s. 1049; Rev., s. 3720; C. S., s. 4435; 1931, c. 14, s. 4; 1973, c. 108, s. 11.)

Cross References. — See Editor's Note to § 14-296.

CASE NOTES

Enjoining Officers. — The court should have found whether the slot machines involved were illegal in determining the plaintiff's right to enjoin officers from interfering with his business. McCormick v. Proctor, 217 N.C. 23, 6 S.E.2d 870 (1940).

Cited in Daniels v. Homer, 139 N.C. 219, 51 S.E. 992 (1905).

§ 14-299. Property exhibited by gamblers to be seized; disposition of same.

All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, or used in the conduct of any such game, including any motor vehicle used in the conduct of a lottery within the purview of G.S. 14-291.1, shall be liable to be seized by any court of competent jurisdiction or by any person acting under its warrant. Moneys so seized shall be turned over to and paid to the treasurer of the county wherein they are seized, and placed in the general fund of the county. Any property seized which is used for and is suitable only for gambling shall be destroyed, and all other property so seized shall be sold in the manner provided for the sale of personal property by execution, and the proceeds derived from said sale shall (after deducting the expenses of keeping the property and the costs of the sale and after paying, according to their priorities all known prior, bona fide liens which were created without the lienor having knowledge or notice that the motor vehicle or other property was being used or to be used in connection with the conduct of such game or lottery) be turned over and paid to the treasurer of the county wherein the property was seized, to be placed by said treasurer in the general fund of the county. (1798, c. 502, s. 3, P. R.; R. C., c. 34, s. 77; Code, s. 1051; Rev., s. 3722; C. S., s. 4436; 1943, c. 84; 1957, c. 501; 1973, c. 108, s. 12.)

CASE NOTES

A confiscation order entered under this section is no part of the personal judgment imposed under § 14-291.1. Hence, a defendant may comply with the personal judgment entered against him upon conviction of violating § 14-291.1, and at the same time prosecute an appeal from .an order of confiscation entered under this section, whether embraced in the same judgment or not; but the failure to appeal the personal judgment, while not estopping him for further contesting the order of confiscation, forever precludes him from contesting the fact of guilt. State v. Richardson, 228 N.C. 426, 45 S.E.2d 536 (1947).

Cited in North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888).

§ 14-300. Opposing destruction of gaming tables and seizure of property.

If any person shall oppose the destruction of any prohibited gaming table, or the seizure of any moneys, property or other thing staked on forbidden games, or shall take and carry away the same or any part thereof after seizure, he shall forfeit and pay to the person so opposed one thousand dollars ($1,000), for the use of the State and the person so opposed, and shall, moreover, be guilty of a misdemeanor. (1798, c. 502, s. 4, P. R.; R. C., c. 34, s. 78; Code, s. 1052; Rev., s. 3723; C. S., s. 4437.)

CASE NOTES

Cited in North Carolina v. Vanderford, 35 F. 282 (W.D.N.C. 1888).

§ 14-301. Operation or possession of slot machine; separate offenses.

It shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. Each time said machine is operated as aforesaid shall constitute a separate offense. (1923, c. 138, ss. 1, 2; C. S., s. 4437(a).)

CASE NOTES

Construed with § 14-304. — This section and §§ 14-302, 14-303, proscribing the operation and possession of slot machines of the type therein defined, are not repealed by §§ 14-304 through 14-309, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Same — Separate and Distinct Offenses. — Where an indictment charged defendant in one count with ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, §§ 14-304 through 14-309, and charged defendant in the second count with the operation and possession of certain illegal slot machines, under this section and §§ 14-302, 14-303, it was held that the different counts in the bill may stand as separate and distinct offenses, and separate judgments may be entered thereon, and defendant's contention of duplicity is untenable. State v. Calcutt, 219 N.C. 545, 15 S.E.2d 9 (1941).

Value Is Required to Be Given. — Under this section, a slot machine so operated that one putting into it a coin receives, in any event, the value of such coin in chewing gum, and stands to win by chance additional chewing gum or discs of commercial value without further payment, is condemned by the statute as being unlawful. But if the slot machine were so operated that one who puts in a coin receives the same return in market value each and every time such machine is operated, it would not then fall within the condemnation of the statute. State v. May, 188 N.C. 470, 125 S.E. 9 (1924).

And Only Lawful Machines Will Be Licensed. — The State license issued for the operation of a slot machine is for one that is lawful and does not permit the operation of one so devised as to give to the one who happens to strike certain mechanical combinations more of the merchandise than received at other times. State v. May, 188 N.C. 470, 125 S.E. 9 (1924).

Sufficiency of Indictment. — An indictment charging that the defendant "unlawfully and willfully did operate a lottery, to wit, a slot machine (chapter 138, Public Laws 1923) against the form of the statute," etc., was insufficient because it failed to inform the accused of the specific offense or the necessary ingredients thereof, notwithstanding the statute was cited. State v. Ballangee, 191 N.C. 700, 132 S.E. 795 (1926).

Cited in Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938).

§ 14-302. Punchboards, vending machines, and other gambling devices; separate offenses.

It shall be unlawful for any person, firm or corporation to operate or keep in his possession, or the possession of any other person, firm or corporation, for the purpose of being operated, any punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, that shall not produce for or give to the person operating, playing or patronizing same, whether personally or through another, by paying money or other thing of value for the privilege of operating, playing or patronizing same, whether through himself or another, the same return in market value, each and every time such punchboard, machine for vending merchandise or other gambling device, by whatsoever name known or called, is operated, played or patronized

by paying of money or other thing of value for the privilege thereof. Each time said punchboard, machine for vending merchandise, or other gambling device, by whatsoever name known or called, is operated, played, or patronized by the paying of money or other thing of value therefor, shall constitute a separate violation of this section as to operation thereunder. (1923, c. 138, ss. 3, 4; C. S., s. 4437(b).)

CASE NOTES

Operation of Device Essential. — An essential element of the offense created by this section is the operation of the gambling device or the keeping in possession of such device for the purpose of being operated; the mere having in possession of gambling devices, and nothing more, is not made a criminal offense. State v. Sheppard, 4 N.C. App. 670, 167 S.E.2d 535 (1969).

Same — Indictment Defective. — An indictment charging possession of gambling devices, but failing to charge that defendant operated the devices or had them in his possession for the purpose of being operated, is fatally defective. State v. Jones, 218 N.C. 734, 12 S.E.2d 292 (1940); State v. Sheppard, 4 N.C. App. 670, 167 S.E.2d 535 (1969).

The omission in a warrant of a charge that the defendant operated the gambling devices or that he kept such devices in his own or the possession of other persons for the purpose of being operated is a fatal defect in the warrant, since an essential element of the offense as provided by this section is the operation of the gambling device or the keeping of the device in his possession for the purpose of being operated. Mere possession of a gambling device is not a criminal offense. State v. Jones, 36 N.C. App. 263, 243 S.E.2d 827 (1978).

Applied in State v. Marsh, 225 N.C. 648, 36 S.E.2d 244 (1945).

§ 14-303. Violation of two preceding sections a misdemeanor.

A violation of any of the provisions of G.S. 14-301, 14-302 shall be a misdemeanor punishable by a fine or imprisonment, or, in the discretion of the court, by both. (1923, c. 138, s. 5; C. S., s. 4437(c).)

CASE NOTES

Applied in State v. Marsh, 225 N.C. 648, 36 S.E.2d 244 (1945).

§ 14-304. Manufacture, sale, etc., of slot machines and devices.

It shall be unlawful to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or to permit the operation of, or for any person to permit to be placed, maintained, used or kept in any room, space or building owned, leased or occupied by him or under his management or control, any slot machine or device. (1937, c. 196, s. 1.)

Legal Periodicals. — For comment on this and the following sections, see 15 N.C.L. Rev. 340.

CASE NOTES

Constitutionality. — This and following sections, prohibiting coin slot machines in the operation of which a player may make varying scores or tallies upon which wages may be made, and differentiating between such machines and those returning a definite and unvarying service or things of value each time they are played, are in accord with the policy of the State to suppress gambling and have a reasonable relation to this objective, and this statute is constitutional as a reasonable regulation relating to the public morals and welfare, well within the police power of the State. Calcutt v. McGeachy, 213 N.C. 1, 195 S.E. 49 (1938); State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940).

Construed with § 14-301. — See note to § 14-301.

Not Repealed by § 105-65.1. — The provisions of the Flanagan Act, ch. 196, Public Laws of 1937, proscribing the possession and distribution of a coin slot machine in the operation of which the user may secure additional chances or rights to use the machine were not repealed by § 105.65.1. State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940).

Testimony as to Description and Operation of Machines. — In a prosecution under this section it is competent for witnesses who have examined and studied the machines in question to testify as to their physical description and operation. State v. Davis, 229 N.C. 552, 50 S.E.2d 668 (1948).

Cited in State v. Finch, 218 N.C. 511, 11 S.E.2d 547 (1940).

§ 14-305. Agreements with reference to slot machines or devices made unlawful.

It shall be unlawful to make or permit to be made with any person any agreement with reference to any slot machines or device, pursuant to which the user thereof may become entitled to receive any money, credit, allowance, or anything of value or additional chance or right to use such machines or devices, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value. (1937, c. 196, s. 2.)

§ 14-306. Slot machine or device defined.

Any machine, apparatus or device is a slot machine or device within the provisions of G.S. 14-304 through 14-309, if it is one that is adapted, or may be readily converted into one that is adapted, for use in such a way that, as a result of the insertion of any piece of money or coin or other object, such machine or device is caused to operate or may be operated in such manner that the user may receive or become entitled to receive any piece of money, credit, allowance or thing of value, or any check, slug, token or memorandum, whether of value or otherwise, or which may be exchanged for any money, credit, allowance or any thing of value, or which may be given in trade, or the user may secure additional chances or rights to use such machine, apparatus or device; or any other machine or device designed and manufactured primarily for use in connection with gambling and which machine or device is classified by the United States as requiring a federal gaming device tax stamp under applicable provisions of the Internal Revenue Code. This definition is intended to embrace all slot machines and similar devices except slot machines in which is kept any article to be purchased by depositing any coin or thing of value, and for which may be had any article of merchandise which makes the same return or returns of equal value each and every time it is operated, or any machine wherein may be seen any pictures or heard any music by depositing therein any coin or thing of value, or any slot weighing machine or any machine for making stencils by the use of contrivances operated by depositing in the machine any coin or thing of value, or any lock operated by slot wherein money or thing of value is to be deposited, where such slot machines make the same return or returns of equal value each and every time the same is operated and does not at any time it is operated offer the user or operator any additional

money, credit, allowance, or thing of value, or check, slug, token or memorandum, whether of value or otherwise, which may be exchanged for money, credit, allowance or thing of value or which may be given in trade or by which the user may secure additional chances or rights to use such machine, apparatus, or device, or in the playing of which the operator does not have a chance to make varying scores or tallies.

The definition contained in the first paragraph of this section does not include, and shall not be construed as including, coin-operated machines or devices designed and manufactured for amusement and the operation of which depends in part upon the skill of the player. Included within this exception, are pinball machines and other arcade amusement devices which award a limited number of replays which are not convertible to money or other things of tangible value, and which do not require a federal gaming device tax stamp. (1937, c. 196, s. 3; 1967, c. 1219; 1977, c. 837.)

CASE NOTES

Indictment Sufficient. — An indictment charging the ownership and distribution of slot machines adapted for use in such a way that as a result of the insertion of a coin the machine may be operated in such a manner that the user may secure additional chances or rights to use such machine and upon which the user has a chance to make various scores upon the outcome of which wagers may be made, follows the language of this section and is sufficient to charge the offense therein defined. State v. Abbott, 218 N.C. 470, 11 S.E.2d 539 (1940).

Evidence. — Where it was admitted that the machines in question were owned by one defendant and rented by him to the other defendants, testimony of an officer, who had examined and studied the machines, that from his observation they could be converted, or reconverted, to coin slot operated machines by simple mechanical changes was evidence sufficient to overrule defendants' demurrer, and the fact that the witness failed to complete a demonstration of the conversion of such a machine because of lack of soldering tools, did not amount to a failure of the State's evidence upon the critical issue. State v. Davis, 229 N.C. 552, 50 S.E.2d 668 (1948).

§ 14-307. Issuance of license prohibited.

There shall be no State, county, or municipal tax levied for the privilege of operating the machines or devices the operation of which is prohibited by G.S. 14-304 through 14-309. (1937, c. 196, s. 4.)

§ 14-308. Declared a public nuisance.

An article or apparatus maintained or kept in violation of G.S. 14-304 through 14-309 is a public nuisance. (1937, c. 196, s. 5.)

§ 14-309. Violation made misdemeanor.

Any person who violates any provision of G.S. 14-304 through 14-309 is guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. (1937, c. 196, s. 6.)

§ 14-309.1. Defense to possession; antique slot machines.

(a) In any prosecution for possession of a slot machine or device as defined in G.S. 14-306, it is a defense that the slot machine was not intended to be used in the operation or promotion of unlawful gambling activity or enterprise and that the slot machine is an antique. For purposes of this section a slot machine manufactured 25 years ago or earlier is conclusively presumed to be an antique.

(b) When a defendant raises the defense provided in subsection (a), any slot machine seized from the defendant shall not be destroyed or otherwise altered until a final court determination is rendered. If the court determines that the defense has been proved the slot machine shall be returned immediately to the defendant. (1979, 2nd Sess., c. 1090.)

Article 38.

Marathon Dances and Similar Endurance Contests.

§ 14-310. Dance marathons and walkathons prohibited.

It shall be unlawful for any person, firm, association or corporation to promote, advertise or conduct any marathon dance contests, walkathon contests and/or similar endurance contests, by whatever name called, of walking or dancing, and it shall be unlawful for any person to participate in any marathon dance contest, walkathon contest, and/or similar physical endurance contests by walking and dancing continuing or intended to continue for a period of more than eight consecutive hours, whether or not an admission is charged and/or a prize awarded, and it shall be unlawful for any person to participate in more than one such contest or performance within any period of 48 hours. (1935, c. 13, s. 1.)

§ 14-311. Penalty for violation.

Any persons violating the provisions of this Article shall be guilty of a misdemeanor and shall be punishable by imprisonment in the county or municipal jail for not less than 30 days nor more than 90 days, or by a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or by both such fine and imprisonment in the discretion of the court. (1935, c. 13, s. 2.)

§ 14-312. Each day made separate offense.

Each and every day that any person, firm or corporation shall continue such a contest or engage in any such activities and/or each day's participation in such contest or advertisement of the same or do any act in violation of the provisions of this Article shall be and constitute a distinct and separate offense. (1935, c. 13, s. 3.)

Article 39.

Protection of Minors.

§ 14-313. Selling cigarettes to minors.

If any person shall sell, give away or otherwise dispose of, directly or indirectly, cigarettes, or tobacco in the form of cigarettes, or cut tobacco in any form or shape which may be used or intended to be used as a substitute for cigarettes, to any minor under the age of 17 years, or if any person shall aid, assist or abet any other person in selling such articles to such minor, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1891, c. 276; Rev., s. 3804; C. S., s. 4438; 1969, c. 1224, s. 3.)

OPINIONS OF ATTORNEY GENERAL

Applicable to State Training Schools. — See opinion of Attorney General to Mr. James M. Paige, Office of Youth Development, 42 N.C.A.G. 203 (1973).

§ 14-314: Repealed by Session Laws 1971, c. 31.

§ 14-315. Selling or giving weapons to minors.

If any person shall knowingly sell, offer for sale, give or in any way dispose of to a minor any pistol or pistol cartridge, brass knucks, bowie knife, dirk, loaded cane or slingshot, he shall be guilty of a misdemeanor. (1893, c. 514; Rev., s. 3832; C. S., s. 4440.)

§ 14-316. Permitting young children to use dangerous firearms.

(a) It shall be unlawful for any parent, guardian, or person standing in loco parentis, to knowingly permit his child under the age of 12 years to have the possession, custody or use in any manner whatever, any gun, pistol or other dangerous firearm, whether such weapon be loaded or unloaded, except when such child is under the supervision of the parent, guardian or person standing in loco parentis. It shall be unlawful for any other person to knowingly furnish such child any weapon enumerated herein. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days.

(b) Air rifles, air pistols, and BB guns shall not be deemed "dangerous firearms" within the meaning of subsection (a) of this section except in the following counties: Anson, Caldwell, Caswell, Chowan, Cleveland, Cumberland, Durham, Forsyth, Gaston, Harnett, Haywood, Mecklenburg, Stanly, Stokes, Surry, Union, Vance. (1913, c. 32; C. S., s. 4441; 1965, c. 813; 1971, c. 309.)

§ 14-316.1. Contributing to delinquency and neglect by parents and others.

Any person over 16 years of age who knowingly or willfully causes, encourages, or aids any juvenile within the jurisdiction of the court to be in a place or condition, or to commit an act whereby the juvenile could be adjudicated delinquent, undisciplined, abused, or neglected as defined by G.S. 7A-517 shall be guilty of a misdemeanor.

It is not necessary for the district court exercising juvenile jurisdiction to make an adjudication that any juvenile is delinquent, undisciplined, abused, or neglected in order to prosecute a parent or any person, including an employee of the Department of Human Resources under this section. An adjudication that a juvenile is delinquent, undisciplined, abused, or neglected shall not preclude a subsequent prosecution of a parent or any other person including an employee of the Division of Youth Services who contributes to the delinquent, undisciplined, abused, or neglected condition of any juvenile. (1919, c. 97, s. 19; C. S., s. 5057; 1959, c. 1284; 1969, c. 911, s. 4; 1971, c. 1180, s. 5; 1979, c. 692.)

Editor's Note. — This section formerly appeared as § 110-39. It was transferred to its present position by Session Laws 1969, c. 911, s. 4.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

This section is not unconstitutional for vagueness. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

The words used in this section are ordinary words in common usage, and adequate warning is provided those inclined to violate them. Simply stated, any person who knowingly does any act to produce, promote or contribute to any condition of delinquency of a child is in violation of the section. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Defendant was not denied his right against double jeopardy by his conviction in superior court of child neglect in violation of this section after a judgment of nonsuit was entered in a prosecution of defendant in the district court for child abuse in violation of § 14-318.2. State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980).

Proof of Delinquency Not Required. — Statutes such as this section are preventive as well as punitive in nature and it is not necessary to allege or prove that the child in fact is, or has become a delinquent. State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270 (1971).

This section does not require that the creation of a state of delinquency be accomplished; the legislative intent was to protect children from wrongful influence by adults, and in protection of minors the State should not await the result of the wrong perpetrated before punishing the offender. State v. Worley, 13 N.C. App. 198, 185 S.E.2d 270 (1971).

Conviction of Minor Not Required. — It is not necessary that a minor be convicted of the charges contained in a juvenile petition before a person may be prosecuted under this section for contributing to the delinquency of the minor. State v. Sparrow, 276 N.C. 499, 173 S.E.2d 897 (1970).

Neglect Resulting in Death of Child As Involuntary Manslaughter. — Where evidence was sufficient to show that the child's death resulted from the culpably negligent omission of defendants to perform their legal duty with respect to the child, the trial court did not err in overruling defendants' motions for nonsuit as to involuntary manslaughter. State v. Mason, 18 N.C. App. 433, 197 S.E.2d 79, cert. denied, 283 N.C. 669, 197 S.E.2d 898 (1973).

Applied in State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

§ 14-317. Permitting minors to enter barrooms or billiard rooms.

If the manager or owner of any barroom, wherein beer, wine, or any alcoholic beverages are sold or consumed, or billiard room shall knowingly allow any minor under 18 years of age to enter or remain in such barroom or billiard room, where before such minor under 18 years of age enters or remains in such barroom or billiard room, the manager or owner thereof has been notified in writing by the parents or guardian of such minor under 18 years of age not to allow him to enter or remain in such barroom or billiard room, he shall be guilty of a misdemeanor and upon conviction shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. (1897, c. 278; Rev., s. 3729; C. S., s. 4442; 1967, c. 1089.)

§ 14-318. Exposing children to fire.

If any person shall leave any child of the age of seven years or less locked or otherwise confined in any dwelling, building or enclosure, and go away from such dwelling, building or enclosure without leaving some person of the age of discretion in charge of the same, so as to expose the child to danger by fire, the person so offending shall be guilty of a misdemeanor, and shall be punished at the discretion of the court. (1893, c. 12; Rev., s. 3795; C. S., s. 4443.)

§ 14-318.1. Discarding or abandoning iceboxes, etc.; precautions required.

It shall be unlawful for any person, firm or corporation to discard, abandon, leave or allow to remain in any place any icebox, refrigerator or other container, device or equipment of any kind with an interior storage area of more

than one and one-half cubic feet of clear space which is airtight, without first removing the door or doors or hinges from such icebox, refrigerator, container, device or equipment. This section shall not apply to any icebox, referigerator, container, device or equipment which is being used for the purpose for which it was originally designed, or is being used for display purposes by any retail or wholesale merchant, or is crated, strapped or locked to such an extent that it is impossible for a child to obtain access to any airtight compartment thereof. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be punished at the discretion of the court. (1955, c. 305.)

§ 14-318.2. Child abuse a general misdemeanor.

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse.

(b) The misdemeanor of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies, and is punishable as provided in G.S. 14-3(a). (1965, c. 472, s. 1; 1971, c. 710, s. 6.)

Legal Periodicals. — For article reviewing the development of protective services for children in this State, see 54 N.C.L. Rev. 743 (1976).

For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

CASE NOTES

By the enactment of this section the General Assembly intended to provide for three separate and independent offenses, none dependent on the other; therefore, the first provision of this section making infliction of injury upon the child by the parent himself a punishable offense is divisible and separable from the remainder of the statute. State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973).

This section provides for three separate offenses: If the parent by other than accidental means (1) inflicts physical injury upon the child, (2) allows physical injury to be inflicted upon the child, or (3) creates or allows to be created a substantial risk of physical injury. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Complaint of Constitutional Vagueness in Provision of Section Not Allowed. — Where defendant's case was submitted to the jury only on the issue of whether defendant actually inflicted her child's injuries, defendant could not complain of alleged unconstitutional vagueness in the provision of this section, making it a criminal offense to create or allow to be created a substantial risk of physical injury upon a child since provisions of this section are severable. State v. Fredell, 17 N.C. App. 205, 193 S.E.2d 587 (1972), aff'd, 283 N.C. 242, 195 S.E.2d 300 (1973).

Defendant was not denied his right against double jeopardy by his conviction in superior court of child neglect in violation of § 14-316.1 after a judgment of nonsuit was entered in a prosecution of defendant in the district court for child abuse in violation of this section. State v. Hunter, 48 N.C. App. 656, 270 S.E.2d 120 (1980).

Child Abuse Not Lesser Included Offense. — The General Assembly did not intend child abuse to be a lesser included offense. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

And Does Not Merge with Any Other Offense. — The General Assembly did not intend child abuse to merge with any other offense. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

Charges of child abuse and child neglect were not merged into a charge of second-degree murder. State v. Mapp, 45 N.C. App. 574, 264 S.E.2d 348 (1980).

State's Burden of Proof. — To convict a parent of child abuse under this section it is necessary that the State prove only one of three separate and distinct acts or courses of conduct; that the parent, other than by accidental means, (1) inflicted physical injury upon the

child, (2) allowed physical injury to be inflicted upon the child, or (3) created or allowed to be created a substantial risk of physical injury upon the child. State v. Fredell, 17 N.C. App. 205, 193 S.E.2d 587 (1972), aff'd, 283 N.C. 242, 195 S.E.2d 300 (1973).

Cited in State v. Heiser, 36 N.C. App. 358, 244 S.E.2d 170 (1978).

§ 14-318.3: Repealed by Session Laws 1971, c. 710, s. 7.

§ 14-318.4. Child abuse a felony.

(a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of the child who intentionally inflicts any serious physical injury which results in:

(1) Permanent disfigurement, or
(2) Bone fracture, or
(3) Substantial impairment of physical health, or
(4) Substantial impairment of the function of any organ, limb, or appendage of such child,

is guilty of a Class I felony.

(b) The felony of child abuse is an offense additional to other civil and criminal provisions and is not intended to repeal or preclude any other sanctions or remedies. (1979, c. 897, s. 1; 1979, 2nd Sess., c. 1316, s. 18.)

Editor's Note. — Session Laws 1979, c. 897, s. 2, provides: "This act applies to acts occurring on or after the date of ratification [June 8, 1979]. This act shall become effective on January 1, 1980."

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, substituted "Class I felony" for "felony punishable by imprisonment for a period not to exceed five years" at the end of subsection (a). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Legal Periodicals. — For survey of 1979 criminal law, see 58 N.C.L. Rev. 1350 (1980).

§ 14-319: Repealed by Session Laws 1975, c. 402.

§ 14-320. Separating child under six months old from a custodial parent.

It shall be unlawful for any person to separate or aid in separating any child under six months old from a parent legally entitled to custody of the child for the purpose of placing such child in a foster home or institution, or with the intent to remove it from the State for such purpose, without the written consent of either the county director of social services of the county in which the parent legally entitled to custody of the child resides, or of the county in which the child was born or of a private child-placing agency duly licensed by the Social Services Commission; but the written consent of any of the officials named in this section shall not be necessary for a child when the parent legally entitled to custody of the child places the child with relatives or in a boarding home or institution inspected by the Department of Human Resources and licensed by the Social Services Commission. The consent when required shall be filed in the records of the official or agency giving consent. Any person or agency violating the provisions of this section shall, upon conviction, be fined not exceeding five hundred dollars ($500.00) or imprisoned for not more than one year, or both, in the discretion of the court. (1917, c. 59; 1919, c. 240; C. S., s. 4445; 1939, c. 56; 1945, c. 669; 1949, c. 491; 1965, c. 356; 1969, c. 982; 1973, c. 476, s. 138; 1979, c. 779.)

Cross References. — As to adoption generally, see Chapter 48.

§ 14-320.1. Transporting child outside the State with intent to violate custody order.

When any court of competent jurisdiction in this State shall have awarded custody of a child under the age of 16 years, it shall be a felony for any person with the intent to violate the court order to take or transport, or cause to be taken or transported, any such child from any point within this State to any point outside the limits of this State or to keep any such child outside the limits of this State. Such crime shall be punishable as a Class J felony. Provided that keeping a child outside the limits of the State in violation of a court order for a period in excess of 72 hours shall be prima facie evidence that the person charged intended to violate the order at the time of taking. (1969, c. 81; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, rewrote the second sentence, which formerly provided for punishment by a fine in the discretion of the court or by imprisonment for not more than three years, in the discretion of the court or by both such fine and imprisonment. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For note discussing criminal sanctions against "child-snatching," see 55 N.C.L. Rev. 1275 (1977).

OPINIONS OF ATTORNEY GENERAL

Removal of Child After Award By Clerk But in Violation of Restraining Order Issued By Succeeding District Court. — See opinion of Attorney General to Mr. John Morton, Attorney at Law, 40 N.C.A.G. 711 (1969).

§ 14-321. Failing to pay minors for doing certain work.

Whenever any person, having a contract with any corporation, company or person for the manufacture or change of any raw material by the piece or pound, shall employ any minor to assist in the work upon the faith of and by color of such contract, with intent to cheat and defraud such minor, and, having secured the contract price, shall willfully fail to pay the minor when he shall have performed his part of the contract work, whether done by the day or by the job, the person so offending shall be guilty of a misdemeanor, and upon conviction shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. (1893, c. 309; Rev., s. 3428a; C. S., s. 4446.)

Cross References. — As to child labor regulations, see § 110-1 et seq.

ARTICLE 40.

Protection of the Family.

§ 14-322. Abandonment and failure to support spouse and children.

(a) For purposes of this Article:

(1) "Supporting spouse" means a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent or from whom such other spouse is substantially in need of maintenance and support.

(2) "Dependent spouse" means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.

(b) Any supporting spouse who shall willfully abandon a dependent spouse without providing that spouse with adequate support shall be guilty of a misdemeanor and upon conviction shall be punished according to subsection (f).

(c) Any supporting spouse who, while living with a dependent spouse, shall willfully neglect to provide adequate support for that dependent spouse shall be guilty of a misdemeanor and upon conviction shall be punished according to subsection (f).

(d) Any parent who shall willfully neglect or refuse to provide adequate support for that parent's child, whether natural or adopted, and whether or not the parent abandons the child, shall be guilty of a misdemeanor and upon conviction shall be punished according to subsection (f). Willful neglect or refusal to provide adequate support of a child shall constitute a continuing offense and shall not be barred by any statute of limitations until the youngest living child of the parent shall reach the age of 18 years.

(e) Upon conviction for an offense under this section, the court may make such order as will best provide for the support, as far as may be necessary, of the abandoned spouse or child, or both, from the property or labor of the defendant.

(f) A first offense under this section shall be punishable by a fine not exceeding five hundred dollars ($500.00), or by imprisonment for not more than six months, or both. A second or subsequent offense shall be a misdemeanor punishable by fine, or by imprisonment for not more than two years, or both. (1868-9, c. 209, s. 1; 1873-4, c. 176, s. 10; 1879, c. 92; Code, s. 970; Rev., s. 3355; C. S., s. 4447; 1925, c. 290; 1949, c. 810; 1957, c. 369; 1969, c. 1045, s. 1; 1981, c. 683, s. 1.)

Cross References. — As to competency of wife's testimony upon trial of husband for abandonment, see § 8-57. As to when offense of failure to support child deemed committed in State, see § 14-325.1.

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, rewrote this section, which formerly applied only to abandonment and nonsupport of a wife by a husband and failure to provide adequate support for a child or children by a father or mother.

Legal Periodicals. — For discussion of statutory abandonment, see 38 N.C.L. Rev. 1 (1959).

CASE NOTES

I. General Consideration.
II. Nonsupport of Spouse.
III. Nonsupport of Children.

I. GENERAL CONSIDERATION.

The duty to provide support is not a debt in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided by this section for its willful neglect or abandonment. Ritchie v. White, 225 N.C. 450, 35 S.E.2d 414 (1945).

This section must be strictly construed. State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941); State v. Carson, 228 N.C. 151, 44 S.E.2d 721 (1947).

The district court has exclusive original jurisdiction of misdemeanors, including action to determine liability of persons for the support of dependents in any criminal proceeding. Cline v. Cline, 6 N.C. App. 523, 170 S.E.2d 645 (1969).

The constructive domicile of the wife is that of her husband, and where he has resided in another state and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of the State statute making it a misdemeanor. State v. Sneed, 197 N.C. 668, 150 S.E. 197 (1929).

Plea in Abatement after Plea of Not Guilty. — Where the defendant had been convicted of abandoning his wife and child and failing to provide an adequate support for them under the provisions of this section, his plea in abatement came too late after his plea of not guilty. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

Order of the Judge Providing for Support. — It is within the discretion of the trial judge to provide for the support of the wife and the minor children of the marriage from the property or labor of the husband upon his conviction of willfully abandoning them, and an order that he pay a certain sum of money into the clerk's office monthly for this purpose, and secure compliance therewith by executing a bond in the sum of $1,000 comes within the provisions of the statute. State v. Vickers, 196 N.C. 239, 145 S.E. 175 (1928).

Where a husband has been convicted of abandoning his wife and minor children, the order of the judge providing for their support should be definite in providing for the contingencies that may arise, such as the coming of age of the children, etc., and should state what part thereof is for the support of the wife and what part is for the support of the children; and an order requiring the defendant to pay a certain sum monthly into the office of the clerk of the superior court, under a bond of the defendant to secure compliance, without further provisions, will be remanded so that a more definite order be given in the judgment of the lower court. State v. Vickers, 196 N.C. 239, 145 S.E. 175 (1928).

Applied in State v. Woodland, 119 N.C. 779, 25 S.E. 719 (1896); National Council, Junior Order of United American Mechanics v. Tate, 212 N.C. 305, 193 S.E. 397, 113 A.L.R. 1514 (1937); State v. Evans, 262 N.C. 492, 137 S.E.2d 811 (1964); State v. Smith, 18 N.C. App. 308, 196 S.E.2d 519 (1973); State v. Buff, 32 N.C. App. 395, 232 S.E.2d 303 (1977).

Quoted in Jeffreys v. Hocutt, 195 N.C. 339, 142 S.E. 226 (1928).

Stated in State v. Robinson, 245 N.C. 10, 95 S.E.2d 126 (1956).

Cited in Steel v. Steel, 104 N.C. 631, 10 S.E. 707 (1889); State v. Henderson, 207 N.C. 258, 761 S.E. 758 (1934); Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941); State v. McDay, 232 N.C. 388, 61 S.E.2d 86 (1950); State v. Campo, 233 N.C. 79, 62 S.E.2d 500 (1950); State v. Clark, 234 N.C. 192, 66 S.E.2d 669 (1951); Lee v. Coffield, 245 N.C. 570, 96 S.E.2d 726 (1957); State v. Lowe, 254 N.C. 631, 119 S.E.2d 449 (1961); In re Custody of Hughes, 254 N.C. 434, 119 S.E.2d 189 (1961); State v. Stevens, 11 N.C. App. 402, 181 S.E.2d 159 (1971); State v. Hodges, 34 N.C. App. 183, 237 S.E.2d 576 (1977); In re Dinsmore, 36 N.C. App. 720, 245 S.E.2d 386 (1978).

II. NONSUPPORT OF SPOUSE.

Indictment. — An indictment against a husband for abandoning his wife must aver his failure to support her. State v. May, 132 N.C. 1020, 43 S.E. 819 (1903).

Abandonment and Failure to Support Must Be Willful. — By express language the abandonment and failure to support must be willful to create criminal offenses State v. Westmoreland, 255 N.C. 725, 122 S.E.2d 702 (1961).

Willful Abandonment May Signify Whether Failure to Support Was Willful. — Under certain circumstances the willful abandonment of a wife by a husband may be a significant factor in determining whether his failure to provide adequate support was willful, as when he leaves and goes to a new community where there is no prospect of equally

satisfactory employment. State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955).

An offer of a home when not made in good faith, and when refused, is equivalent to abandonment by the husband. State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913).

Separation by Consent. — Where the wife has consented to a separation from her husband, his leaving her is not an abandonment within the meaning of this section. State v. Smith, 164 N.C. 475, 79 S.E. 979 (1913).

Institution of bastardy proceedings prior to birth of child is insufficient to establish such abandonment as is contemplated by this section. In re Jane Doe, 231 N.C. 1, 56 S.E.2d 8 (1949).

Wife Guilty of Adultery. — Where a wife is guilty of adultery, her husband is not liable to prosecution for abandonment. State v. Hopkins, 130 N.C. 647, 40 S.E. 973 (1902).

Upon the trial of the husband for abandonment, under this section, the wife's unchastity is a defense, which he may put in issue by cross-examination or otherwise, with the burden remaining on the State to show his guilt beyond a reasonable doubt. State v. Falkner, 182 N.C. 793, 108 S.E. 756 (1921).

Statute of Limitations. — Where the abandonment consisted in the failure to remit her a certain sum of money periodically to a certain county in which his conduct had forced her to reside, the failure to support occurred at the time he failed to perform his agreement, and the statute will begin to run from that date. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

Same — Renewal of Cohabitation. — Where a man willfully abandons his wife, sends remittances for her support, returns and lives with her as man and wife for a while, and again abandons her, his willfully leaving her the second time without providing an adequate support for her is a fresh abandonment and failure to support, and an indictment found within two years therefrom is not barred by the statute of limitations. State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921).

Venue. — When the husband has agreed to a separation from his wife upon consideration of his remitting periodically a certain sum of money to a certain county in which she was to reside, and he fails to perform, the venue of an action under the provisions of this section is in that county. State v. Hooker, 186 N.C. 761, 120 S.E. 449 (1923).

Same — Where Husband Nonresident. — Where a man willfully abandons his wife in this State and fails to send her funds for an adequate support, when he was residing in another state, he cannot direct her choice of residence and is indictable under this section in the county of her residence. State v. Beam, 181 N.C. 597, 107 S.E. 429 (1921).

Instruction Properly Refused. — Plaintiff's contention that the court should have charged that the failure to provide support under this section must have been willful in order to constitute an abandonment was untenable. Hyder v. Hyder, 215 N.C. 239, 1 S.E.2d 540 (1939).

Crucial Questions for Jury — Defective Instruction. — Where, in a prosecution for abandonment and willful failure to support, the evidence tended to show that the husband was employed and had earnings, and had in some measure made provision for the support of the wife, the adequacy of such support and the willfulness of the defendant's failure to do more, were the crucial questions to be submitted to the jury, and an instruction to the effect that defendant's earning capacity made no difference was erroneous, and an instruction that the failure to provide support would be excusable only if the husband had no income or earning capacity whatsoever, was inexact. State v. Lucas, 242 N.C. 84, 86 S.E.2d 770 (1955).

Good Faith of Abandonment Question for Jury. — In a prosecution of a husband for abandonment the question whether such abandonment was in good faith, for the causes assigned, is for the jury. State v. Hopkins, 130 N.C. 647, 40 S.E. 973 (1902).

Proof of Adultery as Justification. — While ordinarily the husband may not withdraw his support from his wife and children, and compel her to leave him without violating this section, it is one of the exceptions to the rule under which the husband may prove justification, when she has committed adultery with another man, and an instruction which deprives the husband of this defense is reversible error. State v. Johnson, 194 N.C. 378, 139 S.E. 697 (1927).

Husband Cannot Be Twice Convicted. — A husband once convicted of an abandonment of his wife cannot be again tried for the same offense, he not having lived with her since the original abandonment. State v. Dunston, 78 N.C. 418 (1878).

Condonation by Wife Does Not Bar Prosecution. — Abandonment of the wife by the husband is a statutory offense, and it is not condoned, so far as the State's right to prosecute is concerned, by a subsequent resumption of the marital relation. State v. Manon, 204 N.C. 52, 167 S.E. 493 (1933).

Divorce after First Conviction No Defense on New Trial. — Where the husband has been indicted, tried, and convicted under this section for the criminal abandonment of his wife, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense. State v. Faulkner, 185 N.C. 635, 116 S.E. 168 (1923).

Abandonment under § 50-7(1) is not synonymous with the criminal offense defined in this section. Richardson v. Richardson, 268 N.C. 538, 151 S.E.2d 12 (1966).

There is a distinction between criminal abandonment and the matrimonial offense of desertion. Peoples v. Peoples, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

III. NONSUPPORT OF CHILDREN.

Sufficient Warrant. — A warrant charging defendant with willful refusal and neglect to provide adequate support for his minor children, naming them, was sufficient, abandonment not being an element of the offense since the 1957 amendment rewrote this section. State v. Goodmen, 266 N.C. 659, 147 S.E.2d 44 (1966).

The word "willfully" as used in § 49-2 is used with the same import as in this section. State v. Cook, 207 N.C. 261, 176 S.E. 757 (1934).

In a prosecution under this section, the failure by a defendant to provide adequate support for his child must be willful, that is, he intentionally and without just cause or excuse does not provide adequate support for his child according to his means and station in life, and this essential element of the offense must be alleged and proved. State v. Hall, 251 N.C. 211, 110 S.E.2d 868 (1959); State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Defective Instruction on Presumption of Willfulness. — Where the defendant was indicted under this section for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tended to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there was no presumption of willfulness from the failure to provide adequate support under § 14-323 (now repealed), and an instruction that left out this essential element of the crime was held to be reversible error. State v. Roberts, 197 N.C. 662, 150 S.E. 199 (1929).

Sufficient Evidence to Show Willful Abandonment and Failure to Support Minor Child. — Evidence that defendant refused to support his minor child although repeated demands were made on him after the parties had returned to this State, was held to show that the offense of willful abandonment and failure to support said minor child was committed by the defendant in this State, since this section provides that the abandonment of a minor child shall constitute a continuing offense. State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936).

Evidence Insufficient to Infer Willfulness. — Where there was no evidence in the record that the defendant was employed, or that he owned any property, or had any income or any ability whatsoever to contribute to the support of his children; nor any evidence that the defendant had failed to apply himself to some honest calling for the support of himself and family, or that he was a frequenter of drinking houses, or a known common drunkard, so as to bring the case within the presumption raised by § 14-323 (now repealed), the record was devoid of evidence from which the jury might infer that the defendant willfully or intentionally failed to discharge his obligation to support his children, and the defendant's motion for judgment as of nonsuit should have been allowed. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

This section has no application to illegitimate children, and therefore an indictment drawn under this section charging defendant with the abandonment of his illegitimate child fails to charge a crime. State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941).

This section relates only to legitimate children. An illegitimate child is not protected thereby. Allen v. Hunnicutt, 230 N.C. 49, 52 S.E.2d 18 (1949).

Denial of Paternity. — Where the husband in an action for nonsupport for a child admits the nonsupport, but denies that he is the father, and introduces evidence in support thereof, an instruction that withdraws the question of the paternity of the child from the jury is reversible error. State v. Ray, 195 N.C. 628, 143 S.E. 216 (1928).

Biological Paternity Not Irrelevant. — The common-law presumption of the husband's paternity is not a rule of substantive law making biological paternity irrelevant in a prosecution under this section. State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980).

Instruction as to Presumption of Legitimacy Held Not Unconstitutional. — In a prosecution for willfully refusing to provide adequate support for his child in violation of this section, where the child was conceived while defendant and her mother were living together as husband and wife; she was born after they had separated but during wedlock; and there was some evidence that her mother had sexual relations with another man after conception and during the period of gestation, a jury instruction on the common-law presumption of the child's legitimacy did not violate defendant's right to a trial by due process of law. State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980).

Rebutting Presumption of Paternity. — To require a defendant-husband to offer evidence of the physical impossibility of his fatherhood in order to rebut the presumption of paternity places upon him a burden of produc-

tion so stringent that, in effect, it unconstitutionally shifts the burden of persuasion to him on this issue. Due process precludes requiring that the defendant, in order to rebut the mandatory presumption, do more than offer some evidence which is sufficient to raise a factual issue as to the paternity of the child. State v. White, 300 N.C. 494, 268 S.E.2d 481 (1980).

This section in express terms constitutes the abandonment of children a continuing offense. The prosecution of an offense of this nature is a bar to a subsequent prosecution for the same offense charged to have been committed at any time before the institution of the first prosecution, but it is not a bar to a subsequent prosecution for continuing the offense thereafter, as this is a new violation of the law. State v. Hinson, 209 N.C. 187, 183 S.E. 397 (1936).

Due to continuing nature of the crime under this section, a person, arrested in Georgia and sought to be extradited to North Carolina, who temporarily came into the State after the commission of the crime, although for an innocent purpose, was a fugitive from justice when he again departed from the State. Daugherty v. Hornsby, 151 F.2d 799 (5th Cir. 1945).

Abandonment of children is a continuing offense, and therefore, termination of a prosecution in defendant's favor will not preclude a subsequent prosecution. State v. Smith, 241 N.C. 301, 84 S.E.2d 913 (1954).

A parent's willful failure or refusal to provide adequate support for his children is a continuing offense, and is not barred by any statute of limitations until the youngest child shall have reached the age of 18 years. State v. McMillan, 10 N.C. App. 734, 180 S.E.2d 35 (1971).

Autrefois Acquit and Convict. — In a prosecution for the violation of this section a plea by the defendant of former conviction of the same offense is good as to the period prior to the conviction, but it is not a bar to the prosecution for his failure to provide adequate support for his children subsequent thereto. State v. Jones, 201 N.C. 424, 160 S.E. 468 (1931).

If the mother is guilty of nonsupport, this section provides a remedy and this remedy is exclusive. Hensen v. Thomas, 231 N.C. 173, 56 S.E.2d 432, 12 A.L.R.2d 1171 (1949).

A father cannot, by contract, relieve himself of his obligation to support his child. Goodyear v. Goodyear, 257 N.C. 374, 126 S.E.2d 113 (1962).

Abandonment of Children after Divorce. — The father's duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law. State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

Statute of Limitations Repelled by Promise and Gifts. — The promise of a father to support his children and his making gifts to them was sufficient to repel the bar of the two-year statute of limitations, whether he was living in the home with them or otherwise, in proceedings under this section for his willfully abandoning them. State v. Bell, 184 N.C. 701, 115 S.E. 190 (1922).

§ 14-322.1. Abandonment of child or children for six months.

Any man or woman who, without just cause or provocation, willfully abandons his or her child or children for six months and who willfully fails or refuses to provide adequate means of support for his or her child or children during the six months' period, and who attempts to conceal his or her whereabouts from his or her child or children with the intent of escaping his lawful obligation for the support of said child or children, shall be punished as a Class H felon. (1963, c. 1227; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "shall be punished as a Class H felon" for "shall, upon conviction thereof, be guilty of a felony and punished in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-322.2: Repealed by Session Laws 1979, c. 838, s. 28.

§§ 14-323 to 14-325: Repealed by Session Laws 1981, c. 683, s. 3, effective July 1, 1981.

Cross References. — For present provisions as to abandonment and nonsupport of spouse or children, see § 14-322.

§ 14-325.1. When offense of failure to support child deemed committed in State.

The offense of willful neglect or refusal of a parent to support and maintain a child, and the offense of willful neglect or refusal to support and maintain one's illegitimate child, shall be deemed to have been committed in the State of North Carolina whenever the child is living in North Carolina at the time of such willful neglect or refusal to support and maintain such child. (1953, c. 677; 1981, c. 683, s. 2.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "parent" for "father" and "a child" for "his child or children" near the beginning of the section.

Legal Periodicals. — For brief comment on this section, see 31 N.C.L. Rev. 404 (1953).

§ 14-326: Repealed by Session Laws 1981, c. 683, s. 3, effective July 1, 1981.

Cross References. — For present provisions as to abandonment and nonsupport of spouse or children, see § 14-322.

§ 14-326.1. Parents; failure to support.

If any person being of full age, and having sufficient income after reasonably providing for his or her own immediate family shall, without reasonable cause, neglect to maintain and support his or her parent or parents, if such parent or parents be sick or not able to work and have not sufficient means or ability to maintain or support themselves, such person shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court; upon conviction of a second or subsequent offense he or she shall be punished by fine or by imprisonment not exceeding two years, or both, in the discretion of the court.

If there be more than one person bound under the provisions of the next preceding paragraph to support the same parent or parents, they shall share equitably in the discharge of such duty. (1955, c. 1099; 1969, c. 1045, s. 3.)

Local Modification. — Person: 1967, c. 848, s. 3.

Cross References. — Application of this section not altered by decree of emancipation. See § 7A-724.

Legal Periodicals. — For article entitled, "Juvenile Justice in Transition — A New Juvenile Code for North Carolina," see 16 Wake Forest L. Rev. 1 (1980).

CASE NOTES

Cited in Shealy v. Associated Transp., Inc., 252 N.C. 738, 114 S.E.2d 702 (1960).

ARTICLE 41.

Alcoholic Beverages.

§§ 14-327, 14-328: Repealed by Session Laws 1971, c. 872, s. 3.

§ 14-329. Manufacturing, trafficking in, transporting, or possessing poisonous alcoholic beverages.

(a) Any person who, either individually or as an agent for any person, firm or corporation, shall manufacture for use as a beverage, any spirituous liquor which is found to contain any foreign properties or ingredients poisonous to the human system, shall be punished as a Class H felon.

(b) Any person who, either individually or as agent for any person, firm or corporation, shall, knowing or having reasonable grounds to know of the poisonous qualities thereof, transport for other than personal use, sell or possess for purpose of sale, for use as a beverage, any spirituous liquor which is found to contain any foreign properties or ingredients poisonous to the human system, shall be punished as a Class H felon.

(c) Any person who, either individually or as agent for any person, firm or corporation, shall transport for other than personal use, sell or possess for purpose of sale, any spirituous liquor to be used as a beverage which is found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of a misdemeanor and shall be punished by imprisonment for not less than six months, and may be fined in the discretion of the court. In prosecutions under this subsection and under subsection (b) above, proof of transportation of more than one gallon of spirituous liquor will be prima facie evidence of transportation for other than personal use, and proof of possession of more than one gallon of spirituous liquor will be prima facie evidence of possession for purpose of sale.

(d) Any person who, either individually or as agent for any person, firm or corporation, shall transport or possess, for use as a beverage, any illicit spirituous liquor which is found to contain any foreign properties or ingredients poisonous to the human system, shall be guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200.00), and may be imprisoned in the discretion of the court: Provided, anyone charged under this subsection may show as a complete defense that the spirituous liquor in question was legally obtained and possessed and that he had no knowledge of the poisonous nature of the beverage. (1873-4, c. 180, ss. 1, 2; Code, s. 983; Rev., s. 3522; C. S., s. 4453; 1961, c. 897; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and shall be punished by imprisonment in the State's prison not less than five years, and may be fined in the discretion of the court" at the end of subsection (a) and "punished as a Class H felon" for "guilty of the felony and shall be punished by imprisonment in the State's prison for not less than twelve months, and may be fined in the discretion of the court" at the end of subsection (b). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Applied in State v. Barefoot, 254 N.C. 308, 118 S.E.2d 758 (1961), decided prior to the 1961 amendment.

§§ 14-330 to 14-332: Repealed by Session Laws 1971, c. 872, s. 3.

Editor's Note. — Section 14-330 was also repealed by Session Laws 1971, c. 168.

ARTICLE 42.

Public Drunkenness.

§ 14-333: Repealed by Session Laws 1971, c. 872, s. 3.

§§ 14-334 to 14-335.1: Repealed by Session Laws 1977, 2nd Session, c. 1134, s. 6.

Cross References. — For present provisions as to public intoxication, see §§ 14-443 et seq. and 122-65.10 et seq.

ARTICLE 43.

Vagrants and Tramps.

§ 14-336. Persons classed as vagrants.

If any person shall come within any of the following classes, he shall be deemed a vagrant, and shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days: provided, however, that this limitation of punishment shall not be binding except in cases of a first offense, and in all other cases such person shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. The classes are:

(1) Persons wandering or strolling about in idleness, who are able to work and have no property to support them.

(2) Persons leading an idle, immoral or profligate life, who have no property to support them and who are able to work and do not work.

(3) All persons able to work having no property to support them and who have not some visible and known means of a fair, honest and reputable livelihood.

(4) Persons having a fixed abode who have no visible property to support them and who live by stealing or by trading in, bartering for or buying stolen property.

(5) Professional gamblers living in idleness.

(6) All able-bodied men having no other visible means of support who shall live in idleness upon the wages or earnings of their mother, wife or minor children, except of male children over eighteen years old.

(7) Keepers and inmates of bawdy houses, assignation houses, lewd and disorderly houses, and other places where illegal sexual intercourse is habitually carried on: provided, that nothing here is intended or shall be construed as abolishing the crime of keeping a bawdy house, or lessening the punishment by law for such crime. (1905, c. 391; Rev., s. 3740; 1907, c. 1012, s. 1; 1913, c. 75; 1915, c. 1; C. S., s. 4459; 1969, c. 1224, s. 21.)

Cross References. — As to prostitution, see § 14-203.

Legal Periodicals. — For note, "Federal Court Intervention as Protection against Illegal Police Harassment," see 48 N.C.L. Rev. 138 (1969).

For comment entitled "Vagrancy — A Crime of Status," see 6 Wake Forest Intra. L. Rev. 307 (1970).

CASE NOTES

This section is unconstitutional and its enforcement is permanently enjoined. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This section is void for vagueness and overbreadth. The section's terms do not give fair notice of what acts are criminally prohibited and are so broad as to embrace, on its face, obviously innocent activities. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This section is unconstitutional because it is vague and overbroad; because it punishes mere status; and because it invidiously discriminates against those without property, all in violation of the Fourteenth Amendment. Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969).

This vagrancy statute is properly attacked on its face as being vague and overbroad; it suppresses free expression and free association; no single criminal state court prosecution could conceivably explore and clarify and limit its myriad possible constructions. Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969).

§ 14-337: Repealed by Session Laws 1973, c. 108, s. 13.

§ 14-338. Tramp defined and punishment provided; certain persons excepted.

If any person shall go about from place to place begging or subsisting on charity, he shall be denominated a tramp, and shall be punished by a fine not exceeding fifty dollars ($50.00), or by imprisonment not exceeding 30 days: provided, that any person who shall furnish satisfactory evidence of good character shall be discharged without cost. Any act of begging or vagrancy by any person, unless a well-known object of charity, shall be evidence that the person committing the same is a tramp. This section shall not apply to any woman, to any minor under the age of 14 years, or to any blind person. (1879, c. 198, ss. 1, 4, 6; Code, ss. 3828, 3829, 3831, 3833; 1897, c. 268; Rev., s. 3735; C. S., s. 4461.)

§ 14-339. Trespassing and the carrying of dangerous weapons by tramps.

If any tramp shall enter any dwelling house or kindle any fire on the land of another without the consent of the owner or occupant thereof, or shall kindle a fire on any highway, or shall be found carrying any firearm or other dangerous weapon, or shall threaten to do any injury to the person, or to the real or

personal estate, of another, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1879, c. 198, s. 2; Code, s. 3829; Rev., s. 3736; C. S., s. 4462; 1969, c. 1224, s. 18.)

§ 14-340: Repealed by Session Laws 1971, c. 700.

§ 14-341: Repealed by Session Laws 1971, c. 699.

ARTICLE 44.

Regulation of Sales.

§ 14-342. Selling or offering to sell meat of diseased animals.

If any person shall knowingly and willfully slaughter any diseased animal and sell or offer for sale any of the meat of such diseased animal for human consumption, or if any person knows that the meat offered for sale or sold for human consumption by him is that of a diseased animal, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (1905, c. 303; Rev., s. 3442; C. S., s. 4465.)

§ 14-343. Unauthorized dealing in railroad tickets.

If any person shall sell or deal in tickets issued by any railroad company, unless he is a duly authorized agent of the railroad company, or shall refuse upon demand to exhibit his authority to sell or deal in such tickets, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1895, c. 83, s. 1; Rev., s. 3764; C. S., s. 4466; 1969, c. 1224, s. 1.)

§ 14-344. Sale of admission tickets in excess of printed price.

Any person, firm, or corporation shall be allowed to add a reasonable service fee to the face value of the tickets sold, and the person, firm, or corporation which sells or resells such tickets shall not be permitted to recoup funds greater than the combined face value of the ticket and the authorized service fee. This fee shall not exceed one dollar ($1.00) for each ticket. This service fee may be a pre-established amount per ticket or a percentage of each ticket. The existence of the service fee shall be made known to the public by printing or writing the amount of the fee on the tickets which are printed for the event. Any person, firm or corporation which sells or offers to sell a ticket for a price greater than the price permitted by this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1941, c. 180; 1969, c. 1224, s. 8; 1977, c. 9; 1979, c. 909; 1981, c. 36.)

Effect of Amendments. — The 1981 amendment, effective Oct. 1, 1981, substituted "one dollar ($1.00) for each ticket" for "ten percent (10%) of the sales price" at the end of the second sentence.

§ 14-345. Sale of cotton at night under certain conditions.

If any person shall buy, sell, deliver or receive, for a price, or for any reward whatever, any cotton in the seed, or any unpacked lint cotton, brought or carried in a basket, hamper or sheet, or in any mode where the quantity is less than what is usually baled, or where the cotton is not baled, between the hours of sunset and sunrise, such person so offending shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1873-4, c. 62; 1874-5, c. 70; Code, s. 1006; 1905, c. 417; Rev., s. 3813; C. S., s. 4467; 1969, c. 1224, s. 1.)

Local Modification. — Mecklenburg, Nash: C. S. 4467.

CASE NOTES

Cited in State v. Moore, 104 N.C. 714, 10 S.E. 143 (1889); State v. Yarboro, 194 N.C. 498, 140 S.E. 216 (1927).

§ 14-346. Sale of convict-made goods prohibited.

(a) It shall be unlawful to sell or to offer for sale anywhere within the State of North Carolina any articles or commodities manufactured or produced, wholly or in part, in this State or elsewhere by convicts or prisoners, except

(1) Articles or commodities manufactured or produced by convicts on probation or parole or prisoners released part time for regular employment in the free community, and

(2) Products of agricultural or forestry enterprises or quarrying or mining operations in which inmates of any penal or correctional institution of this State are employed, and

(3) Articles and commodities manufactured or produced in any penal or correctional institution of this State for sale to departments, institutions, and agencies supported in whole or in part by the State, or to any political subdivision of this State, for the use of these departments, institutions, agencies, and political subdivisions of the State and not for resale, and

(4) Articles of handicraft made by the inmates of any penal or correctional institution of this State during their leisure hours and with their own materials.

(b) Any person, firm or corporation selling, undertaking to sell, or offering for sale any prison-made or convict-made goods, wares or merchandise, anywhere within the State, in violation of the provisions of this section, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Each sale or offer to sell, in violation of the provisions of this section, shall constitute a separate offense. (1933, c. 146, ss. 1-4; 1959, c. 170, s. 1; 1969, c. 1224, s. 4.)

§ 14-346.1. Sale of bay rum.

It shall be unlawful for any person, firm or corporation to sell or offer for sale any bay rum in the State of North Carolina, or to cause any delivery of bay rum to be made in the State of North Carolina pursuant to any sale thereof, except:

(1) When such sale is made to a pharmacy or drugstore, supervised by a person licensed as a pharmacist or assistant pharmacist as described in G.S. 90-71;

(2) When such sale is made pursuant to a prescription of some duly licensed physician, or
(3) When such sale is made to a duly licensed barber for use in the course of treatments given or services performed in a barbershop, and not for resale.

Any person who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine not exceeding five hundred dollars ($500.00), imprisonment for not more than six months, or both.

The provisions of this section shall not apply to the following counties: Anson, Beaufort, Bertie, Brunswick, Burke, Camden, Caswell, Columbus, Craven, Currituck, Dare, Duplin, Edgecombe, Forsyth, Franklin, Gates, Greene, Halifax, Harnett, Hertford, Hoke, Hyde, Johnston, Lenoir, Lincoln, Martin, Moore, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Randolph, Robeson, Stanly, Tyrrell and Wilson. (1951, c. 1096; 1953, cc. 179, 181, 411; 1955, c. 947; 1959, c. 1300; 1963, c. 260; 1967, c. 746; 1969, c. 1224, s. 19.)

§ 14-346.2. Sale of certain articles on Sunday prohibited; counties excepted.

Any person, firm or corporation who engages on Sunday in the business of selling, or sells or offers for sale on such day, clothing and wearing apparel, clothing accessories, furniture, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments or recordings, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

Each separate sale or offer to sell shall constitute a separate offense: provided this section shall not be applicable to Avery, Brunswick, Camden, Carteret, Cherokee, Clay, Currituck, Dare, Graham, Haywood, Henderson, Hyde, Jackson, Macon, Madison, Mitchell, New Hanover, Pamlico, Pender, Polk, Swain, Transylvania, Watauga, Wilkes and Yancey counties. (1961, c. 1156; 1963, c. 488; 1969, c. 1224, s. 4.)

Editor's Note. — The 1963 amendatory act provides that it shall not apply to Chimney Rock township of Rutherford County, Colly township of Bladen County or Edneyville township of Henderson County, or to facilities within the right-of-way of the Blue Ridge Parkway in Ashe, Alleghany and Watauga counties, or to Blowing Rock township of Watauga County. The act further provides that:

"The areas that are exempted from this act by the foregoing provisions are so exempted upon the classification of such areas as resort or tourist areas, the General Assembly recognizing that different considerations apply to such areas. By exempting from this act the General Assembly hereby classifies such areas as resort or tourist areas."

Legal Periodicals. — For case law survey on blue laws, see 41 N.C.L. Rev. 431 (1963).

For an article on local legislation in the General Assembly discussing this section, see 45 N.C.L. Rev. 340 (1967).

CASE NOTES

Constitutionality. — The 1963 amendment is not general because it does not apply to and operate uniformly on all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law. On the contrary, it applies to and operates only on merchants in designated counties or portions thereof and not on similarly situated merchants in other counties or portions thereof and no reasonable basis exists for the attempted classification of the exempted counties or portions thereof as resort areas or tourist areas; hence, the 1963 amendment must be considered a local and special act in violation of N.C. Const., Art II, § 29, and therefore void. Treasure City of Fayetteville, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964).

For constitutionality of section prior to the 1963 amendment, see G.I. Surplus Store, Inc. v. Hunter, 257 N.C. 206, 125 S.E.2d 764 (1962).

Cited in High Point Surplus Co. v. Pleasants, 264 N.C. 650, 142 S.E.2d 697 (1965).

ARTICLE 45.

Regulation of Employer and Employee.

§ 14-347: Repealed by Session Laws 1971, c. 350.

§ 14-348: Repealed by Session Laws 1971, c. 701.

§ 14-349: Repealed by Session Laws 1971, c. 351.

§ 14-350: Repealed by Session Laws 1971, c. 352.

§ 14-351: Repealed by Session Laws 1971, c. 353.

§ 14-352: Repealed by Session Laws 1971, c. 354.

§ 14-353. Influencing agents and servants in violating duties owed employers.

Any person who gives, offers or promises to an agent, employee or servant any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business; any agent, employee or servant who requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner in relation to his principal's, employer's or master's business; any agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives, directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers such an agent, employee or servant such commission, discount or bonus, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1913, c. 190, s. 1; C. S., s. 4475; 1969, c. 1224, s. 6.)

Legal Periodicals. — For list of articles respecting acts prohibited by this section and similar statutes, and "commercial bribery" and influencing of employees, see State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

CASE NOTES

Constitutionality. — The first two parts of this section are not repugnant to the "due process of law" clause of the Fourteenth Amendment to the United States Constitution, and to "the law of the land" clause of Const., Art. I, § 17, and are a reasonable and proper exercise of the police power of the State. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

The acts prohibited in the first clause of this section are stated in words sufficiently explicit, clear and definite to inform any man of ordinary intelligence what conduct on his part will render him liable to its penalties. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Although the second clause of this section employs general terms, the words used are sufficiently explicit and definite to convey to any man of ordinary intelligence and understanding an adequate description of the prohibited act or acts, and to inform him of what conduct on his part will render him liable to its penalties. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

The first two parts of this section are divisible and separable from the remainder of the statute. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

A violation of this section is not a malicious misdemeanor. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

A violation of the first clause of this section is related to unfair trade practices, and is an unfair method of competition. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

And Is Commonly Called "Commercial Bribery." — If a person does the prohibited act or acts specified in the first clause of this section with the intent explicitly stated therein, he is guilty of what is commonly called "commercial bribery." State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Such Practices Are Generally Prohibited. — There is general agreement that where an agent or employee receives money or other considerations from a person in return for the agent's or employee's efforts to further that person's interest in business dealings between him and the principal or employer, such an act or acts on the part of the agent or employee and on the part of the person who gives the money or other consideration is an essential element of the offense prohibited. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

The intent specified in the first clause of this section is an essential element of the offense. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

As Is Agreement or Understanding in Second Clause. — The agreement or understanding in the second clause of this section is an essential element of the offense. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

First Clause Does Not Prohibit Customary Tipping. — A contention that the language of the first clause of this section is so broad as to prohibit the customary habit of tipping is untenable. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Since Tipping Lacks Intent to Influence. — Customary tipping is in obedience to custom or in appreciation of service, and is done with no intent to influence the action of the person receiving the tip in relation to his or her employer's business, and as to tipping done in such a manner the statute is not applicable. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

But If Such Intent Is Present, Tipping May Be Violation. — It is possible that a person by tipping an agent, servant or employee with the intent specified in the first clause of this section could bring himself within its penalties, e.g., by giving substantial amounts or considerations and calling them tips. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Second Clause Is Intended to Prohibit Disloyalty by Employees. — The plain intent and purpose of the second clause of this section is to prohibit any agent, employee or servant from being disloyal and unfaithful to his principal, employer or master. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

The third and fourth parts of this section refer to a commission, discount or bonus received by any agent, employee or servant under the circumstances therein specified, and to any person who gives or offers such an agent, employee, or servant such commission, discount or bonus. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Parties to Prohibited Acts Generally Only Witnesses. — The activities necessary to accomplish the offenses prohibited by this section and similar statutes, require no violence, embody no traces in lasting form, and frequently, if not almost entirely, have no witnesses other than persons implicated or potentially implicated. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Failure to Prove Conspiracy Does Not Bar Conviction of Substantive Offense. — Although the State failed to prove that one of the defendants was one of the conspirators and was guilty of the conspiracy alleged against him in one count in the indictment, he could still be convicted of the substantive offenses committed by him in violation of this section, as charged against him in other counts. State v. Brewer, 258 N.C. 533, 129 S.E.2d 262, appeal dismissed, 375 U.S. 9, 84 S. Ct. 72, 11 L. Ed. 2d 40 (1963).

Cited in State v. Fredell, 283 N.C. 242, 195 S.E.2d 300 (1973).

§ 14-354. Witness required to give self-incriminating evidence; no suit or prosecution to be founded thereon.

No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and other documents before any court, or in obedience to the subpoena of any court, having jurisdiction of the crime denounced in G.S. 14-353, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or to subject him to a penalty or to a forfeiture; but no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before such court or in obedience to its subpoena or in any such case or proceeding: Provided, that no person so testifying or producing any such books, papers, contracts, agreements or other documents shall be exempted from prosecution and punishment for perjury committed in so testifying. (1913, c. 190, s. 2; C. S., s. 4476.)

Cross References. — As to constitutional provisions against self-criminating evidence, see N.C. Const., Art. I, § 11, and note thereto, and the United States Constitution, Amendment V.

Legal Periodicals. — For an article discussing the limits to self-incrimination, see 15 N.C.L. Rev. 229.

CASE NOTES

Stated in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-355. Blacklisting employees.

If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars ($500.00); and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action. This section shall not be construed as prohibiting any person or agent of any company or corporation from furnishing in writing, upon request, any other person, company or corporation to whom such discharged person or employee has applied for employment, a truthful statement of the reason for such discharge. (1909, c. 858, s. 1; C. S., s. 4477.)

Legal Periodicals. — For note on worker's compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

CASE NOTES

Intent of Section. — This section was intended to correct the abuse under the common law of statements made concerning a discharged employee out of malice, where damages for the loss of employment were difficult of admeasurement; and under the provisions of the act a statement made as to the standing of the discharged employee is not privileged, if made maliciously. Seward v. Receivers of Seaboard Air Line Ry., 159 N.C. 241, 75 S.E. 34 (1912).

Remedial Provisions. — The provisions of this section and § 14-356 are remedial and do not put the burden upon the plaintiff of showing either malice or actual damages. Goins v. Sargent, 196 N.C. 478, 146 S.E. 131 (1929).

What Constitutes a Violation. — Where an employer has discharged his employee for being a member of a lawful association of like employees, and has advised others, without a request from them, who would have engaged the services of such employee that he would not sell his product to them should they employ him, and thus has prevent the discharged employee from getting employment within the State, and forced him to obtain employment in another state, depriving him of his living at home here with his family, etc., the employee is entitled to recover damages in his civil action against his former employer, and a demurrer ore tenus to a complaint setting forth this cause of action is bad. Goins v. Sargent, 196 N.C. 478, 146 S.E. 131 (1929).

Cited in Scott v. Burlington Mills Corp., 245 N.C. 100, 95 S.E.2d 273 (1956); Arnold v. Sharpe, 37 N.C. App. 506, 246 S.E.2d 556 (1978).

§ 14-356. Conspiring to blacklist employees.

It shall be unlawful for two or more persons to agree together to blacklist any discharged employee or to attempt, by words or writing or any other means whatever, to prevent such discharged employee, or any employee who may have voluntarily left the service of his employer, from obtaining employment with any other person or company. Persons violating the provisions of this section shall be guilty of a misdemeanor and shall be fined or imprisoned, or both, at the discretion of the court. (1909, c. 858, s. 2; C. S., s. 4478.)

Legal Periodicals. — See note to § 14-355.

For comment on criminal conspiracy in North Carolina, see 39 N.C.L. Rev. 422 (1962).

CASE NOTES

Cited in Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A.L.R. 1217 (1941).

§ 14-357. Issuing nontransferable script to laborers.

If any person who employs laborers by the day, week or month shall issue in payment for the services of such laborers any ticket, certificate or other script bearing upon its face the word "nontransferable," or shall issue such ticket, certificate or other script in any form that would render it void by transfer from the person to whom issued, or shall refuse to pay to the person holding the same its face value, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars ($10.00) nor more than fifty dollars ($50.00) for each offense, or imprisoned not more than 30 days. (1889, c. 280; 1891, cc. 46, 78, 167, 370, 456; 1895, c. 127; Rev., s. 3730; C. S., s. 4479.)

CASE NOTES

"Face Value" Defined. — The "face value" is the value expressed on the face of the writing in the commodity in which it is payable. W.C. Marriner & Bros. v. John L. Roper Co., 112 N.C. 164, 16 S.E. 906 (1893).

Rights of Assignee. — This section does not authorize the assignee of a ticket or script payable in merchandise to demand and receive payment in money instead of in merchandise. W.C. Marriner & Bros. v. John L. Roper Co., 112 N.C. 164, 16 S.E. 906 (1893).

§ 14-357.1. Requiring payment for medical examination, etc., as condition of employment.

(a) It shall be unlawful for any employer, as defined in subsection (b) of this section, to require any applicant for employment, as defined in subsection (c), to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of the initial act of hiring.

(b) The term "employer" as used in this section shall mean and include an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water, air, or express company, doing business in or operating within the State.

Provided that this section shall not apply to any employer as defined in this subsection who employs less than 25 employees.

(c) The term "applicant for employment" shall mean and include any person who seeks to be permitted, required or directed by any employer, as defined in subsection (b) hereof, in consideration of direct or indirect gain or profit, to engage in employment.

(d) Any employer who violates the provisions of this section shall be liable to a fine of not more than one hundred dollars ($100.00) for each and every violation. It shall be the duty of the Commissioner of Labor to enforce this section. (1951, c. 1094.)

ARTICLE 46.

Regulation of Landlord and Tenant.

§ 14-358. Local: Violation of certain contracts between landlord and tenant.

If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord shall contract with a tenant or cropper to furnish him advances to enable him to make a crop, and shall willfully fail or refuse, without good cause, to furnish such advances according to his agreement with intent to defraud the tenant, he shall be guilty of a misdemeanor and shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. Any person employing a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances for the amount thereof, and shall also be guilty of a misdemeanor, and fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. This section shall apply to the following counties only: Alamance, Alexander, Beaufort, Bertie, Bladen, Cabarrus, Camden, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Duplin, Edgecombe, Gaston, Gates, Greene, Halifax, Harnett, Hertford, Johnston, Jones, Lee, Lenoir, Lincoln, Martin, Mecklenburg, Montgomery, Nash, Northampton, Onslow, Pamlico, Pender, Perquimans, Person, Pitt, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Tyrrell, Vance, Wake, Warren, Washington, Wayne, Wilson and Yadkin. (1905, cc. 297, 383, 445, 820; Rev., s. 3366; 1907, c. 8; c. 84, s. 1; c. 595, s. 1; cc. 639, 719, 869; Pub. Loc. 1915, c. 18; C. S., s. 4480; Ex. Sess. 1920, c. 26; 1925, c. 285, s. 2; Pub. Loc. 1925, c. 211; Pub. Loc. 1927, c. 614; 1931, c. 136, s. 1; 1945, c. 635; 1953, c. 474.)

Cross References. As to ejectment of tenant, see § 42-26 and note thereto.

CASE NOTES

Constitutionality. — The provisions of this section contravene N.C. Const., Art. I, § 16, prohibiting imprisonment for debt, except in cases of fraud; and an indictment thereunder, without averment of fraud, will be quashed. State v. Williams, 150 N.C. 802, 63 SE. 949 (1909); Minton v. Early, 183 N.C. 199, 111 S.E. 347 (1922).

Indictment Insufficient. — An indictment under the provisions of this section which does not charge that the abandonment of the crop by tenant or cropper was "without cause" and "before paying for such advances," should be quashed as insufficient. State v. Williams, 150 N.C. 802, 63 S.E. 949 (1909).

§ 14-359. Local: Tenant neglecting crop; landlord failing to make advances; harboring or employing delinquent tenant.

If any tenant or cropper shall procure advances from his landlord to enable him to make a crop on the land rented by him, and then willfully refuse to cultivate such crops or negligently or willfully abandon the same without good cause and before paying for such advances with intent to defraud the landlord; or if any landlord who induces another to become tenant or cropper by agreeing to furnish him advances to enable him to make a crop, shall willfully fail or refuse without good cause to furnish such advances according to his agreement with intent to defraud the tenant, or if any person shall entice, persuade or procure any tenant, lessee or cropper, who has made a contract agreeing to cultivate the land of another, to abandon or to refuse or fail to cultivate such land with intent to defraud the landlord, or after notice shall harbor or detain on his own premises, or on the premises of another, any such tenant, lessee or cropper, he shall be guilty of a misdemeanor and shall be fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. Any person who employs a tenant or cropper who has violated the provisions of this section, with knowledge of such violation, shall be liable to the landlord furnishing such advances, for the amount thereof. This section shall apply only to the following counties: Alamance, Anson, Cabarrus, Caswell, Davidson, Franklin, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Lee, Lincoln, Moore, Person, Randolph, Richmond, Rockingham, Rowan, Rutherford, Sampson, Stanly, Stokes, Union, Vance, Wake and Washington. (1905, c. 299, ss. 1-7; Rev., s. 3367; 1907, c. 84, s. 2; c. 238, s. 1; c. 543; c. 595, s. 2; c. 810; C. S., s. 4481; Ex. Sess. 1920, cc. 20, 26; 1923, c. 32; 1925, c. 285, s. 3; Pub. Loc. 1927, c. 614; 1929, c. 5, s. 1; 1931, c. 44; c. 136, s. 2; 1939, c. 95; 1945, c. 635; 1949, c. 83; 1951, c. 615.)

Cross References. — As to willful destruction of landlord's property by the tenant, see § 42-11.

ARTICLE 47.

Cruelty to Animals.

§ 14-360. Cruelty to animals; construction of section.

If any person shall willfully overdrive, overload, wound, injure, torture, torment, deprive of necessary sustenance, cruelly beat, needlessly mutilate or kill or cause or procure to be overdriven, overloaded, wounded, injured, tortured, tormented, deprived of necessary sustenance, cruelly beaten, needlessly mutilated or killed as aforesaid, any useful beast, fowl or animal, every such offender shall for every such offense be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. In this section, and in every law which may be enacted relating to animals, the words "animal" and "dumb animal" shall be held to include every living creature; the words "torture," "torment" or "cruelty" shall be held to include every act, omission or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted. Such terms shall not be construed to prohibit the lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission. (1881, c. 34, s. 1; c. 368, ss. 1, 15; Code, ss. 2482, 2490; 1891, c. 65; Rev., s. 3299; 1907, c. 42; C. S., s. 4483; 1969, c. 1224, s. 2; 1979, c. 641.)

Cross References. — As to livestock, see also § 14-366.

CASE NOTES

This section is for the protection of animals. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

It is not for the protection of trespassers or mere licensees. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

Hence, Unlawful Shooting at Dog Is Not Negligence Per Se. — Where plaintiff, who was struck by a bullet fired by defendant, was at best a mere licensee, the fact that defendant was unlawfully shooting at a dog did not render the act negligence per se, nor impose on defendant absolute liability. Since this section is not for the protection of the class to which plaintiff belonged, its violation did not impose liability in the absence of a showing that defendant knew, or in the exercise of reasonable care should have known, of plaintiff 's presence in the vicinity. Belk v. Boyce, 263 N.C. 24, 138 S.E.2d 789 (1964).

The word "willful" as used in criminal statutues signifies more than the mere intention to do a thing, and means the commission of the act "without just cause, excuse, or justification." State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939); State v. Fowler, 22 N.C. App. 144, 205 S.E.2d 749 (1974).

Unnecessary suffering knowingly and willfully permitted constitutes the offense. State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893).

Finding Required for Conviction. — In order to convict there must be a finding that the act was "willfully and unlawfully" done. State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

A dog is a useful animal within the meaning of this section. State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939).

Unnecessary to Show Dog Has Pecuniary Value. — It is unnecessary to show that a dog is of a pecuniary value to the owner to maintain an indictment for cruelty forbidden by the section. State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911).

Punishment in Effort to Train. — Punishment administered to an animal in an honest and good faith effort to train it is not without justification and not willful. State v. Fowler, 22 N.C. App. 144, 205 S.E.2d 749 (1974).

Anger No Excuse. — Anger does not excuse the killing when it was willful and needless. And under such circumstances the intent is immaterial. State v. Neal, 120 N.C. 613, 27 S.E. 81 (1897).

Evidence of Dog's Presence on Property Properly Excluded. — In a prosecution for needlessly killing a useful dog, evidence that a dog, not identified as the dog killed, had frequented the place where defendant was employed, resulting in unpleasant odors around the place, and that the dog had barked at night,

is properly excluded from the evidence upon the State's objection, since the evidence does not tend to establish justification, the presence of the dog on the premises giving the defendant only the right to drive him away but not to injure him unnecessarily, and previous offenses committed by the dog not being justification for killing him, the right to kill being founded on the immediate necessity of protecting property, a person, or another animal. State v. Dickens, 215 N.C. 303, 1 S.E.2d 837 (1939).

Injury to Prevent Depredations No Defense. — The fact that cows (State v. Butts, 92 N.C. 784 (1885)) or chickens (State v. Neal, 120 N.C. 613, 27 S.E. 81 (1897)) were trespassing on defendant's property is not a defense to an action under this section, where the killing or wounding was unnecessary. See also State v. Smith, 156 N.C. 628, 72 S.E. 321 (1911).

Indictment. — The facts constituting torturing, tormenting or cruel conduct must be set out when such conduct is charged. State v. Watkins, 101 N.C. 702, 8 S.E. 346 (1888).

A charge that defendant "did unlawfully and willfully beat" was held sufficient in State v. Allison, 90 N.C. 733 (1884).

Illustrations. — Shooting pigeons for sport (State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893)) and poisoning chickens (State v. Bossee, 145 N.C. 579, 59 S.E. 879 (1907)) have been held violations of the section.

Hitting a runaway horse with a rock, however, has been held insufficient to sustain a direct verdict — the question of the willful purpose to injure being for the jury. State v. Isley, 119 N.C. 862, 26 S.E. 35 (1896).

Applied in State v. Holt, 90 N.C. 749 (1884); State v. Candler, 25 N.C. App. 318, 212 S.E.2d 901 (1975); State v. Simmons, 36 N.C. App. 354, 244 S.E.2d 168 (1978).

Quoted in State ex rel. Bruton v. American Legion Post No. 113, 256 N.C. 691, 124 S.E.2d 885 (1962).

§ 14-361. Instigating or promoting cruelty to animals.

If any person shall willfully set on foot, or instigate, or move to, carry on, or promote, or engage in, or do any act towards the furtherance of any act of cruelty to any animal, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1881, c. 368, s. 6; Code, s. 2487; 1891, c. 65; Rev., s. 3300; C. S., s. 4484; 1953, c. 857, s. 1; 1969, c. 1224, s. 3.)

CASE NOTES

Cited in State v. Porter, 112 N.C. 887, 16 S.E. 915 (1893).

§ 14-361.1. Abandonment of animals.

Any person being the owner or possessor, or having charge or custody of an animal, who willfully and without justifiable excuse abandons the animal is guilty of a misdemeanor punishable by a fine of up to two hundred dollars ($200.00). (1979, c. 687.)

§ 14-362. Bearbaiting, cockfighting and similar amusements.

If any person shall keep, or use, or in any way be connected with, or interested in the management of, or shall receive money for the admission of any person to, any place kept or used for the purpose of fighting, or baiting any bull, bear, dog, cock, or other animal; or if any person shall encourage, aid or assist therein, or shall permit or suffer any place to be so kept or used, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1881, c. 368, s. 2; Code, s. 2483; 1891, c. 65; Rev., s. 3301; C. S., s. 4485; 1953, c. 857, s. 2; 1969, c. 1224, s. 3.)

§ 14-363. Conveying animals in a cruel manner.

If any person shall carry or cause to be carried in or upon any vehicle or other conveyance, any animal in a cruel or inhuman manner, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. Whenever an offender shall be taken into custody therefor by any officer, the officer may take charge of such vehicle or other conveyance and its contents, and deposit the same in some safe place of custody. The necessary expenses which may be incurred for taking charge of and keeping and sustaining the vehicle or other conveyance shall be a lien thereon, to be paid before the same can be lawfully reclaimed; or the said expenses, or any part thereof remaining unpaid, may be recovered by the person incurring the same of the owner of such animal in an action therefor. (1881, c. 368, s. 5; Code, s. 2486; 1891, c. 65; Rev., s. 3302; C. S., s. 4486; 1953, c. 857, s. 3; 1969, c. 1224, s. 4.)

§ 14-363.1. Living baby chicks or other fowl, or rabbits under eight weeks of age; disposing of as pets or novelties forbidden.

If any person, firm or corporation shall sell, or offer for sale, barter or give away as premiums living baby chicks, ducklings, or other fowl or rabbits under eight weeks of age as pets or novelties, such person, firm or corporation shall be guilty of a misdemeanor punishable by a fine not to exceed one hundred dollars ($100.00) or imprisonment for not more than 30 days, or both. Provided, that nothing contained in this section shall be construed to prohibit the sale of nondomesticated species of chicks, ducklings, or other fowl, or of other fowl from proper brooder facilities by hatcheries or stores engaged in the business of selling them for purposes other than for pets or novelties. (1973, c. 466, s. 1.)

§ 14-363.2. Confiscation of cruelly treated animals.

Conviction of any offense contained in this Article may result in confiscation of cruelly treated animals belonging to the accused and it shall be proper for the court in its discretion to order a final determination of the custody of the confiscated animals. (1979, c. 640.)

Article 48.

Animal Diseases.

§ 14-364: Repealed by Session Laws 1945, c. 635.

Article 49.

Protection of Livestock Running at Large.

§ 14-365: Repealed by Session Laws 1971, c. 110.

§ 14-366. Molesting or injuring livestock.

If any person shall unlawfully and on purpose drive any livestock, lawfully running at large in the range, from said range, or shall kill, maim or injure any livestock, lawfully running at large in the range or in the field or pasture of

the owner, whether done with actual intent to injure the owner, or to drive the stock from the range, or with any other unlawful intent, every such person, his counselors, aiders, and abettors, shall be guilty of a misdemeanor: provided, that nothing herein contained shall prohibit any person from driving out of the range any stock unlawfully brought from other states or places. In any indictment under this section it shall not be necessary to name in the bill or prove on the trial the owner of the stock molested, maimed, killed or injured. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1850, c. 94, ss. 1, 2; R. C., c. 34, s. 104; Code, s. 1002; 1885, c. 383; 1887, c. 368; 1895, c. 190; Rev., s. 3314; C. S., s. 4494; 1969, c. 1224, s. 9.)

Local Modification. — Graham, Haywood, Jackson, Swain, Transylvania: C.S. 4494.

Cross References. — As to cruelty to animals, see § 14-360.

CASE NOTES

Applied in State v. Pollard, 83 N.C. 598 (1880); State v. Tweedy, 115 N.C. 704, 20 S.E. 183 (1894).

§ 14-367. Altering the brands of and misbranding another's livestock.

If any person shall knowingly alter or deface the mark or brand of any other person's horse, mule, ass, neat cattle, sheep, goat, or hog, or shall knowingly mismark or brand any such beast that may be unbranded or unmarked, not properly his own, with intent to defraud any other person, the person so offending shall be guilty of a felony, and shall be punished as if convicted of larceny. (1797, c. 485, s. 2, P. R.; R. C., c. 34, s. 57; Code, s. 1001; Rev., s. 3317; C. S., s. 4495.)

Cross References. — As to cattle brands, their registration, defacement, etc., see § 80-45 et seq.

§ 14-368. Placing poisonous shrubs and vegetables in public places.

If any person shall throw into or leave exposed in any public square, street, lane, alley or open lot in any city, town or village, or in any public road, any mock orange or other poisonous shrub, plant, tree or vegetable, he shall be liable in damages to any person injured thereby and shall also be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1887, c. 338; Rev., s. 3318; C. S., s. 4496; 1969, c. 1224, s. 3.)

Cross References. — As to putting out poisonous foodstuffs, see § 14-401.

§ 14-369. Wounding, capturing or killing of homing pigeons prohibited.

It shall be unlawful for any person or persons at any time or in any manner to hurt, pursue, take, capture, wound, maim, disfigure or kill any homing pigeon then and there owned by another person, or to trap the same by use of any pit, pitfall, scaffold, cage, snare, trap, net, baited hook or similar trapping device, or make use of any drug, poison, explosive or chemical for the purpose of injuring, capturing or killing any such homing pigeon. Any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1941, c. 10; 1969, c. 1224, s. 8.)

ARTICLE 50.

Protection of Letters, Telegrams, and Telephone Messages.

§ 14-370. Wrongfully obtaining or divulging knowledge of telephonic messages.

If any person wrongfully obtains, or attempts to obtain, any knowledge of a telephonic message by connivance with a clerk, operator, messenger or other employee of a telephone company, or, being such clerk, operator, messenger or employee, willfully divulges to any but the person for whom it was intended, the contents of a telephonic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, he shall be guilty of a misdemeanor, and shall be fined or imprisoned, or both, in the discretion of the court. (1903, c. 599; Rev., s. 3848; C. S., s. 4497.)

§ 14-371. Violating privacy of telegraphic messages; failure to transmit and deliver same promptly.

If any person wrongfully obtains, or attempts to obtain, any knowledge of a telegraphic message by connivance with a clerk, operator, messenger, or other employee of a telegraph company, or, being such clerk, operator, messenger, or other employee, willfully divulges to any but the person for whom it was intended, the contents of a telegraphic message or dispatch intrusted to him for transmission or delivery, or the nature thereof, or willfully refuse or neglect duly to transmit or deliver the same, he shall be guilty of a misdemeanor. (1889, c. 41, s. 1; Rev., s. 3846; C. S., s. 4498.)

§ 14-372. Unauthorized opening, reading or publishing of sealed letters and telegrams.

If any person shall willfully, and without authority, open or read, or cause to be opened or read, a sealed letter or telegram, or shall publish the whole or any portion of such letter or telegram, knowing it to have been opened or read without authority, he shall be guilty of a misdemeanor. (1889, c. 41, s. 2; Rev., s. 3728; C. S., s. 4499.)

Cross References. — See note to § 14-155.

CASE NOTES

Indictment. — It is necessary to charge, in an indictment for a violation of this section and to prove upon the trial, that the letter or telegram was "sealed," or that it was published with knowledge that it had been opened and read without authority. State v. Bagwell, 107 N.C. 859, 12 S.E. 254 (1890).

Article 51.

Protection of Athletic Contests.

§ 14-373. Bribery of players, managers, coaches, referees, umpires or officials.

If any person shall bribe or offer to bribe or shall aid, advise, or abet in any way another in such bribe or offer to bribe, any player or participant in any athletic contest with intent to influence his play, action, or conduct and for the purpose of inducing the player or participant to lose or try to lose or cause to be lost any athletic contest or to limit or try to limit the margin of victory or defeat in such contest; or if any person shall bribe or offer to bribe or shall aid, advise, or abet in any way another in such bribe or offer to bribe, any referee, umpire, manager, coach, or any other official or an athletic club or team, league, association, institution or conference, by whatever name called connected with said athletic contest with intent to influence his decision or bias his opinion or judgment for the purpose of losing or trying to lose or causing to be lost said athletic contest or of limiting or trying to limit the margin of victory or defeat in such contest, such person shall be punished as a Class H felon. (1921, c. 23, s. 1; C. S., s. 4499(a); 1951, c. 364, s. 1; 1961, c. 1054, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Editor's Note. — Session Laws 1961, c. 1504, s. 7, provides that notwithstanding any other provisions of the act, it shall not be construed as repealing any provision of article 51 of chapter 14 of the General Statutes as said article reads or provided immediately preceding June 19, 1961, with respect to any act done or offense committed in violation of said article prior to the said date, and the provisions of said article 51 in effect immediately preceding said date shall continue in full force and effect with respect to all acts done or offenses committed prior to said date.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and, upon conviction shall be imprisoned in State's prison not less than one nor more than ten years, and shall be fined not less than three thousand dollars, nor more than ten thousand dollars" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Essential Element. — An essential element of the offense is bribery or offer to bribe with intent to influence the play, action or conduct of a player in any athletic contest. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964).

It is necessary for the State to prove specific intent to influence the play, action or conduct of a player in any athletic contest. State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964).

Competency of Evidence. — Testimony admitted over objections and exceptions as to the bribery of a number of basketball players in other states and rigging of basketball games in other states, was held competent as proof of intent to influence the play, action or conduct of a player in an athletic contest in State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964).

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-374. Acceptance of bribes by players, managers, coaches, referees, umpires or officials.

If any player or participant in any athletic contest shall accept, or agree to accept, a bribe given for the purpose of inducing the player or participant to lose or try to lose or cause to be lost or limit or try to limit the margin of victory or defeat in such contest; or if any referee, umpire, manager, coach, or any other official of an athletic club, team, league, association, institution, or conference connected with an athletic contest shall accept or agree to accept a bribe given with the intent to influence his decision or bias his opinion or judgment and for the purpose of losing or trying to lose or causing to be lost said athletic contest or of limiting or trying to limit the margin of victory or defeat in such contest, such person shall be punished as a Class H felon. (1921, c. 23, s. 2; C. S., s. 4499(b); 1951, c. 364, s. 2; 1961, c. 1054, s. 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and upon conviction shall be imprisoned in the State's prison not less than one nor more than ten years, or fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-375. Completion of offenses set out in §§ 14-373 and 14-374.

To complete the offenses mentioned in G.S. 14-373 and 14-374, it shall not be necessary that the player, manager, coach, referee, umpire, or official shall, at the time, have been actually employed, selected, or appointed to perform his respective duties; it shall be sufficient if the bribe be offered, accepted, or agreed to with the view of probable employment, selection, or appointment of the person to whom the bribe is offered or by whom it is accepted. It shall not be necessary that such player, referee, umpire, manager, coach, or other official actually play or participate in any athletic contest, concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered, or accepted in view of his or their possibly participating therein. (1921, c. 23, s. 3; C. S., s. 4499(c); 1951, c. 364, s. 3; 1961, c. 1054, s. 3.)

CASE NOTES

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-376. Bribe defined.

By a "bribe," as used in this article, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal advantage, or in the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any player, referee, manager, coach, umpire, club or league official, to see which game an admission fee may be charged, or in which athletic contest any player, manager, coach, umpire, referee, or other official is paid any compensation for his services. Said bribe as defined in this article need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other manner defined to cover the true intention of the parties. (1921, c. 23, s. 4; C. S., s. 4499(d); 1951, c. 364, s. 4; 1961, c. 1054, s. 4.)

CASE NOTES

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-377. Intentional losing of athletic contest or limiting margin of victory or defeat.

If any player or participant shall commit any willful act of omission or commission, in playing of an athletic contest, with intent to lose or try to lose or to cause to be lost or to limit or try to limit the margin of victory or defeat in such contest for the purpose of material gain to himself, or if any referees, umpire, manager, coach, or other official of an athletic club, team, league, association, institution or conference connected with an athletic contest shall commit any willful act of omission or commission connected with his official duties with intent to try to lose or to cause to be lost or to limit or try to limit the margin of victory or defeat in such contest for the purpose of material gain to himself, such person shall be punished as a Class H felon. (1921, c. 23, s. 5; C. S., s. 4499(e); 1951, c. 364, s. 5; 1961, c. 1054, s. 5; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony and upon conviction shall be imprisoned in the State's prison, not less than one nor more than ten years, or fined in the discretion of the court" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

CASE NOTES

Cited in State v. Brewer, 258 N.C. 533, 129 S.E.2d 262 (1963).

§ 14-378. Venue.

In all prosecutions under this Article, the venue may be laid in any county where the bribe herein referred to was given, offered, or accepted, or in which the athletic contest was carried on in relation to which the bribe was offered, given, or accepted, or the acts referred to in G.S. 14-377 were committed. (1921, c. 23, s. 6; C. S., s. 4606(c); 1951, c. 364, s. 6.)

§ 14-379. Bonus or extra compensation not forbidden.

Nothing in this Article shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager, coach, or professional player, or to any league, association, or conference for the purpose of encouraging such manager, coach, or player to a higher degree of skill, ability, or diligence in the performance of his duties. (1921, c. 23, s. 7; C. S., s. 4499(f); 1951, c. 364, s. 7; 1961, c. 1054, s. 6.)

§ 14-380: Repealed by Session Laws 1951, c. 364, s. 8.

Article 51A.

Protection of Horse Shows.

§ 14-380.1. Bribery of horse show judges or officials.

Any person who bribes, or offers to bribe, any judge or other official in any horse show, with intent to influence his decision or judgment concerning said horse show, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1963, c. 1100, s. 1; 1969, c. 1224, s. 1.)

§ 14-380.2. Bribery attempts to be reported.

Any judge or other official of any horse show shall report to the resident superior court district attorney any attempt to bribe him with respect to his decisions in any horse show, and a failure to so report shall constitute a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1963, c. 1100, s. 2; 1969, c. 1224, s. 1; 1973, c. 47, s. 2.)

§ 14-380.3. Bribe defined.

The word "bribe," as used in this Article, shall have the same meaning as set forth in G.S. 14-376, in relation to athletic contests. (1963, c. 1100, s. 3.)

§ 14-380.4. Printing Article in horse show schedules.

The provisions of this Article shall be printed on all schedules for any horse show held prior to January 1, 1965. (1963, c. 1100, s. 4.)

ARTICLE 52.

Miscellaneous Police Regulations.

§ 14-381. Desecration of State and United States flag.

It shall be unlawful for any person willfully and knowingly to cast contempt upon any flag of the United States or upon any flag of North Carolina by public acts of physical contact including, but not limited to, mutilation, defiling, defacing or trampling. Any person violating this section shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars ($500.00) or imprisonment for not more than six months or both, in the discretion of the court.

The flag of the United States, as used in this section, shall be the same as defined in 4 U.S.C.A. 1 and 4 U.S.C.A. 2. The flag of North Carolina, as used in this section, shall be the same as defined in G.S. 144-1. (1917, c. 271; C. S., s. 4500; 1971, c. 295.)

CASE NOTES

Former Provisions Held Unconstitutional. — See Parker v. Morgan, 322 F. Supp. 585 (W.D.N.C. 1971).

§ 14-382. Pollution of water on lands used for dairy purposes.

It shall be unlawful for any person, firm, or corporation owning lands adjoining the lands of any person, firm, or corporation which are or may be used for dairy purposes or for grazing milk cows, to dispose of or permit disposal of any animal, mineral, chemical, or vegetable refuse, sewage or other deleterious matter in such way as to pollute the water on the lands so used or which may be used for dairy purposes or for grazing milk cows, or to render unfit or unsafe for use the milk produced from cows feeding upon the grasses and herbage growing on such lands. This section shall not apply to incorporated towns maintaining a sewer system. Anyone violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars ($50.00) or imprisoned for not more than 30 days, or both, and each day that such pollution is committed or exists shall constitute a separate offense. (1919, c. 222; C. S., s. 4501.)

CASE NOTES

Cited in Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 14-383. Cutting timber on town watershed without disposing of boughs and debris; misdemeanor.

Any person, firm or corporation owning lands or the standing timber on lands within 400 feet of any watershed held or owned by any city or town, for the purpose of furnishing a city or town water supply, upon cutting or removing the timber or permitting the same cut or removed from lands so within 400 feet

of said watershed, or any part thereof, shall, within three months after cutting, or earlier upon written notice by said city or town, remove or cause to be burned under proper supervision all treetops, boughs, laps and other portions of timber not desired to be taken for commercial or other purposes, within 400 feet of the boundary line of such part of such watershed as is held or owned by such town or city, so as to leave such space of 400 feet immediately adjoining the boundary line of such watershed, so held or owned, free and clear of all such treetops, laps, boughs and other inflammable material caused by or left from cutting such standing timber, so as to prevent the spread of fire from such cutover area and the consequent damage to such watershed. Any such person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1913, c. 56; C. S., s. 4502; 1969, c. 1224, s. 1.)

CASE NOTES

Constitutionality. — This section constitutes a valid exercise of the police power and is constitutional. State v. Perley, 173 N.C. 783, 92 S.E. 504 (1917).

The motive is immaterial and where the intent to violate the section is shown the defendant is punishable. State v. Perley, 173 N.C. 783, 92 S.E. 504 (1917).

§ 14-384. Injuring notices and advertisements.

If any person shall wantonly or maliciously mutilate, deface, pull or tear down, destroy or otherwise damage any notice, sign or advertisement, unless immoral or obscene, whether put up by an officer of the law in performance of the duties of his office or by some other person for a lawful purpose, before the object for which such notice, sign or advertisement was posted shall have been accomplished, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding twenty-five dollars ($25.00) or imprisoned not exceeding 30 days at the discretion of the court. Nothing herein contained shall apply to any person mutilating, defacing, pulling or tearing down, destroying or otherwise damaging notices, signs or advertisements put upon his own land or lands of which he may have charge or control, unless consent of such person to put up such notice, sign or advertisement shall have first been obtained, except those put up by an officer of the law in the performance of the duties of his office. (1885, c. 302; Rev., s. 3709; C. S., s. 4503.)

§ 14-385. Defacing or destroying public notices and advertisements.

If any person shall willfully and unlawfully deface, tear down, remove or destroy any legal notice or advertisement authorized by law to be posted by any officer or other person, the same being actually posted at the time of such defacement, tearing down, removal or destruction, during the time for which such legal notice or advertisement shall be authorized by law to be posted, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars ($50.00) or imprisoned not exceeding 30 days. (1876-7, c. 215; Code, s. 981; Rev., s. 3710; C. S., s. 4504.)

§ 14-386. Erecting signals and notices in imitation of those of railroads.

No person, firm or corporation other than a railroad or street railway company shall, for advertisement or other purposes, erect and maintain on or near any highway any cross-arm post or other post or standard containing the words "Stop! Look! Listen!" or other such words or combinations of words in imitation of railroad signals or notices. Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1917, c. 230; C. S., s. 4505; 1969, c. 1224, s. 8.)

§ 14-387: Repealed by Session Laws 1945, c. 635.

§ 14-388: Repealed by Session Laws 1943, c. 543.

§ 14-389. Sale of Jamaica ginger.

It shall be unlawful for any person, firm, or corporation to sell the compound known as Jamaica ginger except upon the prescription of a duly licensed and regularly practicing physician; the person, firm, or corporation selling Jamaica ginger upon prescription shall keep a list of said prescriptions, and shall allow said list to be examined by any officer of the law, and no prescription shall ever be filled but once; it shall be unlawful for any physician to give a prescription for Jamaica ginger except to a person directly under his care, and then only in good faith for medicinal purposes only. Any person violating any provision of this section shall be punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not for more than six months, or both. (Pub. Loc. 1913, c. 761; 1919, c. 288; C. S., s. 4507; 1969, c. 1224, s. 9.)

§§ 14-390, 14-390.1: Repealed by Session Laws 1969, c. 970, s. 11.

Cross References. — For present provisions as to furnishing intoxicants, barbiturates or stimulant drugs to inmates of charitable or penal institutions, see § 90-113.12. For present provisions as to furnishing poison, narcotics, deadly weapons, cartridges or ammunition to inmates of charitable or penal institutions, see § 90-113.13.

§ 14-391. Usurious loans on household and kitchen furniture or assignment of wages.

Any person, firm or corporation who shall lend money in any manner whatsoever by note, chattel mortgage, conditional sale, or purported conditional sale or otherwise, upon any article of household or kitchen furniture, or any assignment of wages, earned or to be earned, and shall willfully:

(1) Take, receive, reserve or charge a greater rate of interest than permitted by law, either before or after the interest may accrue; or

(2) Refuse to give receipts for payments on interest or principal of such loan; or

(3) Fail or refuse to surrender the note and security when the same is paid off or a new note and mortgage is given in renewal, unless such new mortgage shall state the amount still due by the old note or mortgage and that the new one is given as additional security;

shall be guilty of a misdemeanor and in addition thereto shall be subject to the provisions of G.S. 24-2. (1907, c. 110; C. S., s. 4509; 1927, c. 72; 1959, c. 195; 1977, c. 807.)

Cross References. — As to interest in general, see § 24-1 et seq.

Editor's Note. — Section 3 of c. 1053, Session Laws 1961, which chapter enacted the North Carolina Consumer Finance Act, provides that this section shall not be applicable to persons licensed under the Consumer Finance Act, that is, §§ 53-164 to 53-191. See Editor's note to § 53-164.

Legal Periodicals. — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

CASE NOTES

This section is constitutional. State v. Davis, 157 N.C. 648, 73 S.E. 130 (1911).

Interest Need Not Be Received. — The charge of the usurious interest constitutes the offense without the necessity of having received it. State v. Davis, 157 N.C. 648, 73 S.E. 130 (1911).

§ 14-392. Digging ginseng on another's land during certain months.

All persons shall be allowed to dig ginseng at any time of the year for the purpose of replanting the same. If any person dig ginseng, except on his own premises, or for the purpose of replanting the same, between the first day of April and the first day of September, he shall forfeit and pay the sum of ten dollars ($10.00) for each day's or part of a day's digging, and shall also be guilty of a misdemeanor. (1866-7, c. 60; Code, s. 1053; 1905, c. 211; Rev., ss. 3502, 3714; C. S., s. 4510.)

Cross References. — As to the larceny of ginseng, see § 14-79.

§ 14-393. Purchase of ginseng; register to be kept; details.

Every person, firm or corporation buying ginseng in any quantity shall keep a register, and shall keep therein a true and accurate record of each purchase, showing the amount of the ginseng, the name and residence of the person from whom purchased, the source from which obtained, and amount paid for the same and the date of the purchase. A failure to comply with the above requirements, or the making of a false entry in regard to the purchasing of such ginseng, shall be a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1923, c. 199; C. S., s. 4510(a); 1969, c. 1224, s. 5.)

§ 14-394. Anonymous or threatening letters, mailing or transmitting.

It shall be unlawful for any person, firm, or corporation, or any association of persons in this State, under whatever name styled, to write and transmit any letter, note, or writing, whether written, printed, or drawn, without signing his, her, their, or its true name thereto, threatening any person or persons, firm or corporation, or officers thereof with any personal injury or violence or destruction of property of such individuals, firms, or corporations, or using therein any language or threats of any kind or nature calculated to intimidate or place in fear any such persons, firms or corporations, or officers thereof, as to their personal safety or the safety of their property, or using vulgar or obscene language, or using such language which if published would bring such persons into public contempt and disgrace, and any person, firm, or corporation violating the provisions of this section shall be fined or imprisoned, or both, in the discretion of the court. (1921, c. 112; C. S., s. 4511(a).)

CASE NOTES

Transmission an Essential Element. — For a conviction under this section, there must be a transmission of the anonymous letter which contains at least one of the categories of prohibited language. Unless and until there is a transmission, no crime has been committed. State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).

What Constitutes Transmission. — There can be no transmission within the meaning of this section without an intended recipient and a delivery of the prohibited writing or a communication of its contents to the intended recipient. State v. Robbins, 253 N.C. 47, 116 S.E.2d 192 (1960).

Circumstantial evidence of defendant's guilt of transmitting a threatening letter held sufficient to sustain conviction and overrule defendant's motion for judment as of nonsuit. State v. Strickland, 229 N.C. 201, 49 S.E.2d 469 (1948).

Cited in State v. Barnes, 253 N.C. 711, 117 S.E.2d 849 (1961).

§ 14-395. Commercialization of American Legion emblem; wearing by nonmembers.

It shall be unlawful for anyone not a member of the American Legion, an organization consisting of ex-members of the army, navy and marine corps, who served as members of such organizations in the recent world war, to wear upon his or her person the recognized emblem of the American Legion, or to use the said emblem for advertising purposes, or to commercialize the same in any way whatsoever; or to use the said emblem in display upon his or her property or place of business, or at any place whatsoever. Anyone violating the provisions of this section shall be guilty of a misdemeanor and fined not more than fifty dollars ($50.00) or imprisoned not more than 30 days. (1923, c. 89; C. S., s. 4511(b).)

§ 14-396. Dogs on "Capitol Square" worrying squirrels.

It shall be unlawful for any owner or keeper of a dog to permit the same to run at large on the Capitol grounds known as "Capitol Square" or to be thereon unless on leash or otherwise in the immediate physical control of said owner or keeper, or to pursue, worry or harass any squirrel or other wild animal kept on said grounds. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by fine not exceeding fifty dollars ($50.00) or imprisonment not exceeding 30 days. (1925, c. 289.)

§ 14-397. Use of name of denominational college in connection with dance hall.

It shall be unlawful for any person, firm, corporation, club or society, by whatsoever name called, to use in connection with any dance, or dance hall, by advertisement, announcement, or otherwise, the name of any college, or any class or organization of any college operated and conducted by a religious denomination, unless the written permission of the dean of such college is given, permitting and allowing the use of the name of such denominational college, or a class or organization of the same in connection with such dance, or dance hall. Any person violating any of the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1927, c. 6; 1969, c. 1224, s. 5.)

§ 14-398. Theft or destruction of property of public libraries, museums, etc.

Any person who shall steal or unlawfully take or detain, or willfully or maliciously or wantonly write upon, cut, tear, deface, disfigure, soil, obliterate, break or destroy, or who shall sell or buy or receive, knowing the same to have been stolen, any book, document, newspaper, periodical, map, chart, picture, portrait, engraving, statue, coin, medal, apparauts, specimen, or other work of literature or object of art or curiosity deposited in a public library, gallery, museum, collection, fair or exhibition, or in any department or office of State or local government, or in a library, gallery, museum, collection, or exhibition, belonging to any incorporated college or university, or any incorporated institution devoted to educational, scientific, literary, artistic, historical or charitable purposes, shall, if the value of the property stolen, detained, sold, bought or received knowing same to have been stolen, or if the damage done by writing upon, cutting, tearing, defacing, disfiguring, soiling, obliterating, breaking or destroying any such property, shall not exceed fifty dollars ($50.00), be guilty of a misdemeanor and upon conviction shall be fined or imprisoned in the discretion of the court. If the value of the property stolen, detained, sold or received knowing same to have been stolen, or the amount of damage done in any of the ways or manners hereinabove set out, shall exceed the sum of fifty dollars ($50.00), the person committing same shall be punished as a Class H felon. (1935, c. 300; 1943, c. 543; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony, and shall upon conviction be punished in accordance with the laws applicable thereto" at the end of the section. The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-399. Littering.

(a) No person, firm, organization, private corporation, or governing body, agents or employees of any municipal corporation shall intentionally or recklessly throw, scatter, spill or place or intentionally or recklessly cause to be blown, scattered, spilled, thrown or placed or otherwise dispose of any litter upon any public property or private property not owned by him within this State or in the waters of this State including, but not limited to, any public highway, public park, beach, campground, forest land, recreational area, trailer park, highway, road, street or alley except:

(1) When such property is designated by the State or political subdivision thereof for the disposal of garbage and refuse, and such person is authorized to use such property for such purpose; or

(2) Into a litter receptacle in such a manner that the litter will be prevented from being carried away or deposited by the elements upon any part of such private or public property or waters.

(b) When litter is so blown, scattered, spilled, thrown or placed from a vehicle or watercraft, the operator thereof shall be presumed to have committed such offense.

(c) As used in this section, the word "litter" shall be defined as any rubbish, waste material, cans, refuse, garbage, trash, debris, dead animals or discarded

materials of every kind and description; the word "vehicle" shall be defined as in G.S. 20-4.01(49); and the word "watercraft" shall be defined as any boat or vessel used for transport upon or across the water.

(d) A violation of this section is a misdemeanor punishable by a fine of fifty dollars ($50.00) for the first offense. Any second or subsequent offense is punishable by a fine of not more than two hundred dollars ($200.00). (1935, c. 457; 1937, c. 446; 1943, c. 543; 1951, c. 975, s. 1; 1953, cc. 387, 1011; 1955, c. 437; 1957, cc. 73, 175; 1959, c. 1173; 1971, c. 165; 1973, c. 877; 1977, c. 887, s. 1; 1979, c. 1065, s. 1.)

Local Modification. — Mecklenburg: 1981, c. 373.

CASE NOTES

Former Section Unconstitutional. — Before its amendment in 1959, this section made it unlawful to place, temporarily or permanently, any trash, refuse, garbage, or scrapped motor vehicles within 150 yards of a hard-surfaced highway unless such materials were concealed from the view of persons on the highway. The section further provided that it should not apply to junk yards which were properly screened from the view of persons on the highway. The section was held unconstitutional on the ground that its requirements had no substantial relationship to the public health, safety, morals or general welfare, since the mere screening of the proscribed materials from the public view could relate only to aesthetic considerations, which alone are an insufficient predicate for the exercise of the police power. State v. Brown, 250 N.C. 54, 108 S.E.2d 74 (1969).

§ 14-400. Tattooing prohibited.

It shall be unlawful for any person or persons to tattoo the arm, limb, or any part of the body of any other person under 18 years of age. Anyone violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1937, c. 112, ss. 1, 2; 1969, c. 1224, s. 8; 1971, c. 1231, s. 1.)

§ 14-401. Putting poisonous foodstuffs, etc., in certain public places, prohibited.

It shall be unlawful for any person, firm or corporation to put or place any strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field, woods or yard in the country. Any person, firm or corporation who violates the provisions of this section shall be liable in damages to the person injured thereby and also shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. This section shall not apply to the poisoning of insects or worms for the purpose of protecting crops or gardens by spraying plants, crops or trees nor to poisons used in rat extermination. (1941, c. 181; 1953, c. 1239.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 479.

CASE NOTES

Constitutionality. — This section is not unconstitutionally vague since the General Assembly intended to prohibit putting poison outside virtually everywhere where an innocent child or animal could find it. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Burden with Respect to Pest Control Exception. — The insect control and rat extermination exception in this section is neither an element of the crime nor an affirmative defense thereto but is instead a "hybrid" factor in determining criminal liability: the State has no initial burden of producing evidence to show that defendant's actions do not fall within the exception; however, once the defendant, in a nonfrivolous manner, puts forth evidence to show that his conduct is within this exception, the burden of persuading the trier of fact that the exception does not apply falls upon the State. In sum, the exception is not a sufficiently independent, distinct substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself to put all the "onus" of proof on the defendant. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Requirements of Indictment or Warrant. — An indictment or warrant for an arrest under this section need not set forth a charge that defendant's conduct is not within the insect control and rat extermination exception to the statute. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Concrete patio held within definition of section. See State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

Rat Poisons Used for Other Purposes. — While parathion is a poison used in rat extermination, if it is put out for purposes other than rat extermination it comes within the scope of the statutory prohibition. State v. Trimble, 44 N.C. App. 659, 262 S.E.2d 299 (1980).

§ 14-401.1. Misdemeanor to tamper with examination questions.

Any person who purloins, steals, buys, receives, or sells, gives or offers to buy, give, or sell any examination questions or copies thereof of any examination provided and prepared by law before the date of the examination for which they shall have been prepared, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1917, c. 146, s. 10; C. S., s. 5658; 1969, c. 1224, s. 3.)

CASE NOTES

Section Limited to Examinations "Provided and Prepared by Law". — The portion of this section reading "any examination provided and prepared by law" expressly limits the application of the statute to examinations "provided and prepared by law," i.e., examinations given by the State Board of Medical Examiners, the State Board of Law Examiners, and other examining boards of this class. The statute has no application to college examination papers. State v. Andrews, 246 N.C. 561, 99 S.E.2d 745 (1957).

§ 14-401.2. Misdemeanor for detective to collect claims, accounts, etc.

It shall be unlawful for any person, firm, or corporation, who or which is engaged in business as a detective, detective agency, or what is ordinarily known as "secret service work," or conducts such business, to engage in the business of collecting claims, accounts, bills, notes, or other money obligations for others, or to engage in the business known as a collection agency. Violation of the provisions hereof shall be a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1943, c. 383; 1969, c. 1224, s. 5.)

§ 14-401.3. Inscription on gravestone or monument charging commission of crime.

It shall be illegal for any person to erect or cause to be erected any gravestone or monument bearing any inscription charging any person with the commission of a crime, and it shall be illegal for any person owning, controlling or operating any cemetery to permit such gravestone to be erected and maintained therein. If such gravestone has been erected in any graveyard, cemetery or burial plot, it shall be the duty of the person having charge thereof to remove and obliterate such inscription. Any person violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1949, c. 1075; 1969, c. 1224, s. 8.)

§ 14-401.4. Identifying marks on machines and apparatus; application to Division of Motor Vehicles for numbers.

(a) No person, firm or corporation shall willfully remove, deface, destroy, alter or cover over the manufacturer's serial or engine number or any other manufacturer's number or other distinguishing number or identification mark upon any machine or other apparatus, including but not limited to farm equipment, machinery and apparatus, but excluding electric storage batteries, nor shall any person, firm or corporation place or stamp any serial, engine, or other number or mark upon such machinery, apparatus or equipment except as provided for in this section, nor shall any person, firm or corporation purchase or take into possession or sell, trade, transfer, devise, give away or in any manner dispose of such machinery, apparatus, or equipment except by intestate succession or as junk or scrap after the manufacturer's serial or engine number or mark has been willfully removed, defaced, destroyed, altered or covered up unless a new number or mark has been added as provided in this section: Provided, however, that this section shall not prohibit or prevent the owner or holder of a mortgage, conditional sales contract, title retaining contract, or a trustee under a deed of trust from taking possession for the purpose of foreclosure under a power of sale or by court order, of such machinery, apparatus, or equipment, or from selling the same by foreclosure sale under a power contained in a mortgage, conditional sales contract, title retaining contract, deed of trust, or court order; or from taking possession thereof in satisfaction of the indebtedness secured by the mortgage, deed of trust, conditional sales contract, or title retaining contract pursuant to an agreement with the owner.

(b) Each seller of farm machinery, farm equipment or farm apparatus covered by this section shall give the purchaser a bill of sale for such machinery, equipment or apparatus and shall include in the bill of sale the manufacturer's serial number or distinguishing number or identification mark, which the seller warrants to be true and correct according to his invoice or bill of sale as received from his manufacturer, supplier, or distributor or dealer.

(c) Each user of farm machinery, farm equipment or farm apparatus whose manufacturer's serial number, distinguishing number or identification mark has been obliterated or is now unrecognizable, may obtain a valid identification number for any such machinery, equipment or apparatus upon application for such number to the Division of Motor Vehicles accompanied by satisfactory proof of ownership and a subsequent certification to the Division by a member of the North Carolina Highway Patrol that said applicant has placed the number on the proper machinery, equipment or apparatus. The Division of Motor Vehicles is hereby authorized and empowered to issue appropriate iden-

tification marks or distinguishing numbers for machinery, equipment or apparatus upon application as provided in this section and the Division is further authorized and empowered to designate the place or places on the machinery, equipment or apparatus at which the identification marks or distinguishing numbers shall be placed. The Division is also authorized to designate the method to be used in placing the identification marks or distinguishing numbers on the machinery, equipment or apparatus: Provided, however, that the owner or holder of the mortgage conditional sales contract, title retaining contract, or trustee under a deed of trust in possession of such encumbered machinery, equipment, or apparatus from which the manufacturer's serial or engine number or other manufacturer's number or distinguishing mark has been obliterated or has become unrecognizable or the purchaser at the foreclosure sale thereof, may at any time obtain a valid identification number for any such machinery, equipment or apparatus upon application therefor to the Division of Motor Vehicles.

(d) Any person, firm or corporation who shall violate any part of this section shall be guilty of a misdemeanor and upon plea of guilty or conviction shall be punished in the discretion of the court. (1949, c. 928; 1951, c. 1110 s. 1; 1953, c. 257; 1975, c. 716, s. 5.)

§ 14-401.5. Practice of phrenology, palmistry, fortune-telling or clairvoyance prohibited.

It shall be unlawful for any person to practice the arts of phrenology, palmistry, clairvoyance, fortune-telling and other crafts of a similar kind in the counties named herein. Any person violating any provision of this section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars ($500.00) or imprisonment for not more than six months or both such fine and imprisonment in the discretion of the court.

This section shall not prohibit the amateur practice of phrenology, palmistry, fortune-telling or clairvoyance in connection with school or church socials, provided such socials are held in school or church buildings.

Provided that the provisions of this section shall apply only to the Counties of Alexander, Ashe, Avery, Bertie, Bladen, Brunswick, Buncombe, Burke, Caldwell, Camden, Carteret, Caswell, Chatham, Chowan, Clay, Columbus, Craven, Cumberland, Currituck, Dare, Davidson, Davie, Duplin, Durham, Franklin, Gates, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Iredell, Johnston, Lee, Lenoir, Madison, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Person, Polk, Richmond, Robeson, Rockingham, Rutherford, Sampson, Scotland, Surry, Transylvania, Union, Vance, Wake and Warren. (1951, c. 314; 1953, cc. 138, 227, 328; 1955, cc. 55, 454; 1957, cc. 151, 166, 309, 355, 915; 1959, cc. 428, 1018; 1961, c. 271; 1969, c. 1224, s. 20; 1973, cc. 12, 195; 1975, cc. 331, 351; 1977, c. 335.)

Local Modification. — Chatham: 1961, c. 544; Durham: 1951, c. 1189; Harnett: 1955, c. 1326; Lee: 1955, c. 766; Orange: 1961, c. 544.

§ 14-401.6. Unlawful to possess, etc., tear gas except for certain purposes.

(a) It is unlawful for any person, firm, corporation or association to possess, use, store, sell, or transport within the State of North Carolina, any form of that type of gas generally known as "tear gas," or any container or device for

holding or releasing that gas; except this section does not apply to the possession, use, storage, sale or transportation of that gas or any container or device for holding or releasing that gas:

(1) By officers and enlisted personnel of the armed forces of the United States or this State while in the discharge of their official duties and acting under orders requiring them to carry arms or weapons;
(2) By or for any governmental agency for official use of the agency;
(3) By or for county, municipal or State law-enforcement officers in the discharge of their official duties;
(4) By or for security guards sanctioned under Chapters 74A and 74B of the General Statutes, provided those security guards are on duty and have received training according to standards prescribed by the State Bureau of Investigation;
(5) For bona fide scientific, educational, or industrial purposes;
(6) In safes, vaults, and depositories, as a means of protection against robbery;
(7) For use in the home for protection and elsewhere by individuals, who have not been convicted of a felony, for self-defense purposes only, as long as the capacity of any tear gas cartridge, shell, device or container does not exceed 50 cubic centimeters, and any tear gas device or container does not have the capability of discharging any cartridge, shell, or container larger than 50 cubic centimeters.

(b) Violation of this section is a misdemeanor punishable by a fine of not more than five hundred dollars ($500.00), imprisonment for not more than six months, or both.

(c) Tear gas for the purpose of this section shall mean any solid, liquid or gaseous substance or combinations thereof which will, upon dispersion in the atmosphere, cause tears in the eyes, burning of the skin, coughing, difficulty in breathing or any one or more of these reactions and which will not cause permanent damage to the human body, and the substance and container or device is designed, manufactured, and intended to be used as tear gas. (1951, c. 592; 1969, c. 1224, s. 8; 1977, c. 126; 1979, c. 661.)

Editor's Note. — Chapter 74B, referred to in this section, has been repealed. See now Chapter 74C.

§ 14-401.7. Persons, firms, banks and corporations dealing in securities on commission taxed as a private banker.

No person, bank, or corporation, without a license authorized by law, shall act as a stockbroker or private banker. Any person, bank, or corporation that deals in foreign or domestic exchange certificates of debt, shares in any corporation or charter companies, bank or other notes, for the purpose of selling the same or any other thing for commission or other compensation, or who negotiates loans upon real estate securities, shall be deemed a security broker. Any person, bank, or corporation engaged in the business of negotiating loans on any class of security or in discounting, buying or selling negotiable or other papers or credits, whether in an office for the purpose or elsewhere shall be deemed to be a private banker. Any person, firm, or corporation violating this section shall pay a fine of not less than one hundred ($100.00) nor more than five hundred dollars ($500.00) for each offense. (1939, c. 310, s. 1004; 1953, c. 970, s. 9.)

CASE NOTES

Cited in State ex rel. Utils Comm'n v. Carolina Tel. & Tel. Co., 243 N.C. 46, 89 S.E.2d 802 (1955).

§ 14-401.8. Refusing to relinquish party telephone line in emergency; false statement of emergency.

Any person who shall willfully refuse to immediately relinquish a party telephone line when informed that such line is needed for an emergency call to a fire department or police department, or for medical aid or ambulance service, or any person who shall secure the use of a party telephone line by falsely stating that such line is needed for an emergency call, shall be guilty of a misdemeanor, and, upon conviction shall be fined or imprisoned in the discretion of the court.

The term "party line" as used in this section is defined as a subscriber's line telephone circuit, consisting of two or more main telephone stations connected therewith, each station with a distinctive ring or telephone number. The term "emergency" as used in this section is defined as a situation in which property or human life are in jeopardy and the prompt summoning of aid is essential. (1955, c. 958.)

CASE NOTES

Cited in Citizens Tel. Co. v. Telephone Serv. Co., 214 F. Supp. 627 (W.D.N.C. 1963).

§ 14-401.9. Parking vehicle in private parking space without permission.

It shall be unlawful for any person other than the owner or lessee of a privately owned or leased parking space to park a motor or other vehicle in such private parking space without the express permission of the owner or lessee of such space; provided, that such private parking lot be clearly designated as such by a sign no smaller than 24 inches by 24 inches prominently displayed at the entrance thereto, and provided further, that the parking spaces within the lot be clearly marked by signs setting forth the name of each individual lessee or owner.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than ten dollars ($10.00) in the discretion of the court. (1955, c. 1019; 1977, c. 398, s. 2.)

§ 14-401.10. Soliciting advertisements for official publications of law-enforcement officers' associations.

Every person, firm or corporation who solicits any advertisement to be published in any law-enforcement officers' association's official magazine, yearbook, or other official publication, shall disclose to the person so solicited, whether so requested or not, the name of the law-enforcement association for which such advertisement is solicited, together with written authority from the president or secretary of such association to solicit such advertising on its behalf.

Any person, firm or corporation violating the provisions of this section shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1961, c. 518; 1969, c. 1224, s. 8.)

§ 14-401.11. Distribution of certain food at Halloween and all other times prohibited.

(a) It shall be unlawful for any person to knowingly distribute, sell, give away or otherwise cause to be placed in a position of human accessibility, any food or eatable substance which that person knows to contain:

(1) Any noxious or deleterious substance, material or article which might be injurious to a person's health or might cause a person any physical discomfort, or

(2) Any controlled substance included in any schedule of the Controlled Substances Act, or

(3) Any poisonous chemical or compound or any foreign substance such as, but not limited to, razor blades, pins, and ground glass, which might cause death, serious physical injury or serious physical pain and discomfort.

(b) Penalties.

(1) Any person violating the provisions of G.S. 14-401.11(a)(1):

a. Where the actual or possible effect on a person eating the food or substance was or would be limited to mild physical discomfort without any lasting effect, shall be guilty of a misdemeanor punishable in the discretion of the court.

b. Where the actual or possible effect on a person eating the food or substance was or would be greater than mild physical discomfort without any lasting effect, shall be punished as a Class H felon.

(2) Any person violating the provisions of G.S. 14-401.11(a)(2) shall be punished as a Class H felon.

(3) Any person violating the provisions of G.S. 14-401.11(a)(3) shall be punished as a Class D felon. (1971, c. 564, 1973, c. 540, s. 1; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class H felon" for "guilty of a felony punishable in the discretion of the court" in subdivision (b)(1)b, substituted "punished as a Class H felon" for "guilty of a felony punishable by imprisonment in the Department of Correction for not less than two nor more than 10 years" in subdivision (b)(2) and substituted "punished as a Class D felon" for "guilty of a felony punishable by imprisonment in the Department of Correction for not less than five nor more than 40 years" in subdivision (b)(3). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

§ 14-401.12. Soliciting charitable contributions by telephone.

(a) Any professional solicitor who solicits by telephone contributions for charitable purposes or in any way compensates another person to solicit by telephone contributions for charitable purposes shall be guilty of a misde-

meanor. Any person compensated by a professional solicitor to solicit by telephone contributions for charitable purposes shall be guilty of a misdemeanor.

(b) Definitions. — Unless a different meaning is required by the context, the following terms as used in this section have the meanings hereinafter respectively ascribed to them:

(1) "Charitable purpose" shall mean any charitable, benevolent, religious, philanthropic, environmental, public or social advocacy or eleemosynary purpose for religion, health, education, social welfare, art and humanities, civic and public interest.

(2) "Contribution" shall mean any promise, gift, bequest, devise or other grant for consideration or otherwise, of any money or property of any kind or value, including the promise to pay, which contribution is wholly or partly induced by a solicitation. The term "contribution" shall not include payments by members of an organization for membership fees, dues, fines or assessments, or for services rendered to individual members, if membership in such organization confers a bona fide right, privilege, professional standing, honor or other direct benefit, other than the right to vote, elect officers, or hold offices; nor any money, credit, financial assistance or property received from any governmental authority; nor any donation of blood or any gift made pursuant to the Uniform Anatomical Gift Act. Reference to dollar amounts of "contributions" or "solicitations" in this section means, in the case of payments or promises to pay for merchandise or rights of any description, the value of the total amount paid or promised to be paid for such merchandise or rights, and not merely that portion of the purchase price to be applied to a charitable purpose.

(3) "Professional fund-raising counsel" shall mean any person who for a flat fixed fee under a written agreement plans, conducts, manages, carries on, or acts as a consultant, whether directly or indirectly, in connection with soliciting contributions for, or on behalf of any charitable organization but who actually solicits no contributions as a part of such services.

(4) "Professional solicitor" shall mean any person who, for a financial or other consideration, solicits contributions for or on behalf of a charitable organization, whether such solicitation is performed personally or through its agents, servants or employees specially employed by or for a charitable organization, who are engaged in the solicitation of contributions under the direction of such person; or a person who plans, conducts, manages, carries on, advises or acts as a consultant, whether directly or indirectly, to a charitable organization in connection with the solicitation of contributions but does not qualify as "professional fund-raising counsel" as defined in this section. A bona fide salaried officer or employee of a charitable organization maintaining a permanent establishment within the State or the bona fide salaried officer or employee of a parent organization certified as tax exempt shall not be deemed to be a professional solicitor.

(5) The words "solicit" and "solicitation" shall mean the request or appeal, directly or indirectly, for any contribution on the plea or representation that such contribution will be used for a charitable purpose. Solicitation as defined herein shall be deemed to occur when the request is made, at the place the request is received, whether or not the person making the same actually receives any contribution.

(c) A solicitation by telephone is presumed to be for a charitable purpose if the person making the solicitation states or implies that some other named person or organization, other than the professional solicitor or his employees, is a sponsor or endorser of the solicitation who will share in the proceeds that result from the telephone solicitation. (1981, c. 805, s. 1.)

Editor's Note. — Session Laws 1981, c. 805, s. 2, provides: "This act shall become effective October 1, 1981, and shall apply to acts committed on or after that date."

ARTICLE 52A.

Sale of Weapons in Certain Counties.

§ 14-402. Sale of certain weapons without permit forbidden.

It shall be unlawful for any person, firm, of corporation in this State to sell, give away, or transfer, or to purchase or receive, at any place within this State from any other place within or without the State any pistol unless a license or permit therefor has first been obtained by the purchaser or receiver from the sheriff of the county in which that purchaser or receiver resides.

It shall be unlawful for any person or persons to receives from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee within the State of North Carolina any pistol without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same the permit from the sheriff as provided in G.S. 14-403. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), or imprisoned not less than 30 days nor more than six months, or both, in the discretion of the court.

"Antique firearm" as defined by G.S. 14-409.11, and "historic edged weapon" as defined by G.S. 14-409.12, are hereby excepted from the provisions of this section. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781; 1959, c. 1073, s. 2; 1971, c. 133, s. 2; 1979, c. 895, ss. 1, 2.)

Certain Counties Excepted from Application of Article. — Session Laws 1959, c. 1073, s. 2, amended this and other sections of this Article by striking out the word "clerk" and the words "clerk of the superior court" wherever they appeared and substituting therefor the word "sheriff," it being the intent and purpose of the amendatory act to transfer to the sheriffs the duties theretofore performed by the clerks of the superior court in issuing permits for the purchase of weapons and keeping the records of issuance of such permits and all other duties incident to the purchase, sale and ownership of weapons. Session Laws 1959, c. 1073, s. 4, as amended from time to time, except the following counties from the application of the 1959 amendments to this article: Ashe, Bertie, Duplin, Lincoln, Madison, Mitchell, Pender, Perquimans, Polk, Tyrrell, Warren, Watauga and Yancey.

Avery was deleted from the list of counties by Session Laws 1977, c. 35; Bladen was deleted from the list by Session Laws 1977, c. 35; Caswell has been deleted from the list pursuant to Session Laws 1977, c. 347; Cherokee was deleted from the list by Session Laws 1977, c. 35; Clay was added to the list by Session Laws 1969, c. 276, and deleted from the list by Session Laws 1979, c. 134; Currituck was deleted from the list by Session Laws 1981, c. 196; Davie was deleted from the list by Session Laws 1977, c. 72; Franklin was deleted from the list by Session Laws 1975, cc. 139, 173; Greene has been deleted from the list pursuant to Session Laws 1977, c. 223; Halifax was deleted from the list by Session Laws 1975, cc. 173, 374; Harnett was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Haywood was deleted from the list by Session Laws 1969, c. 6; Hertford was deleted from the list by Session Laws 1967, c. 903; Iredell was deleted from the list by Session Laws 1971, c. 410; Jackson was deleted from the list by Session Laws 1975, c. 173; Johnston was deleted from the list by Session Laws 1967, c. 122; Jones was deleted from the list by Session Laws 1969, c. 109; Lee was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Macon was deleted from the list by Session Laws 1975, c. 173; Mecklenburg was deleted from the list by Session Laws 1969, c. 1305; Moore has been deleted from the list pursuant to Session Laws 1977, c. 235; Pamlico was deleted from the list by Session Laws 1967, c. 6; Person was deleted from the list by Session Laws 1975, c. 134; Rockingham was deleted from the list by Session Laws 1979, c. 323; Sampson has been deleted from the list pursuant to Session Laws

1977, c. 347; Stokes was deleted from the list by Session Laws 1975, c. 173; Union was deleted from the list by Session Laws 1973, c. 421; Vance was deleted from the list by Session Laws 1969, c. 396; Washington was deleted from the list by Session Laws 1971, c. 192; Wilson was deleted from the list by Session Laws 1963, c. 537.

The Article as it applies to the counties excepted from the 1959 act has been codified as Article 53, §§ 14-409.1 through 14-409.9.

§ 14-403. Permit issued by sheriff; form of permit.

The sheriffs of any and all counties of this State are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,

. . . . . County.

I, ... , sheriff of said county, do hereby certify that . . . . . whose place of residence is . . . . . Street, in . . . . . (or) in . . . . . Township . . . . . County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, and that the possession of one of the weapons described is necessary for self-defense or the protection of the home, a license or permit is therefore hereby given said . . . . . to purchase one pistol, (or if any other weapon is named strike out the word pistol) . . . . . from any person, firm or corporation authorized to dispose of the same.

This . . . . . day of . . . . . , 19 . . . . . .

. . . . . .

Sheriff.

(1919, c. 197, s. 2; C. S., s. 5107; 1959, c. 1073, s. 2.)

§ 14-404. Applicant must be of good moral character; weapon for defense of home; sheriff's fee.

Before the sheriff shall issue any such license or permit he shall fully satisfy himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation requires the possession of the weapon mentioned for protection of the home. If said sheriff shall not be so fully satisfied, he shall refuse to issue said license or permit: provided, that nothing in this Article shall apply to officers authorized by law to carry firearms if such officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms. The sheriff shall charge for his services upon issuing such license or permit a fee of fifty cents (50¢). (1919, c. 197, s. 3; C. S., s. 5108; 1959, c. 1073, s. 2; 1969, c. 73.)

Local Modification. — Caldwell: 1975, c. 478; Catawba: 1979, 2nd Sess., c. 1322; Chatham: 1975, c. 477; Forsyth: 1971, c. 411; Lee: 1975, c. 377; Mecklenburg: 1971, c. 411; Orange: 1975, c. 477; Wake: 1979, 2nd Sess., c. 1322.

OPINIONS OF ATTORNEY GENERAL

Issuance of Pistol Permits to 18, 19 and 20 Year Olds. — See opinion of Attorney General to Mr. Isaac T. Avery, Jr., 41 N.C.A.G. 465 (1971).

More Than One Permit Allowed. — See opinion of Attorney General to Mr. Leroy Reavis, 41 N.C.A.G. 415 (1971).

Board of County Commissioners without Authority to Increase Fee for Issuance of Permit. — See opinion of Attorney General to Mr. John T. Page, Jr., Attorney for Richmond County Board of Commissioners, 46 N.C.A.G. 134 (1976).

§ 14-405. Record of permits kept by sheriff.

The sheriff shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4; C. S., s. 5109; 1959, c. 1073, s. 2.)

§ 14-406. Dealer to keep record of sales.

Every dealer in pistols, pistol cartridges and other weapons mentioned in this Article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted State, county or police officer, within this State. (1919, c. 197, s. 5; C.S., s. 5110.)

§ 14-407. Weapons to be listed for taxes.

During the period of listing taxes in each year the owner or person in possession or having the custody or care of any weapon mentioned in this article is required to list the same specifically, as is now required for listing personal property for taxes. Any person listing any such weapon for taxes shall be required to designate his place of residence, including local street address. (1919, c. 197, s. 6; C. S., s. 5111.)

§ 14-407.1. Sale of blank cartridge pistols.

The provisions of G.S. 14-402 and 14-405 to 14-407 shall apply to the sale of pistols suitable for firing blank cartridges. The clerks of the superior courts of all the counties of this State are authorized and may in their discretion issue to any person, firm or corporation, in any such county, a license or permit to purchase or receive any pistol suitable for firing blank cartridges from any person, firm or corporation offering to sell or dispose of the same, which said permit shall be in substantially the following form:

North Carolina

. . . . . County

I, ..., Clerk of the Superior Court of said county, do hereby certify that . . . . . ., whose place of residence is . . . . . Street in . . . . . (or) in . . . . . Township in . . . . . County, North Carolina, having this day satisfied me that the possession of a pistol suitable for firing blank cartridges will be used only for lawful purposes, a permit is therefore given said . . . . . to purchase said pistol from any person, firm or corporation authorized to dispose of the same, this . . . . . day of . . . . . ., 19 . . . . . .

. . . . . .

Clerk of Superior Court

The clerk shall charge for his services, upon issuing such permit, a fee of fifty cents (50¢). (1959, c. 1068.)

§ 14-408. Violation of § 14-406 or 14-407 a misdemeanor.

Any person, firm, or corporation violating any of the provisions of G.S. 14-406 or 14-407 shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1919, c. 197, s. 7; C. S., s. 5112; 1969, c. 1224, s. 6.)

§ 14-409. Machine guns and other like weapons.

It shall be unlawful for any person, firm or corporation to manufacture, sell, give away, dispose of, use or possess machine guns, submachine guns, or other like weapons: Provided, however, that this section shall not apply to the following:

Banks, merchants, and recognized business establishments for use in their respective places of business, who shall first apply to and receive from the sheriff of the county in which said business is located, a permit to possess the said weapons for the purpose of defending the said business; officers and soldiers of the United States Army, when in discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties; the manufacture, use or possession of such weapons for scientific or experimental purposes when such manufacture, use or possession is lawful under federal laws and the weapon is registered with a federal agency, and when a permit to manufacture, use or possess the weapon is issued by the sheriff of the county in which the weapon is located. Provided, further, that automatic shotguns and pistols or other automatic weapons that shoot less than 31 shots shall not be construed to be or mean a machine gun or submachine gun under this section; and that any bona fide resident of this State who now owns a machine gun used in former wars, as a relic or souvenir, may retain and keep same as his or her property without violating the provisions of this section upon his reporting said owenrship to the sheriff of the county in which said person lives.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than five hundred dollars ($500.00), or imprisoned for not less than six months, or both, in the discretion of the court. (1933, c. 261, s. 1; 1959, c. 1073, s. 2; 1965, c. 1200.)

CASE NOTES

Definitions. — The usual and customary definitions of the words used in this section are as follows: A machine gun is defined as an automatic gun using small-arms ammunition for rapid continuous firing; a submachine gun as a lightweight automatic or semiautomatic portable firearm fired from the shoulder or hip; a carbine as a light automatic or semiautomatic military rifle; and an automatic rifle as a rifle capable commonly of either semiautomatic or full automatic fire and designed to be fired without a mount. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

"Automatic". — The word "automatic" as used in connection with a firearm is one using either gas pressure or force of recoil and mechanical spring action for repeatedly ejecting the empty cartridge shell, introducing a new cartridge and firing it. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

In ordinary usage the word "automatic" is used to describe both automatic and semiautomatic weapons. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

A machine gun is automatic. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

A submachine gun can be automatic or semiautomatic. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

Section Excludes Weapons Which Shoot Less Than 31 Times. — The General Assembly intended to include within the prohibition of this section all weapons either automatic or semiautomatic which shoot 31 times or more

and to exclude such weapons which shoot less than 31 times. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

This section has a proviso which excludes automatic shotguns and pistols or other automatic weapons that shoot less than 31 shots. Giving the usual and customary meaning to the word "automatic," the proviso would exclude automatic weapons or semiautomatic weapons which shoot less than 31 shots. State v. Lee, 277 N.C. 242, 176 S.E.2d 772 (1970).

ARTICLE 53.

Sale of Weapons in Certain Other Counties.

§ 14-409.1. Sale of certain weapons without permit forbidden.

It shall be unlawful for any person, firm, or corporation in this State to sell, give away, or transfer, or to purchase or receive, at any place within this State from any other place within or without the State any pitsol unless a license or permit therefor has first been obtained by the purchaser or receiver from the clerk of the superior court of the county in which that purchaser or receiver resides.

It shall be unlawful for any person or persons to receive from any postmaster, postal clerk, employee in the parcel post department, rural mail carrier, express agent or employee, railroad agent or employee within the State of North Carolina any pistol without having in his or their possession and without exhibiting at the time of the delivery of the same and to the person delivering the same, the permit from the clerk of superior court as provided in G.S. 14-409.2. Any person violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than fifty dollars ($50.00) nor more than two hundred dollars ($200.00), or imprisoned not less than 30 days nor more than six months, or both, in the discretion of the court.

"Antique firearm" as defined by G.S. 14-409.11, and "historic edged weapon" as defined by G.S. 14-409.12, are hereby excepted from the provisions of this section. (1919, c. 197, s. 1; C. S., s. 5106; 1923, c. 106; 1947, c. 781; 1971, c. 133, s. 2; 1979, c. 895, ss. 3, 4.)

Counties to Which Article Applies. — Counties excepted from Article 52A, §§ 14-402 through 14-409, by Session Laws 1959, c. 1073, s. 4, as amended, are governed by this Article. The list of counties, as amended from time to time, is as follows: Ashe, Bertie, Duplin, Lincoln, Madison, Mitchell, Pender, Perquimans, Polk, Tyrrell, Warren, Watauga and Yancey.

Avery was deleted from the list of counties by Session Laws 1977, c. 35; Bladen was deleted from the list by Session Laws 1977, c. 35; Caswell has been deleted from the list pursuant to Session Laws 1977, c. 347; Cherokee was deleted from the list by Session Laws 1977, c. 35; Clay was added to the list by Session Laws 1969, c. 276, and deleted from the list by Session Laws 1979, c. 134; Currituck was deleted from the list by Session Laws 1981, c. 196; Davie was deleted from the list by Session Laws 1977, c. 72; Franklin was deleted from the list by Session Laws 1975, cc. 139, 173; Greene has been deleted from the list pursuant to Session Laws 1977, c. 223; Halifax was deleted from the list by Session Laws 1975, cc. 173, 374; Harnett was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Haywood was deleted from the list by Session Laws 1969, c. 6; Hertford was deleted from the list by Session Laws 1967, c. 903; Iredell was deleted from the list by Session Laws 1971, c. 410; Jackson was deleted from the list by Session Laws 1975, c. 173; Johnston was deleted from the list by Session Laws 1967, c. 122; Jones was deleted from the list by Session Laws 1969, c. 109; Lee was deleted from the list by Session Laws 1967, c. 470, and Session Laws 1969, c. 658; Macon was deleted from the list by Session Laws 1975, c. 173; Mecklenburg was deleted from the list by Session Laws 1969, c. 1305; Moore has been deleted from the list pursuant to Session Laws 1977, c. 235; Pamlico was deleted from the list by Session Laws 1967, c. 6; Person was deleted from the list by Session Laws 1975, c. 134;

Rockingham was deleted from the list by Session Laws 1979, c. 323; Sampson was deleted from the list by Session Laws 1977, c. 347; Stokes was deleted from the list by Session Laws 1975, c. 173; Union was deleted from the list by Session Laws 1973, c. 421; Vance was deleted from the list by Session Laws 1969, c. 396; Washington was deleted from the list by Session Laws 1971, c. 192; Wilson was deleted from the list by Session Laws 1963, c. 537.

See the note under § 14-402.

§ 14-409.2. Permit issued by clerk of court; form of permit.

The clerks of the superior courts of any and all counties of this State are hereby authorized and directed to issue to any person, firm, or corporation in any such county a license or permit to purchase or receive any weapon mentioned in this article from any person, firm, or corporation offering to sell or dispose of the same, which said license or permit shall be in the following form, to wit:

North Carolina,
. . . . . County.

I, ..., Clerk of the Superior Court of said county, do hereby certify that . . . . . whose place of residence is . . . . . Street, in . . . . . (or) in . . . . . Township . . . . . County, North Carolina, having this day satisfied me as to his, her (or) their good moral character, and that the possession of one of the weapons described is necessary for self-defense or the protection of the home, a license or permit is therefore hereby given said . . . . . to purchase one pistol, (or if any other weapon is named strike out the word pistol) . . . . . from any person, firm or corporation authorized to dispose of the same.

This . . . . . day of . . . . . ., 19 . . . . . .

. . . . . .

Clerk of Superior Court.

(1919, c. 197, s. 2; C. S., s. 5107.)

§ 14-409.3. Applicant must be of good moral character; weapon for defense of home; clerk's fee.

Before the clerk of the superior court shall issue any such license or permit he shall fully satisfy himself by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant therefor, and that such person, firm, or corporation requires the possession of the weapon mentioned for protection of the home. If said clerk shall not be so fully satisfied, he shall refuse to issue said license or permit: provided, that nothing in this article shall apply to officers authorized by law to carry firearms if such officers identify themselves to the vendor or donor as being officers authorized by law to carry firearms. The clerk shall charge for his services upon issuing such license or permit a fee of fity cents (50¢). (1919, c. 197, s. 3; C. S., s. 5108; 1969, c. 73.)

OPINIONS OF ATTORNEY GENERAL

Issuance of Pistol Permits to 18, 19 and 20 Year Olds. — See opinion of Attorney General to Mr. Isaac T. Avery, Jr., 41 N.C.A.G. 465 (1971).

§ 14-409.4. Record of permits kept by clerk.

The clerk of the superior court shall keep a book, to be provided by the board of commissioners of each county, in which he shall keep a record of all licenses or permits issued under this article, including the name, date, place of residence, age, former place of residence, etc., of each such person, firm, or corporation to whom or which a license or permit is issued. (1919, c. 197, s. 4; C. S., s. 5109.)

Cross References. — As to duty of clerk to keep records of weapons permits under former subdivision (35) of § 2-42, see note to § 7A-109.

§ 14-409.5. Dealer to keep record of sales.

Every dealer in pistols, pistol cartridges and other weapons mentioned in this article shall keep an accurate record of all sales thereof, including the name, place of residence, date of sale, etc., of each person, firm, or corporation to whom or which such sales are made, which record shall be open to the inspection of any duly constituted State, county or police officer, within this State. (1919, c. 197, s. 5; C. S., s. 5110.)

§ 14-409.6. Weapons to be listed for taxes.

During the period of listing taxes in each year the owner or person in possession or having the custody or care of any weapon mentioned in this article is required to list the same specifically, as is now required for listing personal property for taxes. Any person listing any such weapons for taxes shall be required to designate his place of residence, including local street address. (1919, c. 197, s. 6; C. S., s. 5111.)

§ 14-409.7. Sale of blank cartridge pistols.

The provisions of G. S. 14-409.1 and 14-409.4 to 14-409.6 shall apply to the sale of pistols suitable for firing blank cartridges. The clerks of the superior courts of all the counties of this State are authorized and may in their discretion issue to any person, firm or corporation, in any such county, a license or permit to purchase or receive any pistol suitable for firing blank cartridges from any person, firm or corporation offering to sell or dispose of the same, which said permit shall be in substantially the following form:

North Carolina,

. . . . . County.

I, ... , Clerk of the Superior Court of said county, do hereby certify that . . . . . , whose place of residence is . . . . . Street in . . . . . (or) in . . . . . Township in . . . . . County, North Carolina, having this day satisfied me that the possession of a pistol suitable for firing blank cartridges will be used only for lawful purposes, a permit is therefore given said . . . . . to purchase said pistol from any person, firm or corporation authorized to dispose of the same, this . . . . . day of . . . . . , 19 . . . . .

. . . . . .

Clerk of Superior Court

The clerk shall charge for his services, upon issuing such permit, a fee of fifty cents (50¢). (1959, c. 1068.)

Editor's Note. — The above section is § 14-407.1 as enacted by Session Laws 1959, c. 1068. Being applicable throughout the State, it has been codified in this article as well as in article 52A. See Editor's notes under §§ 14-402 and 14-409.1.

§ 14-409.8. Violation of § 14-409.5 or 14-409.6 a misdemeanor.

Any person, firm, or corporation violating any of the provisions of G.S. 14-409.5 or 14-409.6 shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1919, c. 197, s. 7; C. S., s. 5112; 1969, c. 1224, s. 6.)

§ 14-409.9. Machine guns and other like weapons.

It shall be unlawful for any person, firm or corporation to manufacture, sell, give away, dispose of, use or possess machine guns, submachine guns, or other like weapons: Provided, however, that this section shall not apply to the following:

Banks, merchants, and recognized business establishments for use in their respective places of business, who shall first apply to and receive from the clerk of the superior court of the county in which said business is located, a permit to possess the said weapons for the purpose of defending the said business; officers and soldiers of the United States Army, when in discharge of their official duties, officers and soldiers of the militia and the State guard when called into actual service, officers of the State, or of any county, city or town, charged with the execution of the laws of the State, when acting in the discharge of their official duties; the manufacture, use or possession of such weapons for scientific or experimental purposes when such manufacture, use or possession is lawful under federal laws and the weapon is registered with a federal agency, and when a permit to manufacture, use or possess the weapon is issued by the sheriff of the county in which the weapon is located. Provided, further, that automatic shotguns and pistols or other automatic weapons that shoot less than 31 shots shall not be construed to be or mean a machine gun or submachine gun under this section; and that any bona fide resident of this State who now owns a machine gun used in former wars as a relic or souvenir, may retain and keep same as his or her property without violating the provisions of this section upon his reporting said ownership to the clerk of the superior court of the county in which said person lives.

Any person violating any of the provisions of this section shall be guilty of a misdemeanor and shall be fined not less than five hundred dollars ($500.00), or imprisoned for not less than six months, or both, in the discretion of the court. (1933, c. 261, s. 1; 1965, c. 1200.)

ARTICLE 53A.

Other Firearms.

§ 14-409.10. Purchase of rifles and shotguns out of State.

It shall be lawful for citizens of this State to purchase rifles and shotguns and ammunition therefor in states contiguous to this State. (1969, c. 101, s. 1.)

§ 14-409.11. "Antique firearm" defined.

The term "antique firearm" means any firearm manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar early type of ignition system) or replica thereof, whether actually manufactured before or after the year 1898; and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade. (1969, c. 101, s. 2.)

§ 14-409.12. "Historic edged weapons" defined.

The term "historic edged weapon" means any bayonet, trench knife, sword or dagger manufactured during or prior to World War II but in no event later than January 1, 1946. (1971, c. 133, s. 1.)

ARTICLE 54.

Sale, etc., of Pyrotechnics.

§ 14-410. Manufacture, sale and use of pyrotechnics prohibited; public exhibitions permitted; common carriers not affected.

It shall be unlawful for any individual, firm, partnership or corporation to manufacture, purchase, sell, deal in, transport, possess, receive, advertise, use or cause to be discharged any pyrotechnics of any description whatsoever within the State of North Carolina: provided, however, that it shall be permissible for pyrotechnics to be exhibited, used or discharged at public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations: provided, further, that the use of said pyrotechnics in connection with public exhibitions, such as fairs, carnivals, shows of all descriptions and public celebrations, shall be under supervision of experts who have previously secured written authority from the board of county commissioners of the county in which said pyrotechnics are to be exhibited, used or discharged: provided, further, that it shall not be unlawful for a common carrier to receive, transport, and deliver pyrotechnics in the regular course of its business. (1947, c. 210, s. 1.)

Local Modification. — Durham: 1963, c. 745; Mecklenburg: 1981, c. 117, s. 2; Pender: 1957, c. 113.

CASE NOTES

Applied in State v. Salem, 17 N.C. App. 269, 193 S.E.2d 755 (1973).

§ 14-411. Sale deemed made at site of delivery.

In case of sale or purchase of pyrotechnics, where the delivery thereof was made by a common or other carrier, the sale shall be deemed to be made in the county wherein the delivery was made by such carrier to the consignee. (1947, c. 210, s. 2.)

§ 14-412. Possession prima facie evidence of violation.

Possession of pyrotechnics by any person, for any purpose other than those permitted under this article, shall be prima facie evidence that such pyrotechnics are kept for the purpose of being manufactured, sold, bartered, exchanged, given away, received, furnished, otherwise disposed of, or used in violation of the provisions of this article. (1947, c. 210, s. 3.)

§ 14-413. Permits for use at public exhibitions.

For the purpose of enforcing the provisions of this article, the board of county commissioners of any county are hereby empowered and authorized to issue permits for use in connection with the conduct of public exhibitions, such as fairs, carnivals, shows of all descriptions and public exhibitions, but only after satisfactory evidence is produced to the effect that said pyrotechnics will be used for the aforementioned purposes and none other. (1947, c. 210, s. 4.)

Local Modification. — Mecklenburg: 1981, c. 117, s. 2. City of Charlotte: 1981, c. 88.

§ 14-414. Pyrotechnics defined; exceptions.

For the proper construction of the provisions of this Article, "pyrotechnics," as is herein used, shall be deemed to be and include any and all kinds of fireworks and explosives, which are used for exhibitions or amusement purposes: provided, however, that nothing herein contained shall prevent the manufacture, purchase, sale, transportation, and use of explosives or signaling flares used in the course of ordinary business or industry, or shells or cartridges used as ammunition in firearms. This Article shall not apply to the sale, use, or possession of explosive caps designed to be fired in toy cap pistols, provided that the explosive mixture of such explosive caps shall not exceed twenty-five hundredths (.25) of a gram for each cap. (1947, c. 210, s. 5; 1955, c. 674, s. 1.)

OPINIONS OF ATTORNEY GENERAL

What Prohibited within Definition of Pyrotechnics. — See Opinion of Attorney General to Mr. W.I. Adams, Sheriff, Wayne County, 40 N.C.A.G. 174 (1970).

§ 14-415. Violation made misdemeanor.

Any person violating any of the provisions of this Article, except as otherwise specified in said Article, shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1947, c. 210, s. 6; 1969, c. 1224, s. 3.)

ARTICLE 54A.

The Felony Firearms Act.

§ 14-415.1. Possession of firearms, etc., by felon prohibited.

(a) It shall be unlawful for any person who has been convicted of any crime set out in subsection (b) of this section to purchase, own, possess, or have in his custody, care, or control any handgun or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c), within five years from the date of such conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later.

Every person violating the provisions of this section shall be punished as a Class I felon.

Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business.

(b) Prior convictions which cause disentitlement under this section shall only include:

(1) Felonious violations of Articles 3, 4, 6, 7, 8, 10, 13, 14, 15, 17, 30, 33, 36, 36A, 52A, or 53 of Chapter 14 of the General Statutes, or of Article 5 of Chapter 90 of the General Statutes;

(2) Common law robbery and common law maim; and

(3) Violations of criminal laws of other states or of the United States substantially similar to the crimes covered in subdivisions (1) and (2) which are punishable where committed by imprisonment for a term exceeding two years.

When a person is charged under this section, records of prior convictions of any offense, whether in the courts of this State, or in the courts of any other state or of the United States, shall be admissible in evidence for the purpose of proving a violation of this section. The term "conviction" is defined as a final judgment in any case in which felony punishment, or imprisonment for a term exceeding two years, as the case may be, is permissible, without regard to the plea entered or to the sentence imposed. A judgment of a conviction or a plea of guilty to such an offense certified to a superior court of this State from the custodian of records of any state or federal court under the same name as that by which the defendant is charged shall be prima facie evidence that the identity of such person is the same as the defendant so charged and shall be prima facie evidence of the facts so certified.

(c) The indictment charging the defendant under the terms of this section shall be separate from any indictment charging him with other offenses related to or giving rise to a charge under this section. An indictment which charges the person with violation of this section must set forth the date that the prior offense was committed, the type of offense and the penalty therefor, and the date that the defendant was convicted or plead guilty to such offense, the identity of the court in which the conviction or plea of guilty took place and the verdict and judgment rendered therein. (1971, c. 954, s. 1; 1973, c. 1196; 1975, c. 870, ss. 1, 2; 1977, c. 1105, ss. 1, 2; 1979, c. 760, s. 5.)

Cross References. — For statute providing the maximum punishment for felonies, see § 14-1.1.

Editor's Note. — Article 7 of this Chapter, referred to in this section, has been repealed. See now Article 7A (§ 14-27.1 et seq.) of this Chapter.

Effect of Amendments. — The 1979 amendment, effective July 1, 1981, substituted "punished as a Class I felon" for "guilty of a felony and shall be imprisoned for not more than five years in the State's prison and shall be fined an amount not exceeding five thousand dollars, or both" at the end of the second paragraph of sub-

section (a). The 1979 amendatory act was originally made effective July 1, 1980. It was postponed to March 1, 1981, by Session Laws 1979, 2nd Sess., c. 1316; to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

Session Laws 1979, c. 760, s. 6, as amended by Session Laws 1979, 2nd Sess., c. 1316, s. 47; 1981, c. 63, s. 1; and 1981, c. 179, s. 14, provides: "This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise."

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Constitutionality. — This section is not constitutionally invalid because the restriction applies during the five years after conviction, discharge from a correctional institution, or termination of a suspended sentence, probation or parole, whichever is later. This merely establishes a class, those convicted of the enumerated crimes who are within five years of the end of their punishment, and the law applies uniformly to all members of the class affected. State v. Tanner, 39 N.C. App. 668, 251 S.E.2d 705, cert. denied, 297 N.C. 303, 254 S.E.2d 924 (1979).

This section is not unconstitutionally vague. It clearly delineates those to whom it applies and the classes of conduct proscribed, so that a person of ordinary intelligence may be apprised of the conduct forbidden. State v. Tanner, 39 N.C. App. 668, 251 S.E.2d 705, cert. denied, 297 N.C. 303, 254 S.E.2d 924 (1979).

Where the defendant's earlier conviction was for second-degree murder, a crime of violence, there was no constitutional difficulty with the classification scheme under this section as applied to defendant, since there was clearly a reasonable relation between the classification, those convicted of a crime of violence, and the purpose of the statute, protection of the people from violence. State v. Tanner, 39 N.C. App. 668, 251 S.E.2d 705, cert. denied, 297 N.C. 303, 254 S.E.2d 924 (1979).

In a prosecution under this section, defendant was not subjected to double jeopardy, though he had been tried and acquitted in district court on the charge of carrying a concealed weapon, a charge stemming from the same transaction from which the charge under this section arose, since the warrant in the former action and the indictment in the present action were drawn pursuant to different statutes and elements of the two offenses were separate and distinct. State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 898 (1974).

Section Held Not Ex Post Facto Respecting Alleged Violation on July 31, 1972. — See State v. Cobb, 18 N.C. App. 221, 196 S.E.2d 521 (1973), rev'd on other grounds, 284 N.C. 573, 201 S.E.2d 898 (1974).

Operability of Gun. — Where the State produced evidence tending to prove the defendant's constructive possession of a shotgun within five years from the date of a conviction for felonious assault, but there was no evidence as to whether the shotgun was operable, the evidence was sufficient to require the submission of the case to the jury and to support the verdict. State v. Baldwin, 34 N.C. App. 307, 237 S.E.2d 881 (1977).

Evidence of Prior Conviction. — In a prosecution for possession of a firearm by a felon, the trial court did not err in allowing the State to introduce defendant's stipulation as to his previous conviction of breaking and entering a motor vehicle, since the State merely introduced defendant's stipulation into evidence so there would be no doubt as to that particular element of the offense being satisfied; the State offered no other evidence in regard to defendant's prior conviction; and the court properly instructed the jury in its charge to consider the conviction only for the purpose of establishing an essential element of the offense and not as evidence of guilt or predisposition. State v. Jeffers, 48 N.C. App. 663, 269 S.E.2d 731 (1980).

Applied in State v. Currie, 19 N.C. App. 241, 198 S.E.2d 491 (1973); State v. Cobb, 284 N.C. 573, 201 S.E.2d 878 (1974).

§ 14-415.2: Repealed by Session Laws 1975, c. 870, s. 3.

ARTICLE 55.

Handling of Poisonous Reptiles.

§ 14-416. Handling of poisonous reptiles declared public nuisance and criminal offense.

The intentional exposure of human beings to contact with reptiles of a venomous nature being essentially dangerous and injurious and detrimental to public health, safety and welfare, the indulgence in and inducement to such exposure is hereby declared to be a public nuisance and a criminal offense, to be abated and punished as provided in this Article. (1949, c. 1084, s. 1.)

§ 14-417. Regulation of ownership or use of poisonous reptiles.

It shall be unlawful for any person to own, possess, use, or traffic in any reptile of a poisonous nature whose venom is not removed, unless such reptile is at all times kept securely in a box, cage, or other safe container in which there are no openings of sufficient size to permit the escape of such reptile, or through which such reptile can bite or inject its venom into any human being. (1949, c. 1084, s. 2.)

§ 14-418. Prohibited handling of reptiles or suggesting or inducing others to handle.

It shall be unlawful for any person to intentionally handle any reptile of a poisonous nature whose venom is not removed, by taking or holding such reptile in bare hands or by placing or holding such reptile against any exposed part of the human anatomy, or by placing their own or another's hand or any other part of the human anatomy in or near any box, cage, or other container wherein such reptile is known or suspected to be. It shall also be unlawful for any person to intentionally suggest, entice, invite, challenge, intimidate, exhort or otherwise induce or aid any person to handle or expose himself to any such poisonous reptile in any manner defined in this Article. (1949, c. 1084, s. 3.)

§ 14-419. Investigation of suspected violations; seizure and examination of reptiles; disposition of reptiles.

In any case in which any law-enforcement officer or animal control officer has reasonable grounds to believe that any of the provisions of this Article have been or are about to be violated, it shall be the duty of such officer and he is hereby authorized, empowered, and directed to immediately investigate such violation or impending violation and to forthwith seize the reptile or reptiles involved, and all such officers are hereby authorized and directed to deliver such reptiles to the Museum of Natural History or to its designated representative for examination and test for the purpose of ascertaining whether said reptiles contain venom and are poisonous. If the Museum of Natural History or its designated representative finds that said reptiles are dangerously poisonous, the Museum of Natural History or its designated representative shall be empowered to dispose of said reptiles in a manner

consistent with the safety of the public; but if said Museum or its designated representative find that the reptiles are not dangerously poisonous, and are not and cannot be harmful to human life, safety, health or welfare, then it shall be the duty of such officers to return the said reptiles to the person from whom they were seized within five days. (1949, c. 1084, s. 4; 1981, c. 203, s. 1.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, inserted "or animal control officer" near the beginning of the first sentence and substituted "Museum of Natural History or to its designated representative for examination and test" for "respective county health authorities for examination and tests of such reptiles by such authorities or other qualified authorities to which the county health authorities may refer the same," near the end of the first sentence. In the second sentence, the amendment substituted "the Museum of Natural History or its designated representative finds" for "such health authorities, or other qualified authorities designated by them to make such examinations and tests, find" near the beginning of the sentence and "the Museum of Natural History or its designated representative shall be empowered to dispose of said reptiles in a manner consistent with the safety of the public; but if said Museum or its designated representative" for "it shall be the duty of the officers making the seizure, and they are hereby authorized and directed to forthwith destroy such reptiles; but if said health authorities, or other qualified authorities by them designated to make such examination and tests," near the middle of the sentence and added "within five days" at the end of the sentence.

§ 14-420. Arrest of persons violating provisions of Article.

If the examination and tests made by the Museum of Natural History or its designated representative as provided herein show that such reptiles are dangerously poisonous, it shall be the duty of the officers making the seizure, in addition to destroying such reptiles, also to arrest all persons violating any of the provisions of this Article. (1949, c. 1084, s. 5; 1981, c. 203, s. 2.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, substituted "Museum of Natural History or its designated representative" for "county health or other qualified authorities."

§ 14-421. Exemptions from provisions of Article.

This Article shall not apply to the possession, exhibition, or handling of reptiles by employees or agents of duly constituted museums, laboratories, educational or scientific institutions in the course of their educational or scientific work. (1949, c. 1084, s. 6.)

§ 14-422. Violation made misdemeanor.

Any person violating any of the provisions of this Article shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1949, c. 1084, s. 7; 1969, c. 1224, s. 3.)

ARTICLE 56.

Debt Adjusting.

§ 14-423. Definitions.

As used in this Article certain terms or words are hereby defined as follows:

(1) The term "debt adjuster" means a person who engages in, attempts to engage in, or offers to engage in the practice or business of debt adjusting as said term is defined in this Article.

(2) The term "debt adjusting" shall mean the entering into or making of a contract, express or implied, with a particular debtor whereby the debtor agrees to pay a certain amount of money periodically to the person engaged in the debt adjusting business and who shall for a consideration, agree to distribute, or distribute the same among certain specified creditors in accordance with a plan agreed upon. The term "debt adjusting" is further defined and shall also mean the business or practice of any person who holds himself out as acting or offering or attempting to act for a consideration as an intermediary between a debtor and his creditors for the purpose of settling, compounding, or in anywise altering the terms of payment of any debt of a debtor, and to that end receives money or other property from the debtor, or on behalf of the debtor, for the payment to, or distribution among, the creditors of the debtor.

(3) The term or word "debtor" means an individual, and includes two or more individuals who are jointly and severally or jointly or severally indebted to a creditor or creditors.

(4) The word "person" means an individual, firm, partnership, limited partnership, corporation or association. (1963, c. 394, s. 1.)

§ 14-424. Engaging, etc., in business of debt adjusting a misdemeanor.

If any person shall engage in, or offer to or attempt to, engage in the business or practice of debt adjusting, or if any person shall hereafter act, offer to act, or attempt to act as a debt adjuster, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both. (1963, c. 394, s. 2; 1969, c. 1224, s. 6.)

§ 14-425. Enjoining practice of debt adjusting; appointment of receiver for money and property employed.

The superior court shall have jurisdiction, in an action brought in the name of the State by the district attorney of the judicial district, to enjoin any person from acting, offering to act, or attempting to act, as a debt adjuster, or engaging in the business of debt adjusting; and, in such action, may appoint a receiver for the property and money employed in the transaction of business by such person as a debt adjuster, to insure, so far as may be possible, the return to debtors of so much of their money and property as has been received by the debt adjuster, and has not been paid to the creditors of the debtors. (1963, c. 394, s. 3; 1973, c. 47, s. 2.)

§ 14-426. Certain persons and transactions not deemed debt adjusters or debt adjustment.

The following individuals or transactions shall not be deemed debt adjusters or as being engaged in the business or practice of debt adjusting:

(1) Any person or individual who is a regular full-time employee of a debtor, and who acts as an adjuster of his employer's debts;

(2) Any person or individual acting pursuant to any order or judgment of a court, or pursuant to authority conferred by any law of this State or of the United States;

(3) Any person who is a creditor of the debtor, or an agent of one or more creditors of the debtor, and whose services in adjusting the debtor's debts are rendered without cost to the debtor;

(4) Any person who at the request of a debtor, arranges for or makes a loan to the debtor, and who, at the authorization of the debtor, acts as an adjuster of the debtor's debts in the disbursement of the proceeds of the loan, without compensation for the services rendered in adjusting such debts;

(5) An intermittent or casual adjustment of a debtor's debts, for compensation, by an individual or person who is not a debt adjuster or who is not engaged in the business or practice of debt adjusting, and who does not hold himself out as being regularly engaged in debt adjusting. (1963, c. 394, s. 4.)

Article 57.

Use, Sale, etc., of Glues Releasing Toxic Vapors.

§§ 14-427 to 14-431: Repealed by Session Laws 1969, c. 970, s. 11.

Cross References. — For present provisions as to use, sale, etc., of glues releasing toxic vapors, see §§ 90-113.9 through 90-113.11.

Article 58.

Records, Tapes and Other Recorded Devices.

§ 14-432. "Owner" defined.

As used in this Article "owner" means the person who owns any master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is recorded and from which the transferred sounds are directly or indirectly derived. (1973, c. 1279, s. 1.)

§ 14-433. Recording of live concerts or recorded sounds and distribution, etc., of such recordings unlawful in certain circumstances.

It shall be unlawful for any person to:

(1) Knowingly transfer or cause to be transferred, directly or indirectly by any means, any sounds at a live concert or any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which

sounds are recorded, with the intent to sell or cause to be sold, or to be used for profit through public performance, such article on which sounds are so transferred, without consent of the owner, or

(2) Manufacture, distribute or wholesale any article with the knowledge that the sounds are so transferred, without consent of the owner.

This section shall not apply to any person engaged in radio or television broadcasting who transfers, or causes to be transferred, any such sounds other than from the sound track of a motion picture intended for, or in connection with broadcast or telecast transmission or related uses, or for archival purposes. (1973, c. 1279, s. 1.)

§ 14-434. Retailing, etc., of certain recorded devices unlawful.

It shall be unlawful for any person to knowingly retail or possess for the purpose of retailing any recorded device that has been produced, manufactured, distributed, or acquired at wholesale in violation of any provision of this Chapter. (1973, c. 1279, s. 1.)

§ 14-435. Recorded devices to show true name of manufacturer.

Ninety days after January 1, 1975, every recorded device sold or transferred or possessed for the purpose of sale by any manufacturer, distributor, or wholesale or retail merchant shall contain on its packaging the true name of the manufacturer. The term "manufacturer" shall not include the manufacturer of the cartridge or casing itself. (1973, c. 1279, s. 1.)

§ 14-436. Recorded devices; civil action for damages.

Any owner of a recorded device as defined in this Chapter whose work is allegedly the subject of a violation of G.S. 14-433 or 14-434, shall have a cause of action in the courts of this State for all damages resulting therefrom, including actual, compensatory and incidental damages. (1973, c. 1279, s. 1.)

§ 14-437. Violation of Article a misdemeanor.

Every individual manufacture, distribution, sale or transfer of such recorded devices in contravention of the provisions of this Article shall constitute a misdemeanor punishable by six months in jail, a fine of up to five hundred dollars ($500.00), or both. (1973, c. 1279, s. 1.)

§§ 14-438 to 14-442: Reserved for future codification purposes.

Article 59.

Public Intoxication.

§ 14-443. Definitions.

As used in this Article:

(1) "Alcoholism" is the state of a person who habitually lacks self-control as to the use of alcoholic beverages, or uses alcoholic beverages to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted; and

(2) "Intoxicated" is the condition of a person whose mental or physical functioning is presently substantially impaired as a result of the use of alcohol; and

(3) A "public place" is a place which is open to the public, whether it is publicly or privately owned. (1977, 2nd Sess., c. 1134, s. 1; 1981, c. 412, s. 4; c. 747, s. 66.)

Effect of Amendments. — The 1981 amendments, effective January 1, 1982, substituted "alcoholic beverages" for "intoxicating liquor" in two places in subdivision (1).

§ 14-444. Intoxicated and disruptive in public.

(a) It shall be unlawful for any person in a public place to be intoxicated and disruptive in any of the following ways:

(1) Blocking or otherwise interfering with traffic on a highway or public vehicular area, or

(2) Blocking or lying across or otherwise preventing or interfering with access to or passage across a sidewalk or entrance to a building, or

(3) Grabbing, shoving, pushing or fighting others or challenging others to fight, or

(4) Cursing or shouting at or otherwise rudely insulting others, or

(5) Begging for money or other property.

(b) Any person who violates this section shall be guilty of a misdemeanor punishable by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days. Notwithstanding the provisions of G.S. 7A-273(1), a magistrate is not empowered to accept a guilty plea and enter judgment for this offense. (1977, 2nd Sess., c. 1134, s. 1.)

CASE NOTES

Mere public intoxication standing alone is no longer unlawful, and in order for there to be a chargeable offense, the intoxicated person must be disruptive in one or more of the ways described in subdivisions (1)-(5) of subsection (a). State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

Section Not Violated. — This statute, making it unlawful for any person in a public place to be intoxicated and disruptive by cursing or shouting at or otherwise rudely insulting others, was not violated by defendant's conduct in standing in a motel parking lot in an intoxicated condition, looking up toward the sky, and shouting God is alive and God is in heaven and other words which sounded like a foreign language. State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

§ 14-445. Defense of alcoholism.

(a) It is a defense to a charge of being intoxicated and disruptive in a public place that the defendant suffers from alcoholism.

(b) The presiding judge at the trial of a defendant charged with being intoxicated and disruptive in public shall consider the defense of alcoholism even though the defendant does not raise the defense, and may request additional information on whether the defendant is suffering from alcoholism.

(c) Whenever any person charged with committing a misdemeanor under G.S. 14-444 enters a plea to the charge, the court may, without entering a judgment, defer further proceedings for up to 15 days to determine whether the person is suffering from alcoholism.

(d) If he believes it will be of value in making his determination, the district court judge may direct an alcoholism court counselor, if available, to conduct a prehearing review of the alleged alcoholic's drinking history in order to

gather additional information as to whether the defendant is suffering from alcoholism. (1977, 2nd Sess., c. 1134, s. 1; 1981, c. 519, s. 1.)

Effect of Amendments. — The 1981 amendment, effective July 1, 1981, added subsections (c) and (d).

CASE NOTES

Quoted in State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

§ 14-446. Disposition of defendant acquitted because of alcoholism.

If a defendant is found not guilty of being intoxicated and disruptive in a public place because he suffers from alcoholism, the court in which he was tried may retain jurisdiction over him for up to 15 days to determine whether he is an alcoholic in need of care as defined by G.S. 122-58.22 or 122-58.23. The trial judge may make that determination at the time the defendant is found not guilty or he may require the defendant to return to court for the determination at some later time within the 15-day period. (1977, 2nd Sess., c. 1134, s. 1.)

Legal Periodicals. — For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

CASE NOTES

Quoted in State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

§ 14-447. No prosecution for public intoxication.

(a) No person may be prosecuted solely for being intoxicated in a public place. A person who is intoxicated in a public place and is not disruptive may be assisted as provided in G.S. 122-65.11.

(b) If, after arresting a person for being intoxicated and disruptive in a public place, the law-enforcement officer making the arrest determines that the person would benefit from the care of a shelter or health-care facility as provided by G.S. 122-65.11, and that he would not likely be disruptive in such a facility, the officer may transport and release the person to the appropriate facility and issue him a citation for the offense of being intoxicated and disruptive in a public place. This authority to arrest and then issue a citation is granted as an exception to the requirements of G.S. 15A-501(2). (1977, 2nd Sess., c. 1134, s. 1; 1981, c. 519, s. 2.)

Effect of Amendments. — The 1981 amendment effective July 1, 1981, added the second sentence in subsection (b).

CASE NOTES

Mere public intoxication standing alone is no longer unlawful, and in order for there to be a chargeable offense, the intoxicated person must be disruptive in one or more of the ways described in § 14-444(a)(1)-(5). State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

Those who are intoxicated but not disruptive may be assisted but not arrested. State v. Cooke, 49 N.C. App. 384, 271 S.E.2d 561 (1980).

§§ 14-448 to 14-452: Reserved for future codification purposes.

Article 60.

Computer-Related Crime.

§ 14-453. Definitions.

As used in this section, unless the context clearly requires otherwise, the following terms have the meanings specified:

(1) "Access" means to approach, instruct, communicate with, cause input, cause output, or otherwise make use of any resources of a computer, computer system or computer network.

(2) "Computer" means an internally programmed, automatic device that performs data processing.

(3) "Computer network" means the interconnection of communication systems with a computer through remote terminals, or a complex consisting of two or more interconnected computers.

(4) "Computer program" means an ordered set of data that are coded instructions or statements that when executed by a computer cause the computer to process data.

(5) "Computer software" means a set of computer programs, procedures and associated documentation concerned with the operation of a computer system.

(6) "Computer system" means a set of related, connected or unconnected computer equipment and devices.

(7) "Financial statement" includes but is not limited to any check, draft, money order, certificate of deposit, letter of credit, bill of exchange, credit card of [or] marketable security, or any electronic data processing representation thereof.

(8) "Property" includes but is not limited to, financial instruments, information, including electronically processed or produced data, and computer software and programs in either machine or human readable form, and any other tangible or intangible item of value.

(9) "Services" includes, but is not limited to, computer time, data processing and storage functions. (1979, c. 831, s. 1.)

Editor's Note. — Session Laws 1979, c. 831, s. 2, makes the act effective Jan. 1, 1980.

§ 14-454. Accessing computers.

(a) A person is guilty of a Class H felony if he willfully, directly or indirectly, accesses or causes to be accessed any computer, computer system, computer network, or any part thereof, for the purpose of:

(1) Devising or executing any scheme or artifice to defraud, unless the object of the scheme or artifice is to obtain educational testing

material, a false educational testing score, or a false academic or vocational grade, or

(2) Obtaining property or services other than educational testing material, a false educational testing score, or a false academic or vocational grade for himself or another, by means of false or fraudulent pretenses, representations or promises.

(b) Any person who willfully and without authorization, directly or indirectly, accesses or causes to be accessed any computer, computer system, computer network, or any part thereof, for any purpose other than those set forth in subsection (a) above, is guilty of a misdemeanor. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 19.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, inserted "Class H" near the beginning of the introductory paragraph in subsection (a). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

§ 14-455. Damaging computers and related materials.

(a) A person is guilty of a Class H felony if he willfully and without authorization alters, damages or destroys a computer, computer system, computer network, or any part thereof.

(b) A person is guilty of a misdemeanor if he willfully and without authorization alters, damages, or destroys any computer software, program or data residing or existing internal or external to a computer, computer system or computer network. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 20.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, inserted "Class H" in subsection (a). The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, c. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

§ 14-456. Denial of computer services to an authorized user.

Any person who willfully and without authorization denies or causes the denial of computer system services to an authorized user of such computer system services, is guilty of a misdemeanor. (1979, c. 831, s. 1.)

§ 14-457. Extortion.

Any person who verbally or by a written or printed communication, maliciously threatens to commit an act described in G.S. 14-455 with the intent to extort money or any pecuniary advantage, or with the intent to compel any person to do or refrain from doing any act against his will, is guilty of a Class H felony. (1979, c. 831, s. 1; 1979, 2nd Sess., c. 1316, s. 21.)

Effect of Amendments. — The 1979, 2nd Sess., amendment, effective July 1, 1981, and applicable to offenses committed on or after that date, inserted "Class H" near the end of the section. The 1979, 2nd Sess., amendatory act was originally made effective March 1, 1981. It was postponed to April 15, 1981, by Session Laws 1981, ch. 63; and to July 1, 1981, by Session Laws 1981, c. 179.

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

September 15, 1981

I, Rufus L. Edmisten, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

RUFUS L. EDMISTEN
Attorney General of North Carolina

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